THE CONSERVATIVE ORIGINS OF STRICT SCRUTINY

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INTRODUCTION

Debate over judicial engagement under the Fourteenth Amendment generally starts from the presumption that strict judicial scrutiny of laws that infringe on important rights is a liberal or Progressive idea in both origins and effects.[1] The history presented in this Essay shows that before modern liberals took control of the Supreme Court in the late 1930s, the Court's conservative majority had in several cases expressed its willingness to override the states' police powers and protect important liberties.

The traditional interpretation of the Supreme Court's due process decisions during the so-called "*Lochner* era"[2] was that the Court sought to protect laissez-faire, Social Darwinist values against ameliorative Progressive legislation.[3] Any purported jurisprudential justifications for the Court's decisions were a mere smokescreen for the Court's extreme and reactionary antiregulatory agenda.

For the last several decades, however, revisionist historians have undermined this traditional understanding of the pre-New Deal Court's due process jurisprudence.[4] The most widely accepted revisionist understanding

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[1] *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1287-88 (2007) (suggesting that the antecedents to strict scrutiny can be traced to the rejection of *Lochner v. New York*, 198 U.S. 45 (1905), and its "reasonableness" test in 1937).

[2] Given that, as noted below, *Lochner v. New York* was an outlier decision from a Court that upheld every other maximum hours law that came before it, it is more than a little odd to name an entire era after the case. For a discussion of how *Lochner* became so notorious, see generally DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

[3] *See, e.g.*, LOREN P. BETH, THE DEVELOPMENT OF THE AMERICAN CONSTITUTION: 1877-1910, at 190 (1971); JAMES MACGREGOR BURNS, PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT 99 (2009); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 135 (1987); GERALD GUNTHER, CONSTITUTIONAL LAW 432 (12th ed. 1991); ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 498 (4th ed. 1970); ROBERT G. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, 1865-1910, at 26-30 (1951); WALLACE MENDELSON, CAPITALISM, DEMOCRACY, AND THE SUPREME COURT 63 (1960).

[4] For overviews of the revisionist literature, see generally David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881 (2005); Stephen A. Siegel, *The Revisionism Thickens*, 20 L. & HIST. REV. 631 (2002).

has been that the Court's primary concern was combating "class legislation."[5] Professor Howard Gillman and others contend that the Court held unconstitutional legislation that distributed benefits or penalties based on legislative classifications that the Court determined had no valid connection to a proper "public purpose."[6]

According to the traditionalists, the pre-New Deal Court had little if any interest in individual liberty beyond their suspicion of legislative intervention on behalf of workers, consumers, and the downtrodden, in general fealty to economic libertarianism.[7] To the revisionists of the class legislation school, meanwhile, and to Gillman in particular, the key issue in pre-New Deal due process cases was whether challenged legislation was within the government's valid police powers—at least the power to protect public health, safety, and morals, but sometimes defined much more broadly.[8]

Despite other differences, the Court's traditionalist critics and revisionists like Gillman agree on one important matter—that it was exclusively the Progressive wing of the Court that planted the seeds of modern fundamental rights jurisprudence. According to both camps, any pre-New Deal antecedents to this jurisprudence can be found in the opinions of Justices Holmes and Brandeis and later Justice Stone, and not in those of their non-Progressive colleagues.[9]

Holmes's and Brandeis's free speech dissents anticipated modern fundamental rights analysis by singling out freedom of speech for special protection.[10] Unlike their colleagues on the Court, Holmes and Brandeis refused to vote to uphold laws that infringed on this freedom even if the laws met traditional police-power criteria. Holmes, for example, argued that

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5 *See* Bernstein, *supra* note 4, at 12.

6 *E.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 105 (1993); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 21 (2000); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 331 (1985); Cushman, *supra* note 4, at 903.

7 *See supra* note 3 and accompanying text.

8 Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 637 (1994); *see also* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 426 (2010) ("[T]he *Lochner*-era Court focused principally on the reasonableness of challenged legislation and whether such legislation fell within the legitimate scope of the legislature's authority. It did so most commonly through references to the traditional police powers of state governments.").

9 Gillman, *supra* note 8, at 625; *see also* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 825-26 (2011); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 301-02, 313, 325 (1996).

10 Stephen A. Siegel, *The Death and Rebirth of the Clear and Present Danger Test*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 211, 223-25 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

states could punish potentially subversive speech only if the speech represented a "clear and present danger" to public safety and welfare.[11]

Unlike traditionalists, revisionists have recognized that the pre-New Deal Court's "conservative"[12] majority has been unfairly caricatured and that the conservative Justices often voted for what today seem like liberal results, including in what today we would call civil liberties cases.[13] The Court, in fact, issued several major rulings that, on first glance, may *seem* like they anticipate modern fundamental rights analysis.

But Gillman argues that the Court's early civil liberties rulings were severely limited by the majority's refusal to go beyond its adherence to traditional police-power doctrine.[14] Regardless of the claimed right at issue—whether it was an "economic" right, such as liberty of contract, or a "noneconomic" right, such as freedom of speech—the Court would uphold the legislation if the government could provide a police-power explanation that showed that the law had a valid public purpose.[15]

This Essay challenges the received wisdom regarding the pre-New Deal Court's majority's due process jurisprudence. Part I describes the Court's early Fourteenth Amendment Due Process Clause jurisprudence and its unwillingness to privilege substantive rights over valid police-power rationales. Part II of this Essay discusses several later instances in which the Supreme Court invalidated legislation under the Due Process Clause even though the Court acknowledged that the state had asserted legitimate police-power justifications for the laws in question.

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11 *E.g.*, Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting). While today *Gitlow* is often referred to as a "First Amendment" case, the Court had not yet adopted the incorporation doctrine when *Gitlow* was decided. Free speech cases against state and local governments were not decided as First Amendment cases, but rather as involving alleged infringements on liberty under the Fourteenth Amendment's Due Process Clause, which protected rights analogous to those protected by the First Amendment.

12 "Conservative" is a rather imprecise and, to some extent, misleading term for the Justices in the majority on the pre-New Deal Court, but as a shorthand for the non-Progressive Justices, it will have to do.

13 *See* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 560-61 (1997).

14 *See* Gillman, *supra* note 8, at 637.

15 *See id.* ("Throughout this period the Court's approach to the nature and scope of legislative power was essentially categorical—laws either promoted the public interest or they didn't; it did not involve the modern method of 'weighing' or 'balancing' the strength of a particular right against the strength of the government's interest in infringing on the right."); *id.* at 640; Williams, *supra* note 8, at 426 ("This more flexible conception of due process allowed for legislation to be upheld even if it interfered with preexisting rights or affected identifiable interests in different ways, so long as the government could point to some legitimate justification for the legislature's decision.").

I. TURN OF THE TWENTIETH CENTURY: POLICE-POWER LIMITS ON THE COURT'S ENFORCEMENT OF LIBERTY RIGHTS

The provision of the Fourteenth Amendment that seems most clearly intended to protect substantive rights is the Privileges or Immunities Clause. In the *Slaughterhouse Cases*[16] and subsequent decisions,[17] however, the Court essentially held that the Clause protects only an extremely narrow and largely inconsequential category of federal rights.[18]

Litigants seeking to challenge state encroachments on liberty instead turned their attention to the Fourteenth Amendment's Due Process Clause, which forbids states from taking life, liberty, or property without due process of law.[19] While the Clause seems facially limited to judicial process,[20] a significant body of state and federal precedent preceding the 1868 enactment of the Fourteenth Amendment held that the requirement of due process of law also puts substantive limits on legislation.[21]

The Supreme Court initially seemed to take the position that no due process claim could succeed absent an arbitrary classification.[22] In other words, consistent with Gillman's interpretation of the Court's pre-New Deal jurisprudence, the Due Process Clause only banned illicit class legislation. Moreover, the Court interpreted the ban on class legislation narrowly.[23] Justice Field, who in his day was perhaps the Justice most skeptical of the constitutionality of state regulatory legislation, explained, "The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application."[24] Special legislation is not illicit class legislation "if all persons brought under its influence are treated alike under the same conditions."[25]

The Court soon abandoned this limit on the scope of the Due Process Clause. By 1897, Justice Rufus Peckham, writing for a unanimous Supreme

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16 83 U.S. (16 Wall.) 36 (1873).

17 *E.g.*, Presser v. Illinois, 116 U.S. 252 (1886).

18 *See id.* at 267; *Slaughterhouse*, 83 U.S. at 80.

19 U.S. CONST. amend. XIV, § 1. Litigants were likely encouraged to rely on due process because, soon after *Slaughterhouse*, the Supreme Court stated in dicta that the Due Process Clause prohibits the invasion of private rights by the states. *See* Davidson v. New Orleans, 96 U.S. 97, 102 (1877).

20 John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494 (1997).

21 Williams, *supra* note 8, at 416, 469-70.

22 *See* Leeper v. Texas, 139 U.S. 462, 468 (1891); *accord* Fla. Cent. & Peninsular R.R. v. Reynolds, 183 U.S. 471, 478 (1902); Giozza v. Tiernan, 148 U.S. 657, 662 (1893); Caldwell v. Texas, 137 U.S. 692, 697 (1891); *see also* Dent v. West Virginia, 129 U.S. 114, 124 (1889) ("[L]egislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates . . . .").

23 See generally Bernstein, *supra* note 4, for a much fuller discussion.

24 Mo. Pac. Ry. v. Mackey, 127 U.S. 205, 209 (1888).

25 *Id.*

Court, explained that the Fourteenth Amendment's protection of liberty from arbitrary deprivation included

> the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[26]

Lochner v. New York,[27] the infamous 1905 case invalidating a maximum hours law for bakers, signaled a shift in judicial focus from class legislation concerns to the protection of individual rights. Despite several factors suggesting that the Court would decide *Lochner* on class legislation grounds,[28] Justice Peckham, writing for the majority, almost entirely ignored the issue. Instead, he focused on the right to liberty of contract protected by the Due Process Clause.[29] This had the important long-term consequence of establishing the Due Process Clause as a fertile source for the protection of liberty rights against the states.[30]

Meanwhile, the Court acknowledged that the government could infringe liberty rights so long as the government could provide a valid police-power justification for the infringement. In *Lochner*, Peckham conceded that the Court would have been constrained to uphold the law if the state had shown that hours regulation had a non-remote impact on public health or that bakers needed government intervention on their behalf to protect their health.[31]

The result in *Lochner* proved anomalous. Many other maximum hours laws came before the Court, both before and after *Lochner*, and the Court upheld every one.[32] Both before and after *Lochner*, the Court also upheld many other ameliorative labor laws that seemed to fit more squarely within the states' police power than did the hours law in *Lochner*.[33]

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26 Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

27 198 U.S. 45 (1905).

28 For example, Joseph Lochner's legal brief and the main dissenting opinion from the New York Court of Appeals focused on class legislation. *See* BERNSTEIN, *supra* note 2, at 32-33. Moreover, a California Supreme Court opinion had invalidated a bakers' hours law as class legislation, *Ex parte Westerfield*, 55 Cal. 550, 551 (1880), and Justice Peckham had a history of denouncing regulations he found constitutionally wanting as class legislation, *People v. Gillson*, 109 N.Y. 389, 399-400 (1888).

29 Bernstein, *supra* note 4, at 26 & n.135.

30 *Id*. at 28-29.

31 *See Lochner*, 198 U.S. at 64.

32 *See, e.g.*, Bunting v. Oregon, 243 U.S. 426 (1917); Wilson v. New, 243 U.S. 332 (1917); Bosley v. McLaughlin, 236 U.S. 385, 392-94 (1915); Miller v. Wilson, 236 U.S. 373, 379-82 (1915); Hawley v. Walker, 232 U.S. 718 (1914) (mem.); Riley v. Massachusetts, 232 U.S. 671, 679-81 (1914); Atkin v. Kansas, 191 U.S. 207 (1903); Holden v. Hardy, 169 U.S. 366 (1898).

33 Laws upheld by the Supreme Court include laws

The Court took a similarly deferential stance with regard to state legislation alleged to infringe on other rights that the Court recognized as encompassed within the libertarian protections of the Due Process Clause. For example, in 1907, the Court stated that even if the Due Process Clause protects freedom of speech, it allows the government to punish speech that "may be deemed contrary to the public welfare."[34] Over time, however, the Court subtly began to undermine its own precedents, holding in several important cases that legislation could unconstitutionally infringe on due process rights even if the government asserted valid police-power rationales for the law.[35]

II. SHIFTING PRE-NEW DEAL COURT JURISPRUDENCE: UPHOLDING LIBERTY RIGHTS DESPITE VALID POLICE-POWER RATIONALES

An early and particularly dramatic example of the Court's willingness to uphold substantive rights despite recognizing valid countervailing police-power considerations was *Buchanan v. Warley*.[36] In *Buchanan*, the Court unanimously invalidated a Louisville, Kentucky law banning whites from buying property on blocks with a majority of black property owners and vice versa.[37]

In the leading case upholding a segregation law, *Plessy v. Ferguson*,[38] the Court held that only "social equality," unprotected by the Fourteenth Amendment's Equal Protection Clause, was at issue. By contrast, Ken-

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> forbidding the employment of children below the age of sixteen in certain hazardous occupations; prohibiting nighttime employment of women in restaurants located in large cities; regulating the hours of labor of women and of men in industrial occupations when overtime work was permitted; regulating the width of entries to coal mines; requiring coal mines to maintain wash houses for their employees at the request of twenty or more workers; making mining companies liable for their willful failure to furnish a reasonably safe place for workers; requiring that coal miners' pay be based on car loads of coal they produced; requiring railroads and mining companies to pay their employees in cash; requiring railroads to pay wages due an employee on discharge regardless of contrary contractual agreement; requiring coal produced by miners be weighed for payment purposes before it passes over a screen; giving preferences to citizens in public works employment; regulating the wages and hours of workers employed on public works projects; forbidding the payment of seamen's wages in advance; regulating the timing of wages paid to employees in specified industries; and mandating an eight-hour day for federal workers or employees of federal contractors . . . .

David E. Bernstein, Lochner's Legacy*'s Legacy*, 82 TEX. L. REV. 1, 36-38 (2003) (footnotes omitted).

[34] Patterson v. Colorado, 205 U.S. 454, 462 (1907). However, Justice Harlan, dissenting, argued:

> The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any State since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge them.

Id. at 465 (Harlan, J., dissenting).

[35] *See infra* Part II.

[36] 245 U.S. 60 (1917).

[37] *Id.* at 70-72, 82.

[38] 163 U.S. 537 (1896).

tucky's housing segregation law infringed on the rights to liberty of contract and to alienate property, rights clearly protected by the Due Process Clause.[39] So the question the Court faced was whether Kentucky could justify Louisville's segregation law's infringement on these rights as an exercise of the police power.[40]

In defending Louisville's law, Kentucky provided several police-power rationales for the regulation. Kentucky argued that (1) the law would discourage miscegenation and "racial amalgamation," a police-power interest the Court had already recognized as valid by upholding laws banning interracial marriage; (2) given existing "race hostility," the law would promote the public peace by separating blacks from whites, thereby promoting racial peace and preventing racial violence; and (3) the law was necessary to prevent the depreciation in the value of property owned by white people when African Americans became their neighbors.[41]

Justice William Day, writing for the unanimous Court, concluded that Louisville's

> attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and [was] in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.[42]

This sounds very much like the Court's standard police-power analysis, but, as discussed below, Day explained that the law was invalid as a violation of fundamental rights even if it served otherwise valid police-power purposes.

Justice Day disposed of Kentucky's first justification for the segregation law through traditional police-power reasoning. Day concluded that the state's interest in preventing "amalgamation" was too remote from the substance of the law.[43] The law did not directly prohibit racial mixing, and it did not even prohibit African Americans from working in white households.[44] Just as the Court in *Lochner* held the hours law invalid because the state's interest in public health was too far removed from a limitation on bakers' hours, here the Court held that the state's interest in preventing miscegenation was too far removed from taking away the rights of blacks and whites to sell property to one another.[45]

By contrast, with regard to Kentucky's second rationale, Justice Day acknowledged that preventing racial violence and preserving public peace were legitimate goals. He implicitly conceded that laws pursuing these

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39 *See Buchanan*, 245 U.S. at 78-79.

40 *Id.* at 74-75.

41 *Id.* at 73-74.

42 *Id.* at 82.

43 *Id.* at 81.

44 *Id.*

45 *Buchanan*, 245 U.S. at 81.

goals were within the police power and did not dispute the notion that government-enforced housing segregation would further the goals.[46] Nevertheless, the Court concluded that it was not constitutionally permissible to pursue these goals "by laws or ordinances which deny rights created or protected by the Federal Constitution."[47]

When considering Kentucky's third police-power rationale, Day, once again, did not dispute the validity of the state's claimed police-power interest, this time in preserving the value of its citizens' property.[48] But Day found that the law improperly singled out African Americans as a threat to property values. He noted that property may also "be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results."[49]

Even though Justice Day implicitly acknowledged that Kentucky had identified two otherwise appropriate police-power rationales for the law, he concluded that the law "was not a legitimate exercise of the police power of the State, and [was] in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law."[50]

Buchanan could be dismissed, perhaps, as an anomaly, because the law in question so clearly challenged the fundamental underlying purpose of the Fourteenth Amendment, namely to ensure that African Americans could exercise their basic civil rights free from state interference. But that factor cannot explain the Court's later decisions that similarly rejected the view that laws serving valid police-power purposes could not violate the Due Process Clause.

In 1923, in *Adkins v. Children's Hospital*,[51] the Supreme Court created a new, stricter test for laws infringing on liberty of contract. Unlike its contrary suggestion in *Lochner*, the Court would no longer permit such infringements just because the government had identified a proper police-power rationale for the law in question.[52] Rather, Justice George Sutherland, speaking for a 5-3 majority, concluded that freedom of contract is "the general rule and restraint the exception," and abridgements of that freedom could be justified "only by the existence of *exceptional circumstances*."[53]

That same year, in *Meyer v. Nebraska*,[54] the Court invalidated as a violation of the Fourteenth Amendment's Due Process Clause a Nebraska law banning the teaching of foreign languages to schoolchildren. Justice James

46 *Id*.
47 *Id*.
48 *Id*. at 82.
49 *Id*.
50 *Id*.
51 261 U.S. 525 (1923).
52 *Id*. at 546.
53 *Id*. (emphasis added).
54 262 U.S. 390 (1923).

McReynolds, writing for the Court, recognized a liberty interest in parents providing an education for their children and in schoolteachers pursuing the occupation of language education.[55] The question, then, was whether Nebraska provided a valid reason for infringing on these rights. As the Court noted, Nebraska argued that

> the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this State." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.[56]

McReynolds acknowledged that it "is clear" that "the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally."[57] McReynolds cautioned, however, that the state's power is limited by

> *fundamental rights which must be respected*. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this *cannot be coerced by methods* which conflict with the Constitution—*a desirable end cannot be promoted by prohibited means*.[58]

So instead of holding that liberty rights under Fourteenth Amendment are limited by the scope of the police power, the Court held that exercises of the police power are limited by the scope of fundamental liberty rights.

Elsewhere in the opinion, McReynolds hedged his bets and suggested that the law at issue failed even a traditional police-powers analysis.[59] He concluded "that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."[60] This language, however, conflicts with McReynolds's earlier suggestion that the statute did further the state's legitimate interests in the assimilation of immigration but was nevertheless invalid because it infringed on "fundamental rights" via prohibited "means" and "methods."[61]

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55 *See id.* at 401-03.

56 *Id.* at 401.

57 *Id.*

58 *Id.* (emphases added).

59 *Id.* at 402-03.

60 *Meyer*, 262 U.S. at 403.

61 Gillman cites only the "competency of the State" language, and ignores McReynolds' discussion of "fundamental rights" and "prohibited means." Gillman, *supra* note 8, at 638-39.

Similar reasoning produced a similar result in the Court's 1927 decision in *Farrington v. Tokushige*.[62] *Farrington* involved a challenge to a law designed to shut down Japanese-language schools in Hawaii, then a federal territory. The Ninth Circuit noted that the government's justification for the law was based on the fact that Hawaii had "a large Japanese population," and that "the Japanese do not readily assimilate with other races; that they still adhere to their own ideals and customs, and are still loyal to their emperor."[63] The Supreme Court, in another McReynolds opinion, stated that it "appreciate[d] the grave problems incident to the large alien population of the Hawaiian Islands."[64] McReynolds concluded, however, that "[t]he Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."[65] Once again, the Court seemed to acknowledge that the law in question furthered legitimate state interests but concluded that the law was nevertheless unconstitutional because it went too far in infringing on fundamental rights.[66]

In none of the above cases did the Supreme Court articulate a standard akin to modern "strict scrutiny," under which fundamental rights may only be infringed if the law at issue is "narrowly tailored" to serve "compelling" government interests.[67] But modern strict scrutiny analysis didn't coalesce until 1963, well after the pre-New Deal Court had faded into memory.[68] The point raised here is that modern doctrine had some antecedents in opinions produced by the pre-New Deal Court's conservative majority.

The existence of the precedents discussed above shows that the Supreme Court's pre-New Deal conservative majority was *not* always willing to uphold laws that infringed on liberty rights so long as the state asserted a valid countervailing police-power interest.[69] The police power does seem to

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62 273 U.S. 284 (1927). Because Hawaii was a federal territory, the Court decided this case under the Fifth Amendment's Due Process Clause, not the Fourteenth Amendment's. The Court treated these identical provisions as providing the same constitutional protections against the relevant government actors. *Id.* at 298-99.

63 Farrington v. Tokushige, 11 F.2d 710, 714 (9th Cir. 1926), *aff'd*, 273 U.S. 284 (1927).

64 *Farrington*, 273 U.S. at 299.

65 *Id*. at 298.

66 McReynolds did use the traditional language of "reasonableness" but failed to articulate why the law in question was unreasonable, beyond that it infringed on the right of parents to direct their children's education. *Id*.

67 *See generally id*.; Meyer v. Nebraska, 262 U.S. 390 (1923); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Buchanan v. Warley, 245 U.S. 60 (1917).

68 Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 357 (2006); *see also* Fallon, *supra* note 1, at 1335 (noting that modern strict scrutiny emerged only in the 1960s).

69 *Cf.* Fallon, *supra* note 1, at 1287 ("Seldom if ever, however, did either Court majorities or dissenting Justices suggest that whereas some exercises of the police power were within the boundaries of state authority as long as they were reasonable in the independent judgment of the courts, others

have limited the Court's enforcement of liberty rights at the beginning of the twentieth century.[70] By the 1920s, though, the Court had clearly grown dissatisfied with this constriction and concluded that states may not infringe on certain fundamental rights even if they are acting within their police powers.[71]

CONCLUSION

While this Essay does not attempt a comprehensive survey of all of the Court's pre-New Deal due process cases, it seems fair to state that (1) the development of some form of strict scrutiny for laws infringing on fundamental rights was not linear but rather appeared in some due process cases and not others, depending on which Justice was writing the majority opinion and how important the right in question was thought to be by that Justice; and (2) the cases discussed above are unlikely to be the only cases in which the Court applied a form of strict scrutiny in due process cases.

In short, the origins of modern fundamental rights/strict scrutiny analysis lie not only in First Amendment opinions by the Progressive wing of the pre-New Deal Court and not just in early liberal-majority, New Deal-era opinions like *Palko v. Connecticut*[72] and *United States v. Carolene Products Co.*,[73] but in Supreme Court opinions of the 1910s and 1920s, such as *Buchanan v. Warley*, *Adkins v. Children's Hospital*, *Meyer v. Nebraska*, and *Farrington v. Tokushige*.

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should be subjected to more or less exacting scrutiny."); Siegel, *supra* note 68, at 357. *But cf.* Fallon, *supra* note 1, at 1335 (concluding that modern strict scrutiny emerged only in the 1960s).

70 Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 752 (2009) ("Today, fundamental rights trump the general welfare, whereas in 1905, under the police power of the state, the general welfare trumped rights.").

71 Indeed, this doctrinal shift would explain why the Court grew noticeably more aggressive in its due process review in the latter part of the "*Lochner* era." For the pioneering work explaining different phases of the Court's pre-New Deal due process jurisprudence, see Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 6-23 (1991).

72 302 U.S. 319 (1937).

73 304 U.S. 144 (1938).