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How Many Times Was *Lochner*-Era Substantive Due Process Effective?

by Michael J. Phillips*

I. INTRODUCTION

According to Justice David Souter, it is “most familiar history” that back when the Supreme Court took a restricted view of the commerce power, it also “routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process.”¹ As the word “routinely” suggests, Souter evidently believed that this *Lochner* Court² struck down a large number of laws on substantive due process grounds³ during the years 1897 to 1937.⁴

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1. *United States v. Lopez*, 115 S. Ct. 1624, 1652 (1995) (Souter, J., dissenting).

2. The reference, of course, is to *Lochner v. New York*, 198 U.S. 45 (1905), where the Court used due process to strike down a maximum hours law for bakery employees. This Article uses the terms “*Lochner* Court” and “old Court” to refer to the Supreme Court during the period 1897-1937 inclusive.

3. In this Article, substantive due process means the courts’ use of the Fifth and Fourteenth Amendments’ Due Process Clauses to assess the substance of government action. This definition incorporates both the modern Court’s privacy cases and a variety of little known contemporary substantive due process decisions involving fairly lax review. On the latter, see Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 RUTGERS L.J. 537, 549-77 (1990). The definition also is broad enough to include all the *Lochner*-era substantive due process cases, which typically involved deprivations of property, freedom of contract, or some other liberty. Finally, the definition even includes situations when other constitutional provisions are incorporated into due process or when the applicable “due process” standards evidently borrow from some other constitutional provision. Throughout this Article, I will distinguish situations of this last kind from

As discussed later, other observers agree. Although they recognize that the old Court rejected more substantive due process attacks than it accepted, they also suggest that cases of the latter kind numbered approximately 200. This means that during the forty years comprising the *Lochner* era, the Court used substantive due process to strike down government action an average of about five times a year.

The question of economic substantive due process's impact has intrinsic historical interest.⁵ Because the Court seems to be slowly

"central" or "core" applications of substantive due process. In "core" applications of substantive due process, the values promoted spring from due process itself.

In either its broad or its narrow signification, substantive due process involves substantive review of the challenged provision. During the *Lochner* era, this sometimes was accomplished through some more or less articulated criterion, such as a means-ends test or the familiar arbitrary and capricious standard. On occasion, though, the old Court would simply declare the challenged law unconstitutional because it collided with some favored right. Contrary to popular belief, however, that favored right was not always, or even usually, freedom of contract. See *infra* note 197 and accompanying text.

4. In this Article, these years comprise the "*Lochner* era." The Court's decision in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), is widely viewed as the first unequivocal sign of economic substantive due process's emergence. E.g., GERALD GUNTHER, CONSTITUTIONAL LAW 438 (12th ed. 1991). On *Allgeyer*, see *infra* notes 119-24 and accompanying text. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), is almost universally regarded as signalling the doctrine's slide into insignificance. E.g., JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 127 (paperback ed. 1992); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36-37.

Of course, other candidates for the opening and closing years of the *Lochner* era exist. For the former, *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418 (1890), an early railroad rate regulation case, may be a plausible alternative to *Allgeyer*. See *infra* note 6. Another plausible alternative to *Allgeyer* is *Mugler v. Kansas*, 123 U.S. 623 (1887), in which the Court explicitly invoked substantive due process while upholding a state regulation. See, e.g., GUNTHER, *supra*, at 438 (describing *Mugler*). Economic substantive due process's virtual demise might be better marked by *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), than by *West Coast Hotel*. *Hope* is widely regarded as putting an end to aggressive Supreme Court review of utility rate regulation. E.g., RICHARD J. PIERCE & ERNEST GELLHORN, REGULATED INDUSTRIES IN A NUTSHELL 98-99 (1994) [hereinafter PIERCE & GELLHORN]. On the old Court's rate regulation cases, see *infra* notes 82-89 and accompanying text.

5. Scholarly attention to the *Lochner* Court has increased appreciably over the past 15 or so years. See, e.g., HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 chs. 3-4 (1995); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *Lochner* ERA POLICE POWERS JURISPRUDENCE (1993); PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *Lochner v. New York* (1990); EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS chs. 5-6 (1996); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980); Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235; Barry Cushman,

reviving the doctrine,⁶ the question is assuming greater practical

Rethinking the New Deal Court, 80 VA. L. REV. 201 (1994); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87 (1993); Richard E. Levy, *Escaping Lochner's Shadow: Toward A Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995); Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265 (1987); Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405 (1996) [hereinafter cited as Phillips II]; Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984) [hereinafter cited as Siegel II]; Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363 (1990).

6. From the late 1930s until at least the early 1950s, the Court may really have eschewed any substantive due process review of economic regulations. Beginning early in the 1950s, however, it reintroduced means-ends analysis when considering due process challenges to the substance of economic regulation. By the 1980s, the Court began to admit that such cases involve substantive due process review. See Phillips, *supra* note 3, at 544-46 and the cases cited there.

Needless to say, this modern substantive due process review has been very lenient. Thus, it might be safe to say that prior to 1996, the Supreme Court had not struck down an economic regulation on substantive due process grounds since its decision in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating a minimum wage law for women). All this may have changed, however, with the Court's recent 5-4 decision in *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996), when it struck down a \$2,000,000 Alabama punitive damages award on due process grounds. Although Justice Stevens's opinion for the Court did not use the terms procedural due process or substantive due process, at first glance he seemed to ground his decision in a notion associated with the former: the absence of fair notice about the penalties accompanying one's behavior. *Id.* at 1598. But the three "guideposts" under which the Court supposedly determined that BMW had not received adequate notice seem to be substantive criteria. These were the following: (1) the reprehensibility of defendant's conduct, (2) the disparity between the harm or potential harm suffered by the claimant and the size of the punitive damages award, and (3) the size of that award when compared with state civil penalties in comparable cases. *Id.* at 1598-99; see *id.* at 1599-1603.

Except perhaps for the third guidepost, the Court did not really say how Alabama's failure to meet these criteria constituted a failure to notify BMW that it could be hit with a \$2,000,000 punitive damages award under the circumstances of the case. It also did not detail the ways in which Alabama punitive damages law failed to provide such notice. Furthermore, the Court did not consider a question that bears on the classification of *Gore* as applying procedural or substantive due process. Suppose, by statute or otherwise, Alabama had notified BMW that it could expect a \$2,000,000 punitive damages award if it behaved as it subsequently did. In that event, application of the Court's guideposts might well dictate the same result even though notice obviously would have been present.

The two dissents in *Gore* each characterized the majority opinion as an application of substantive due process. *E.g.*, *id.* at 1611 (Scalia, J., dissenting); *id.* at 1617 (Ginsburg, J., dissenting). Justice Breyer's concurrence lends some support to this characterization. Unlike Stevens, Breyer explored the asserted procedural deficiencies of Alabama punitive

importance as well. The prospect of a new economic substantive due process naturally awakens traditional criticisms of the *Lochner* Court. But some of these criticisms assume that the doctrine had a strong impact.

The first and perhaps the most formidable of these attacks is that because the original meaning of due process was procedural, substantive due process is illegitimate.⁷ The usual justification for this positivistic argument is that when courts broadly interpret vague provisions like due process to strike down legislation, they offend democratic values.⁸ But the less often economic substantive due process was used in this way, the less vulnerable it is to charges of judicial legislation.

Another common criticism of *Lochner*-era substantive due process is that it unjustifiably benefitted business interests. For example, many people say that the doctrine's practical effect was to knock out progressive social legislation designed to protect workers against the hazards of industrialization and their employers' superior bargaining power.⁹ The

damages law. See *id.* at 1605-09 (Breyer, J., concurring). According to Breyer, the vagueness of these standards, while not itself a violation of due process, "invite[s] the kind of scrutiny the Court has given the particular verdict before us." *Id.* at 1605 (Alabama's lack of constraining standards warrants Court's detailed examination of the award). And in Stevens's opinion (which Breyer joined), that review was largely substantive.

In his concurrence, Breyer also stressed the need for judicial review of punitive damages awards. *Id.* at 1605. The same emphasis on judicial review of government action was present in an 1890 decision that some regard as a critical stepping-stone to *Lochner*-era substantive due process. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986* 41-44 (1990); BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 102-03 (Phoenix paperback ed. 1967); James W. Ely, Jr., *The Railroad Question Revisited: Chicago, Milwaukee & St. Paul Railway v. Minnesota and Constitutional Limits on State Regulations*, 12 *GREAT PLAINS Q.* 121, 122 (1992). In *Chicago, Milwaukee*, 134 U.S. at 456-58, the Court held that a statute giving a state commission the final authority to determine railroad rates deprived the railroad of due process by denying it judicial review to determine the reasonableness of those rates. Technically, this was procedure rather than substance. But in determining the reasonableness of the rate, the state court would have to apply substantive standards. And if it applied them wrongly, might not higher courts, including perhaps the United States Supreme Court itself, be required to correct the error? The same, of course, might be true if the state courts fail in the task Breyer assigned them. For an extended account of the *Chicago, Milwaukee* case, its background, and its implications, see Ely, *supra*, at 121-31.

7. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31-32 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14-21 (1980).

8. See, e.g., BORK, *supra* note 7, at 139-41, 153-55.

9. "[J]udicial interpretations of the constitutional guarantees of individual liberty during the late Nineteenth and early Twentieth Centuries were major obstructions to the adaptation of law to the needs of the weaker segments of the community in an urban and industrial society." ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 134 (1987). "*Lochner's* downfall did not represent a denigration of economic liberties but a recognition

fewer times economic substantive due process had these consequences, one would think, the less valid is this particular charge.

A further, somewhat less common, attack on the *Lochner* Court builds on the previous argument. Not only did economic substantive due process have the effect of assisting business, this argument runs, but it was *consciously intended* to have that effect.¹⁰ In other words, the doctrine resulted less from the old Court's belief in laissez-faire than from its desire to perpetuate business power. But if the *Lochner* Court struck down relatively few laws on substantive due process grounds, one must wonder about its commitment to business hegemony.

This Article's main aim is to determine the number of times the Supreme Court used substantive due process to invalidate government action during the years 1897 to 1937 inclusive. Of course, this is an incomplete measure of the doctrine's impact. A fuller assessment would include the number of successful substantive due process challenges in the lower federal courts and the state courts and, more importantly, the ratio of successful to unsuccessful claims in all relevant forums.¹¹ An even fuller analysis would try to consider decisions whose impact is disproportionate to their numbers. One reason for this Article's limited scope is that the latter undertakings obviously are difficult ones. Another is that, as far as I can tell, this Article's relatively modest task has not been adequately accomplished. Despite the reams that have been written on the *Lochner* era, no one has clearly demonstrated how many times the Supreme Court invalidated government action on substantive due process grounds throughout the full period from the

that such liberties were not meaningfully protected by the 'free' market, at least for those who were more its victims than its masters." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1374 (2d ed. 1988).

10. COX, *supra* note 9, at 135 (*Lochnerian* decisions "flowed partly from the willful defense of wealth and power"); ARTHUR SELWYN MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* 45-46 (1976) (*Lochner* Court Justices knowingly and willingly advanced business interests). For composite statements of this view and some further sources expressing it, see, for example, GILLMAN, *supra* note 5, at 3-4; Mary Cornelia Porter, *That Commerce Shall Be Free*, 1976 SUP. CT. REV. 135, 138-40.

11. For a few such attempts covering various portions of the *Lochner* era, see *infra* note 12.

1890s until the late 1930s.¹² Or if anyone has done so, that achievement has not gained much notoriety.

The Article opens by briefly sketching some problems with contemporary accounts of *Lochner*-era substantive due process and with contemporary estimates of its impact. Then it examines in detail one plausible source of the recurrent assertion that economic substantive due process claimed some 200 victims in the Supreme Court. Depending on how one classifies certain groups of *Lochner*-era due process decisions, the doctrine's real Supreme Court body count is much lower. And even if the term substantive due process is construed broadly, that count still is well below 200. On either reading, moreover, the relevant decisions do not always conform to the dominant stereotypes about old-time economic substantive due process. Nor do they support familiar stereotypes about certain members of the Court; as discussed later, even Justice Holmes often wrote or voted to invalidate laws on substantive due process grounds. Following these discussions, the Article briefly develops the implications of its findings for some standard criticisms of

12. Perhaps the principal effort to do so, WRIGHT, *supra* note 6, at ch. 8, is discussed later in this Article. See *infra* notes 32-38 and accompanying text. Another effort to gauge the impact of economic substantive due process does not cover the whole period. See, e.g., 2 CHARLES WARREN, *THE SUPREME COURT IN AMERICAN HISTORY* 741 (rev. ed. 1926) (of the 422 state police measures challenged before the Supreme Court on due process or equal protection grounds between 1889 and 1918 inclusive, only 53 held the challenged regulation unconstitutional and only 14 involved legislation affecting the general rights of individuals). See also Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294-95 (1913) (of the 560 cases arising under the Fourteenth Amendment's Due Process and Equal Protection Clauses from 1887 to 1911 inclusive, only three struck down social and economic regulation). Presumably, different criteria helped establish the base of Fourteenth Amendment decisions in each of Warren's studies.

Warren's compilations, however, did not include the 1920s, a decade that saw a marked increase in the number of laws invalidated on substantive due process grounds. In a 1927 study limited to due process cases, Ray Brown concluded that: (1) during the period 1868-1912 the Supreme Court had struck down six of 98 laws challenged on due process grounds, (2) during the period 1913-1920 it had struck down seven of 97 such laws, and (3) during the period 1921-27 it had invalidated 15 of 53 laws subjected to a due process attack. Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944-45 (1927). However, Brown limited himself to police power cases, and did not consider the procedure, tax, jurisdiction, and utility regulation cases considered later in this Article. *Id.* at 944 n.7. He also includes in his list of cases invalidating police power regulation a decision in which the Supreme Court merely returned a case to a lower court without mentioning the word due process. *Id.* at 944 n.10. See *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 546-48 (1924) (overturning a lower court decision that had rejected a Fifth Amendment challenge to a District of Columbia rent control law and returning the case to the lower court). I do not include *Chastleton* in the list of substantive due process invalidations I develop later in the Article.

Lochner-era substantive due process. Overall, the findings blunt those criticisms to some degree.

II. THE STANDARD ACCOUNT OF *LOCHNER*-ERA SUBSTANTIVE DUE PROCESS

Contemporary discussions of *Lochner*-era substantive due process generally discuss or cite only twenty or so well-known decisions.¹³ Heading the list is *Lochner v. New York* itself,¹⁴ in which the Court struck down a New York maximum-hours law for bakery employees.¹⁵ Prominent in most accounts, moreover, are some other famous employment cases. These include the old Court's controversial decisions in *Adair v. United States*,¹⁶ *Coppage v. Kansas*,¹⁷ and *Adkins v. Children's Hospital*.¹⁸ Also typically included are two or three equally famous decisions in which the Court upheld maximum-hours laws.¹⁹ Two other regularly discussed cases are the decisions widely regarded as initiating and closing the *Lochner* era: *Allgeyer v. Louisiana*²⁰ and *West Coast Hotel v. Parrish*.²¹ Another frequently included decision is the Court's 1877 decision in *Munn v. Illinois*,²² which established that states have considerable latitude to regulate businesses "affected with a public interest."²³ Sometimes, our standard sources go on to discuss

13. See GUNTHER, *supra* note 4, at 437-39, 444-57; ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 100-13 (2d ed. 1994); JOHN E. NOWAK, RONALD D. ROTUNDA, & J. NELSON YOUNG, CONSTITUTIONAL LAW 340-50 (3d ed. 1986); SIEGAN, *supra* note 5, at 110-55; TRIBE, *supra* note 9, §§ 8-2 to -7 at 567-86. See also Phillips, *supra* note 5, at 270-82 (where I made the same error). Discussing a wider range of cases, however, is KEYNES, *supra* note 5, chs. 5-6.

14. 198 U.S. 45 (1905).

15. *Id.*

16. 208 U.S. 161 (1908) (striking down a federal law forbidding the firing of railroad workers for their union affiliation).

17. 236 U.S. 1 (1915) (striking down a state law that forbade employment contracts conditioning an employee's employment on his not becoming or remaining a member of a labor union).

18. 261 U.S. 525 (1923) (striking down a District of Columbia minimum wage law for, *inter alia*, women), *overruled by* *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

19. See *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a state maximum-hours law for women); *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding a state maximum-hours law for factory workers, without mentioning *Lochner*). See also *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding a state maximum-hours law for workers in underground mines).

20. 165 U.S. 578 (1897) (invalidating a state law that imposed a fine for taking any act to effect marine insurance on in-state property with any insurer not complying with state law).

21. 300 U.S. 379 (1937) (upholding a minimum wage law for women).

22. 94 U.S. 113 (1877).

23. *Id.* at 133-35.

one or more of several lesser-known decisions exploring what might be called *Munn's* negative implication: that states have limited freedom to regulate businesses *not* affected with a public interest.²⁴ Usually they also discuss *Nebbia v. New York*,²⁵ the case in which the affected-with-a-public-interest doctrine met its demise. Also occasionally discussed are two 1920s decisions striking down state laws regulating the weights at which loaves of bread could be sold²⁶ and forbidding the use of "shoddy" in beds, pillows, upholstered furniture, and the like.²⁷ Much more prominent are two "personal rights" decisions that provided some authority for the modern constitutional right of privacy: *Meyer v. Nebraska*²⁸ and *Pierce v. Society of Sisters*.²⁹ Sometimes getting a brief mention, finally, are some old Court decisions striking down restrictions on entry to a business, trade, or occupation.³⁰

To some of our standard sources, however, these twenty or so cases evidently are the tip of a much larger iceberg. Those sources seem to say that the old Court invalidated approximately 200 state and federal laws on substantive due process grounds.³¹ The sources also do nothing

24. See, e.g., *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927) (striking down a state law regulating the price at which theater tickets could be resold); *Ribnik v. McBride*, 277 U.S. 350 (1928) (striking down a state law regulating the fees an employment agency could charge); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1928) (striking down a state law fixing the price at which gasoline could be sold). See also *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923), which contains Chief Justice Taft's attempt to define the term "business affected with a public interest."

25. 291 U.S. 502 (1934) (upholding a state law authorizing the fixing of milk prices by a state agency).

26. *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924).

27. *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926). Shoddy includes various fabrics that are cut up, ground up, torn up, or broken up. *Id.* at 409.

28. 262 U.S. 390 (1923) (striking down a state law forbidding the teaching of any subject to any person in any language other than English and also forbidding the teaching of any language other than English as a language until after the eighth grade).

29. 268 U.S. 510 (1925) (striking down a state law requiring that all children between the ages of eight and 16 attend a public school).

30. The best-known such decisions are *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) and *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

31. "[E]ven during the *Lochner* era, while nearly 200 regulations were struck down, most challenged laws withstood attack." GUNTHER, *supra* note 4, at 445 (discussing *Lochner*-era substantive due process). "It has been estimated that the Supreme Court invalidated state or federal regulations pursuant to the [D]ue [P]rocess [C]lause, usually coupled with another provision such as the [E]qual [P]rotection [C]lause, in 197 cases between 1899 and 1937, while an even larger number of regulations survived scrutiny." TRIBE, *supra* note 9, § 8-2 at 567 n.2 (also discussing *Lochner*-era substantive due process). "B.F. Wright has counted some 184 decisions between 1899 and 1937 which invalidated state laws on the basis of either the due process or equal protection clause Those involving federal laws were far fewer." MCCLOSKEY, *supra* note 13, at 101 (likewise

to dispel the natural impression that their 180 or so additional cases resemble the substantive due process decisions they do discuss. As authority for their figures, the relevant sources invariably cite Benjamin Wright's 1942 study entitled *The Growth of American Constitutional Law*.³² At one point, Wright states that "[b]etween 1899 and 1937 there were 212 cases in which state legislation was held to be unconstitutional for failure to preserve the guarantees of the Constitution regarding the rights of persons. There were 18 such cases involving Congressional acts."³³ After discussing some "civil rights" cases, Wright examined decisions involving "the rights of property." Early in the latter examination, he stated:

Excluding the civil liberties cases, there were 159 decisions under the due process and equal protection clauses in which state statutes were held to be unconstitutional, plus 16 in which both the due process and commerce clauses were involved, plus 9 more involving due process and some other clause or clauses.³⁴

However, Wright's subsequent discussion does not examine or cite 184 such cases.³⁵ He does cite a source which lists something like that number and describes it as a "comprehensive list of cases in which state action was held contrary to the Fourteenth Amendment through 1938."³⁶ This is Felix Frankfurter's 1938 book, *Mr. Justice Holmes and the Supreme Court*. In an appendix to that book, Frankfurter provides a list and individual short descriptions of "Cases Holding State Action Invalid Under the Fourteenth Amendment" from 1877 through 1938. For the years 1897 to 1937 inclusive, the appendix lists 220 cases.³⁷

discussing *Lochner*-era substantive due process). See also PIERCE & GELLHORN, *supra* note 4, at 80 (almost 200 state and federal regulations invalidated by the Court during the 50 years preceding the 1930s, citing Tribe during a discussion of *Lochner*-era substantive due process). To be sure, these statements do not specifically say that the 200 or so invalidations they mention all proceeded on substantive due process grounds. However, because all of these remarks were made during discussions of *Lochner*-era substantive due process, they are most naturally read as referring to cases of that kind.

32. WRIGHT, *supra* note 6. See GUNTHER, *supra* note 4, at 444 n.1; TRIBE, *supra* note 9, at 567 n.2; MCCLOSKEY, *supra* note 13, at 101.

33. WRIGHT, *supra* note 6, at 148. Wright adds that the 212 figure "does not include 17 cases in which the Court relied upon the commerce and either the due process or the equal protection clause." *Id.* n.1.

34. *Id.* at 154.

35. See *id.* at 155-79 (combing the text and the notes). Although Wright's exposition does not facilitate an exact count, this author estimates that Wright cites or mentions about 120 cases invalidating government action on Fourteenth Amendment grounds.

36. *Id.* at 165 n.63.

37. FELIX FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT*, app. at 97 (1938).

On the whole, Frankfurter's list is reasonably complete and accurate.³⁸ However, for present purposes, obvious omissions in the list include seven *Lochner*-era cases striking down *federal* action on substantive due process grounds³⁹ and another case invalidating a Philippine law under the due process provision contained in the islands' constitution.⁴⁰ The list also did not include four substantive due process decisions invalidating state action.⁴¹ On the other hand, four

38. On the completeness question, this author has examined the syllabus for every Supreme Court case containing the words "due process" for the years 1897 through 1937. This LEXIS scan suggests that Frankfurter (or his researcher) missed relatively little. For some relatively minor additions and deletions to the list, see *infra* notes 39-42 and accompanying text.

39. See *Railroad Retirement Bd. v. Alton Ry.*, 295 U.S. 330, 346-61 (1935) (striking down the compulsory retirement and pension provisions of the Railroad Retirement Act under a supposed Commerce Clause analysis that actually involved substantive due process); *Handy v. Delaware Trust Co.*, 285 U.S. 352, 354-55 (1932) (conclusive presumption in federal tax statute violates due process); *Heiner v. Donnan*, 285 U.S. 312, 322-29 (1932) (same); *Chicago, Rock Island & Pac. Ry. v. United States*, 284 U.S. 80, 96-100 (1931) (striking down as a confiscatory and arbitrary denial of Fifth Amendment due process an Interstate Commerce Commission order that exempted certain railroads from stipulated per diem charges for switching cars from railroad to railroad); *Untermeyer v. Anderson*, 276 U.S. 440, 445-46 (1928) (federal gift tax provision violates due process as applied); *Adkins v. Children's Hosp.*, 261 U.S. 525, 544-62 (1923) (striking down a District of Columbia minimum wage law for women), *overruled by West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Adair v. United States*, 208 U.S. 161, 173-80 (1908) (striking down a federal law that forbade the firing of railroad employees for their union affiliations). On my inclusion of *Railroad Retirement Bd. v. Alton Ry.*, which is almost universally regarded as a Commerce Clause decision, see *infra* note 154.

40. In *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), the Court struck down on due process and equal protection grounds an act of the Philippine legislature making it a crime to keep business account books in any language other than English, Spanish, or a local dialect. *Id.* at 524-27. The law had been challenged by Chinese business people operating in the Philippines. *Id.* at 506-07. After stating that the criteria employed in due process and equal protection under the Philippine Constitution are substantially similar to those used under their United States counterparts, the Court used several well-known substantive due process cases of that era to support its decision. *Id.* at 524-27.

41. See *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 668-80 (1935) (striking down as confiscatory telephone rates set by state public service commission); *West Ohio Gas Co. v. Public Utils. Comm'n*, 294 U.S. 79, 80-83 (1935) (striking down as confiscatory gas rates imposed by a public utilities commission); *Chicago, Milwaukee & St. Paul Ry. v. Kennedy*, 232 U.S. 626, 627 (1914) (striking down a state statute making it easier to recover for property damaged by operation of a railroad); *Duluth & Iron Range R.R. v. St. Louis County*, 179 U.S. 302, 304-05 (1900) (state law amending earlier grant so as to preserve corporation's obligations to state while taking away consideration therefor denies equal protection and takes property without due process).

cases contained in Frankfurter's appendix probably should not have been included.⁴²

III. A BREAKDOWN OF FRANKFURTER'S LIST

The previous additions and deletions leave us with 228 decisions invalidating government action on Fifth or Fourteenth Amendment grounds during the years 1897 through 1937. Do these cases substantiate the claim that during the *Lochner* era, the Supreme Court used substantive due process to strike down some 200 state and federal laws? As my previous discussion of Wright's book may have already suggested, our new list fails to do so. Although these cases invalidated federal or state action on Fifth or Fourteenth Amendment grounds, many of them clearly did not use substantive due process to effect the invalidation. Of the remaining "substantive due process" cases, many arguably do not deserve that description. To support these claims, the Article discusses the 228 cases in roughly ascending order of plausible characterization as substantive due process decisions.

A. *The Equal Protection Cases*

One reason why Wright's and Frankfurter's case totals were in the 200 range probably has not escaped some readers. Each source included cases other than due process cases. Specifically, Wright's initial list embraced personal rights cases, and Frankfurter's list covered Fourteenth Amendment decisions. With the exception of one Fourteenth Amendment privileges and immunities decision,⁴³ all of the decisions not involving due process in Frankfurter's compilation involved equal protection. Some of these cases conjoined equal protection and some other basis of decision, but in none of them was that basis clearly due process. Thirty-three such cases appear on Frankfurter's list.

42. In *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913), a suit attacking municipal telephone rates as confiscatory, the Southern District of California dismissed the suit on the ground that federal jurisdiction was lacking. *See id.* at 281-82. While reversing that dismissal, the Supreme Court did not rule on the constitutionality of the rates. *See id.* at 283-96. In *Ludwig v. Western Union Tel. Co.*, 216 U.S. 146, 162-64 (1910), which used the Commerce Clause to strike down a state license tax on foreign corporations, the Court specifically stated that it was not applying due process or equal protection. *Davis v. Wallace*, 257 U.S. 478, 482-85 (1922), was not decided on constitutional grounds. Finally, I do not read *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 55 (1909), in which the Court reversed a lower court decision invalidating a state gas rate determination, as clearly striking down any state action on due process grounds.

43. *Colgate v. Harvey*, 296 U.S. 404, 426-33 (1935) (state tax law exempting interest received from loans of five percent or less made within the state, but not outside it, is unconstitutional), *overruled by Madden v. Kentucky*, 309 U.S. 83 (1940).

In Frankfurter's one specific reference to his full list, he seemed hostile to all of the cases it contained.⁴⁴ Under contemporary standards, at least, this blanket condemnation is inconsistent with his progressive reputation. The reason is the nature of some of those cases. Of the thirty-three listed equal protection decisions, for example, six invalidated state action discriminating on the basis of race. Today, perhaps the best-known of these decisions are *Nixon v. Herndon*,⁴⁵ which struck down a state statute preventing blacks from voting in a Democratic primary election,⁴⁶ and *Nixon v. Condon*,⁴⁷ which outlawed the white primary.⁴⁸ The other four race cases involved the exclusion of blacks from jury service or grand jury service.⁴⁹ To these six race cases we might add the Court's 1915 decision in *Truax v. Raich*,⁵⁰ which struck down an Arizona law commanding that at least eighty percent of the workers in firms employing more than five workers must be qualified electors or native-born United States citizens.⁵¹

However, most of the old Court's equal protection decisions striking down government action—totalling fifteen in all—were tax cases.⁵² About half of these cases involved favoritism toward local firms, or at least the differential treatment of in-state and out-of-state businesses.⁵³

44. See FRANKFURTER, *supra* note 37, at 87-88. For example, Frankfurter described the laws struck down in these cases as involving "matters confessedly of local concern and derived from local experience." *Id.* at 87. "Such judicial control of the individualism of the states," he later added, is both "socially costly" and "often capricious." *Id.* at 88.

45. 273 U.S. 536 (1927).

46. *Id.* at 540-41.

47. 286 U.S. 73 (1932).

48. *Id.* at 89.

49. *Hollins v. Oklahoma*, 295 U.S. 394, 395 (1935) (jury service); *Norris v. Alabama*, 294 U.S. 587, 597-99 (1935) (jury service); *Rogers v. Alabama*, 192 U.S. 226, 229-31 (1904) (grand jury service in a murder case); *Carter v. Texas*, 177 U.S. 442, 447-49 (1900) (grand jury service in a criminal prosecution against a black person).

50. 239 U.S. 33 (1915).

51. *Id.* at 39-43.

52. The old Court's *substantive due process* tax cases are discussed *infra* at notes 72-81 and accompanying text.

53. *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 544-45 (1934) (foreign insurers taxed at higher assessed values than other firms); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 245-47 (1931) (tax on stock of national banks exceeds tax on stock of state banks); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 516-17 (1926) (foreign insurance companies taxed differently than similarly situated domestic insurers); *Air-Way Elec. Appliance Corp. v. Day*, 266 U.S. 71, 81-85 (1924) (state corporate franchise tax; both Commerce Clause and Equal Protection Clause violated); *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421, 423-26 (1921) (statute reducing license tax if at least three-quarters of manufacturer's assets invested in state's property or securities; both Equal Protection Clause and Commerce Clause violated); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 414-17 (1920) (statute not taxing out-of-state income of local corporations without any local

The other half involved tax classifications deemed discriminatory for various other reasons.⁵⁴ Almost as numerous as the fifteen tax cases were a heterogeneous group of eleven equal protection decisions invalidating economic regulations broadly conceived.⁵⁵ With only a few

business, but taxing such income when earned by other local corporations); *Southern Ry. v. Greene*, 216 U.S. 400, 411-18 (1910) (franchise tax applies to foreign corporations but not to domestic corporations doing same business).

54. *Binney v. Long*, 299 U.S. 280, 291, 293-95 (1936) (state succession tax); *Valentine v. Great Atl. & Pac. Tea Co.*, 299 U.S. 32, 33 (1936) (graduated state tax on gross receipts of chain stores); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 555-60 (1935) (sales tax on retailers graduated according to gross sales); *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28-30 (1931) (discriminatory assessments); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 400-02 (1928) (gross receipts tax that distinguishes between corporate taxi businesses and individual or partnership taxi businesses), *overruled by* *Lehnkausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-40 (1928) (tax on recording of mortgages of less than five years, but not on recording of longer mortgages); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445-47 (1923) (discriminatory assessment); *Kansas City S. Ry. v. Road Improvement Dist. No. 6*, 256 U.S. 658, 659-61 (1921) (tax assessment that treats railroads differently from individuals).

55. *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 460-63 (1937) (state law permitting mutual fire insurance companies, but not stock fire insurance companies, to act through their salaried employees); *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 272-74 (1936) (milk control act allowing dealers without advertised trade names who were in business before April 10, 1933 to undersell similar dealers who entered the business later); *Frost v. Corporation Comm'n*, 278 U.S. 515, 521-25 (1929) (permit requirements for cooperative cotton gins more lenient than permit requirements for other gins); *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493-97 (1927) (venue statute that treats foreign corporations differently from domestic corporations); *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 549-51 (1923) (state law imposing various requirements on nonresident corporations, but not nonresident individuals, before each can sue in-state); *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79, 81-87 (1916) (statute making it a criminal offense to pay less for sugar in Louisiana than in another state); *Atchison, Topeka, & Santa Fe Ry. v. Vosburg*, 238 U.S. 56, 59-61 (1915) (law imposes reciprocal burdens on shipper and carrier while letting shipper recover attorney fees upon carrier's delinquency, but not vice-versa); *Cotting v. Goddard*, 183 U.S. 79, 102-12 (1901) (state stock yard regulations that effectively apply only to Kansas City stock yards); *Gulf, C. & S.F. Ry. v. Ellis*, 165 U.S. 150, 154-66 (1897) (law that for claims of \$50 or less against a railroad, plaintiff can recover costs and attorney fees if railroad fails to pay claim within 30 days after presentation of affidavit and if plaintiff then gets a good judgment against railroad).

Frankfurter's list categorized as equal protection decisions two other cases in which the Court did not make its basis of decision clear. FRANKFURTER, *supra* note 37, at 103, 110. Neither case gives much reason to suggest that this categorization is wrong. See *Gast Realty & Inv. Co. v. Schneider Granite Co.*, 240 U.S. 55, 57-59 (1916) (inequitable distribution of costs for paving street); *Ex parte Young*, 209 U.S. 123, 145-48 (1908) (huge criminal penalties for violation of rate setting law made it impracticable to challenge rates).

possible exceptions, these twenty-six decisions simply do not involve due process.⁵⁶

If the old Court's decisions striking down racial discrimination qualify as substantive due process cases, it is difficult to imagine which individual rights cases would not qualify. Because they usually involve economic matters, though, it might seem that the tax cases and especially the regulation cases should be lumped together with our earlier list of widely recognized *Lochner*-era economic substantive due process cases. But the decisions discussed here are equal protection cases, not substantive due process cases. They involve different constitutional language and that language implicates different values than those applied in substantive due process cases. As the Fifth Circuit observed in 1988, the government violates equal protection only when it treats similarly situated people differently, but it violates substantive due process when it treats someone irrationally, even if it treats everyone that way.⁵⁷ One also might argue that the equal protection cases involving taxation and economic regulations should be treated as economic substantive due process cases because, like the latter cases, they often apply something resembling aggressive rational-basis review. But throughout the Twentieth Century, substantive means-ends review has been much less controversial in equal protection cases than in substantive due process cases. People who object to substantive due process usually accept rational-basis review in the equal protection context.⁵⁸

B. Procedural Due Process and Related Matters

One apparently little-known fact about the *Lochner* era is that the Supreme Court did not use the terms "procedural due process" and

56. In *McFarland*, 241 U.S. at 79 and *Ellis*, 165 U.S. at 151, the case syllabi say that the bases of decision were equal protection and due process. Frankfurter's book says the same. FRANKFURTER, *supra* note 37, at 98, 110. But the opinions in these two cases do not clearly indicate that they were decided on due process grounds. See *McFarland*, 241 U.S. at 87 (where Holmes's opinion finally descends from abstraction to make a specific reference to equal protection); *Ellis*, 165 U.S. at 154-66 (which I construe as containing equal protection reasoning). See also the last two cases discussed in the final paragraph of the preceding note.

57. *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988).

58. To Robert Bork, for example, substantive due process of any kind is anathema. See, e.g., BORK, *supra* note 7, at 42-49, 95-100, 110-26. For example, he criticizes Holmes's famous *Lochner* dissent because it allowed that Fourteenth Amendment due process has some substantive content. See *id.* at 45-46. But Bork seems to embrace a substantive test of rationality or reasonableness in equal protection cases. See *id.* at 330.

“substantive due process” during most, if not all, of that era.⁵⁹ Even so, some thirty-five cases on Frankfurter’s list involve procedural due process or cognate subjects. In most of them, the norms the Court applied were the basic due process requirements of adequate notice and a fair trial or hearing, or standards derived from them.⁶⁰ Also implicat-

59. Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 Ky. L.J. 397, 406-07 (1993-94) (no member of the Court used “procedural due process” until 1934 or “substantive due process” until 1948). A LEXIS search for Supreme Court cases using the term “substantive due process” during the period 1897-1937 yielded no mention of that term by a member of the Supreme Court.

60. *Ohio Bell Tel. Co. v. Public Util. Comm’n*, 301 U.S. 292, 300-06 (1937) (public utilities commission order not accompanied by adequate hearing); *Brown v. Mississippi*, 297 U.S. 278, 285-87 (1936) (murder conviction based on confession produced by torture); *Georgia Ry. & Elec. Co. v. Decatur*, 295 U.S. 165, 170-71 (1935) (denial of opportunity to offer evidence on benefits of an assessment denies street railway company an adequate hearing); *Morrison v. California*, 291 U.S. 82, 88-97 (1934) (defendant’s burden of proving either citizenship or eligibility for naturalization under California alien land law violates due process); *Southern Ry. Co. v. Virginia*, 290 U.S. 190, 196-99 (1933) (railroad commission order invalid because statute which it is based on did not provide for notice, hearing, or review); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678-82 (1930) (procedures for challenging state tax do not afford claimant adequate hearing); *Wuchter v. Pizzutti*, 276 U.S. 13, 17-24 (1928) (service of process against secretary of state insufficient notice to party sued because of in-state auto accident); *Tumey v. Ohio*, 273 U.S. 510, 522-35 (1927) (state statute empowering mayor to try alleged violators of state prohibition act violates due process, where mayor had pecuniary and other interests in conviction); *Browning v. Hooper*, 269 U.S. 396, 405-06 (1926) (notice and opportunity to be heard required before road district can make assessments against land); *Moore v. Dempsey*, 261 U.S. 86, 90-91 (1923) (murder trial in which accused black man hurried to conviction under influence of mob violates due process); *Turner v. Wade*, 254 U.S. 64, 69-70 (1920) (tax assessment not accompanied by adequate notice or hearing); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 290-91 (1920) (no fair opportunity to appeal water rate order to judiciary); *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 336-37 (1920) (no effective way to challenge rate order where only vehicle is contempt proceedings and severe penalties for violating order tended to preclude this option); *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 474-76 (1918) (giving conclusive effect to a prior judgment against one not a party thereto, or in privity with such a party, violates due process); *Saunders v. Shaw*, 244 U.S. 317, 319-20 (1917) (state supreme court violates due process when it reverses case on basis of a factual proposition ruled immaterial at trial, on which losing party had no opportunity to offer evidence); *McDonald v. Mabee*, 243 U.S. 90, 90-92 (1917) (service upon out-of-state defendant by publication in in-state newspaper provides insufficient notice); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 422-26 (1915) (no execution against shareholder when execution against corporation returned unsatisfied and shareholder afforded no notice or opportunity to be heard); *Londoner v. City of Denver*, 210 U.S. 373, 380-86 (1908) (inadequate hearing afforded taxpayer and landowner subject to assessment); *Central of Georgia Ry. v. Wricht*, 207 U.S. 127, 138-42 (1907) (state’s system of valuing property for tax purposes does not provide adequate opportunity to be heard); *Wetmore v. Karrick*, 205 U.S. 141, 148-60 (1907) (judgment rendered one year after dismissal of suit against defendant is void, when no subsequent service on defendant); *Old*

ing these requirements are several decisions striking down state laws on vagueness grounds.⁶¹ Some other cases concern a somewhat distinguishable issue that usually is regarded as procedural: the constitutional reach of a state's power through its in personam jurisdiction.⁶² Although they do not involve jurisdiction, a few other *Lochner*-era decisions resemble these jurisdiction cases in their preoccupation with the extraterritorial reach of state power.⁶³

C. Incorporation Broadly Conceived

Since at least 1897, the Supreme Court has held that Fourteenth Amendment due process prevents the states from taking property without just compensation.⁶⁴ Five due process decisions decided

Wayne Mut. Life Ins. Ass'n v. McDonough, 204 U.S. 8, 15-23 (1907) (due process violated by giving full faith and credit to judgment, when first state lacked jurisdiction because no notice); Roller v. Holly, 176 U.S. 398, 407-13 (1900) (five days notice of suit insufficient for out-of-state defendant on promissory note).

61. Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 240-43 (1932) (criminal provisions of Oklahoma statute forbidding waste of petroleum); Cline v. Frink Dairy Co., 274 U.S. 445, 453-65 (1927) (criminal provisions of state antitrust law); Connally v. General Constr. Co., 269 U.S. 385, 391-95 (1926) (criminal penalties in state minimum wage law); American Seeding Mach. Co. v. Kentucky, 236 U.S. 660, 661 (1915) (state antitrust law); Collins v. Kentucky, 234 U.S. 634, 636-38 (1914) (state antitrust law); International Harvester Co. v. Kentucky, 234 U.S. 216, 221-24 (1914) (state antitrust law). The void-for-vagueness doctrine normally is regarded as an application of procedural due process because vagueness implies inadequate notice. GUNTHER, *supra* note 4, at 1202; TRIBE, *supra* note 9, at 683-84.

62. Consolidated Textile Corp. v. Gregory, 289 U.S. 85, 87-88 (1933) (in-state sale of goods through a controlled subsidiary insufficient for jurisdiction); Flexner v. Farson, 248 U.S. 289, 292-93 (1919) (service upon defendant's local agent does not afford jurisdiction when service occurs after agency terminated); Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193-96 (1915) (assertion of jurisdiction over out-of-state corporation exceeds limits set by due process); Simon v. Southern Ry., 236 U.S. 115, 129-32 (1915) (jurisdiction via service on secretary of state fails when cause of action arose outside state, and foreign corporation had no in-state agent).

63. See Hartford Accident & Indem. Co. v. Delta Pine Land Co., 292 U.S. 143, 149-50 (1934) (Mississippi statute invalidating fidelity bond provisions limiting time within which suit possible does not govern contract made in Tennessee, even though suit took place in Mississippi); Home Ins. Co. v. Dick, 281 U.S. 397, 407-10 (1930) (Texas statute invalidating contract provisions that limit time of suit to two years or less violates due process as applied to out-of-state insurance contract with Mexican insurer); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 399-400 (1924) (Texas statute imposing penalty and allowing recovery of attorney fees cannot constitutionally be applied against insurance company, because policy upon which suit is based was made outside the state and therefore is outside the state's power). For another case that arguably belongs here, see *infra* note 124.

64. *E.g.*, GUNTHER, *supra* note 4, at 465; ELY, *supra* note 6, at 130 (citing Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 233-41 (1897) (which found no violation of due process on the facts)).

between then and 1937 arguably proceeded on the theory that the challenged state action was an unconstitutional taking of property. The most notable was Justice Holmes's 1922 decision in *Pennsylvania Coal Co. v. Mahon*.⁶⁵ As we will see, the sizable body of *Lochner*-era utility regulation cases might also be conceptualized in this way.⁶⁶

Our arguable takings cases did not use the modern term "incorporation," but some of them plainly did include the Fifth Amendment Takings Clause within Fourteenth Amendment due process.⁶⁷ The incorporation of other Bill of Rights guarantees within the Fourteenth Amendment began in earnest during the latter part of the *Lochner* era. Of the seven cases in which this occurred, six involved the First Amendment's application to the states and the other involved the Sixth Amendment's imposition on them.⁶⁸

The previous decisions applied to the states constitutional provisions that formally limit the federal government alone. The *Lochner* Court also practiced a different sort of incorporation for a provision that governs only the states. For various reasons, the Contract Clause had become a less potent restriction on state economic regulation by the turn

65. 260 U.S. 393, 412-16 (1922) (state statute forbidding the mining of coal in such a way as to cause subsidence of the land). *See also* *Panhandle E. Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613, 618-23 (1935) (state highway commission order compelling pipeline company to make changes in its transmission lines without compensation); *Delaware Lackawanna & W. R.R. v. Town of Morristown*, 276 U.S. 182, 193-95 (1928) (ordinance establishing a hack stand at railroad station violates due process because it is a taking of railroad's property without just compensation). *Cf.* *Sterling v. Constantin*, 287 U.S. 378, 396-404 (1932) (affirming injunction against governor's order limiting oil production in parts of Texas, perhaps on basis that order is an unconstitutional deprivation of property without due process); *Ettor v. City of Tacoma*, 228 U.S. 148, 156-57 (1913) (striking down a state's repeal of a statute allowing recovery of consequential damages for effects of street grading, on apparent theory that by doing so, the state took a statutory compensation right that had already accrued).

66. *See infra* notes 82-94 and accompanying text.

67. *E.g.*, *TRIBE*, *supra* note 9, at 772 (treating the Takings Clause's application to the states as an instance of incorporation).

68. *Herndon v. Lowry*, 301 U.S. 242, 255-61 (1937) (state anti-insurrection statute violates First Amendment freedom of speech); *De Jonge v. Oregon*, 299 U.S. 353, 361-66 (1937) (state criminal syndicalism law, as applied, violates First Amendment freedoms of speech and assembly); *Grosjean v. American Press Co.*, 297 U.S. 233, 242-50 (1936) (heavy and unusual state tax on certain newspapers violates First Amendment freedom of the press); *Powell v. Alabama*, 287 U.S. 45, 68-73 (1932) (Fourteenth Amendment due process includes Sixth Amendment right to counsel, at least in a capital case); *Near v. Minnesota*, 283 U.S. 697, 707-23 (1931) (state statute making newspapers that regularly engage in libel public nuisances violates First Amendment freedom of the press); *Stromberg v. California*, 283 U.S. 359, 368-70 (1931) (state statute forbidding display of red flag violates First Amendment freedom of speech); *Fiske v. Kansas*, 274 U.S. 380, 386-87 (1927) (state criminal syndicalism statute violates First Amendment freedom of speech as applied).

of the century.⁶⁹ However, this did not prevent Contract Clause reasoning from appearing in due process cases. Some six times between 1904 and 1936, the *Lochner* Court struck down state action on combined due process-Contract Clause grounds.⁷⁰ These cases generally argued that a private agreement or a government grant had been wrongly impaired by subsequent government action.

All things considered, the eighteen "incorporation" cases just discussed seem to be peripheral, penumbral, or borderline candidates for inclusion in our list of *Lochner*-era economic substantive due process cases. To be sure, these decisions did use the Fourteenth Amendment's Due Process Clause to invalidate substantive government action. But they did so not on distinctively "substantive due process" grounds, but primarily under Takings Clause, First Amendment, Sixth Amendment, and Contract Clause rationales. Their application to the states rather than the federal government aside, that is, the first three kinds of "due process" decisions resemble normal takings, First Amendment, and Sixth Amendment decisions,⁷¹ and the due process-Contract Clause cases basically look like normal Contract Clause decisions.

69. See, e.g., CURRIE, *supra* note 6, at 7-13. See also ELY, *supra* note 5, at 110-17 (discussing the Fuller Court's Contract Clause cases).

70. *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 194-98 (1936) (state law changing building and loan association's obligation to maintain a fund to pay shareholders violates due process and Contract Clause); *Coombes v. Getz*, 285 U.S. 434, 441-48 (1932) (repeal of state constitutional provision letting creditors and shareholders of corporation recover against directors for misappropriations by firm's officers violates due process and Contract Clause as applied to present case); *Missouri, Kan. & Tex. Ry. v. Oklahoma*, 271 U.S. 303, 306-10 (1926) (commission order that railroad provide pass under its tracks and highway over them and to pay part of resulting cost violates due process and Contract Clause because it invalidated an earlier ordinance under which city had agreed to pay full cost of such improvements); *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338, 338-40 (1922) (statute validating illegal collection of canal toll after claimant had recovered for that toll apparently violates both due process and Contract Clause); *Bradley v. Lightcap*, 195 U.S. 1, 19-24 (1904) (state statute limiting mortgagee's ability to retain title to repossessed property both impairs a contract obligation and deprives claimant of property without due process). Cf. *Duluth & Iron Range R.R. v. St. Louis County*, 179 U.S. 302, 304-05 (1900) (state law depriving railroad of consideration under an earlier grant, while not violating Contract Clause due to reserved right to amend, does offend equal protection and due process).

71. Consider, for example, James W. Ely's remarks on the relationship between the Takings Clause and substantive due process during the Chief Justiceship of Melville W. Fuller. After noting how Takings Clause norms shaped the development of substantive due process, Ely observes that "[t]he Fuller Court analyzed some cases under the due process framework that today would likely be treated as a takings problem." This failure to achieve doctrinal precision, Ely continues, plagued later justices as well. ELY, *supra* note 5, at 104.

D. *The Due Process Tax Cases*

Stretching the notion of incorporation to its limit are the *Lochner* Court due process decisions in which burden-on-commerce themes predominate. For example, in *West v. Kansas Natural Gas Co.*,⁷² the Court used both due process and the Commerce Clause to strike down an Oklahoma statute prohibiting foreign corporations from building pipelines across highways and using those pipelines to transport natural gas outside the state.⁷³ However, most of these seven due process and burden-on-commerce cases involved state taxation of foreign corporations.⁷⁴

Like the more conventional incorporation cases just discussed, the tax cases decided on due process and Commerce Clause grounds belong at the periphery of *Lochner*-era substantive due process. Although they used due process to strike down substantive government action, they basically are burden-on-commerce decisions. Also consigned to the periphery on this reasoning is a decision striking down a state tax on due process and Contract Clause grounds.⁷⁵ Another group of tax cases deserves the "penumbral" label even though they do not involve values advanced by a specific constitutional provision other than due process. These are some twenty-three decisions concerned primarily with state power to tax out-of-state property, income, and activities.⁷⁶ As Wright

72. 221 U.S. 229 (1911).

73. *Id.* at 249-62.

74. *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 464-67 (1929) (filing fee and license tax for out-of-state corporations); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 216-20 (1925) (state excise tax on out-of-state corporations); *Wallace v. Hines*, 253 U.S. 66, 67-70 (1920) (tax on out-of-state businesses); *Union Tank Line Co. v. Wright*, 249 U.S. 275, 282-86 (1919) (tax on railroad's rolling stock used in state); *International Paper Co. v. Massachusetts*, 246 U.S. 135, 142-45 (1918) (excise tax on out-of-state corporations); *Looney v. Crane Co.*, 245 U.S. 178, 187-91 (1917) (permit charges and franchise tax on foreign corporations); *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 18-48 (1910) (law conditioning out-of-state corporation's doing business on its paying a charter fee based on some percentage of its authorized capital).

75. *Coolidge v. Long*, 282 U.S. 582, 595-606 (1931) (application of estate tax to succession under trust that was created before passage of the tax).

76. *Johnson Oil Ref. Co. v. Oklahoma ex rel. Mitchell*, 290 U.S. 158, 161-63 (1933) (tax on railroad tank cars); *First Nat'l Bank v. Maine*, 284 U.S. 312, 321-31 (1932) (succession tax on in-state corporation owned by resident of another state), *overruled by State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942); *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 130-36 (1931) (state income tax based on ratio of in-state tangible property to all property); *Beidler v. South Carolina Tax Comm'n*, 282 U.S. 1, 7-9 (1930) (inheritance tax on transfer of indebtedness owed to out-of-state decedent by in-state corporation); *Baldwin v. Missouri*, 281 U.S. 586, 590-94 (1930) (inheritance tax on in-state intangibles owned by out-of-state decedent); *Farmers Loan & Trust Co. v. Minnesota*, 280

observes, these cases concerned "what is essentially one phase of federalism"—"the relationship between state and state, or perhaps it would be more accurate to say, between state and property located in other states."⁷⁷ Although federalism-related values may not have any specific constitutional home outside due process, neither do they resemble the values usually applied in due process cases.

A smaller group of tax cases, however, fit within the core of *Lochner*-era substantive due process. While striking down state tax laws on due process grounds, these eleven decisions apply notions of fairness that spring largely from due process itself. Four of the eleven involved municipalities or taxing districts that taxed property owners who derived relatively little benefit from the activity financed by the tax.⁷⁸ Another

U.S. 204, 209-13 (1930) (inheritance tax on bonds issued by taxing state; decedent domiciled, and bonds kept, in another state); *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 91-94 (1929) (tax on out-of-state trust); *Brooke v. City of Norfolk*, 277 U.S. 27, 28-29 (1928) (tax on corpus of trust created and controlled out of state, and owned by people outside the state) *overruled by* *Graves v. Schmidlapp*, 315 U.S. 657 (1942); *Blodgett v. Silberman*, 277 U.S. 1, 18 (1928) (death tax on coins and bank notes that decedent kept in another state); *Southern Ry. v. Kentucky*, 274 U.S. 76, 80-84 (1927) (taxation of railroad's out-of-state intangible property); *Wachovia Bank & Trust Co. v. Doughton*, 272 U.S. 567, 575 (1926) (tax on exercise of power of appointment in trust fund created outside state) *overruled by* *Graves v. Schmidlapp*, 315 U.S. 657 (1942); *Rhode Island Hosp. Trust Co. v. Doughton*, 270 U.S. 69, 80-84 (1926) (tax on inheritance of stock of foreign corporation owned by nonresident decedent); *Frick v. Pennsylvania*, 268 U.S. 473, 488-501 (1925) (tax on transfer of out-of-state tangible property); *Provident Sav. Life Assurance Socy v. Kentucky*, 239 U.S. 103, 112-16 (1915) (tax on insurance premiums paid by state's residents to insurer that had ceased to do business in state); *Atchison, Topeka, & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912) (tax on foreign corporation's capital stock); *Buck v. Beach*, 206 U.S. 392, 399-409 (1907) (tax on mortgage notes present in state, but created out of state and backed by out-of-state property); *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 201-11 (1905) (tax on corporation's out-of-state rolling stock); *Delaware, Lackawanna, & W. R.R. v. Pennsylvania*, 198 U.S. 341, 352-61 (1905) (tax on corporate stock cannot include portion of stock's value attributable to tangible personal property located out of state); *Fargo v. Hart*, 193 U.S. 490, 498-503 (1904) (tax on out-of-state corporate property); *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U.S. 385, 394-99 (1903) (tax on out-of-state franchise); *Dewey v. Des Moines*, 173 U.S. 193, 196-204 (1899) (tax assessment against out-of-state party who owned property in state, for amount by which liability exceeds sum realized from sale of in-state property). *See also* *Senior v. Braden*, 295 U.S. 422, 429-33 (1935) (state investments tax on income from certificates entitling holder to portion of rent from real estate, where some of the real estate is within state and some not; constitutional basis of decision not clear); *Lee v. Osceola & Little River Rd. Improvement Dist.*, 268 U.S. 643, 645-46 (1925) (tax on improvements made to land while it was owned by the federal government).

77. WRIGHT, *supra* note 6, at 160.

78. *Standard Pipe Line Co. v. Miller County Hwy. & Bridge Dist.*, 277 U.S. 160, 161-63 (1928) (tax assessment by highway and bridge district arbitrary because plaintiff got relatively little benefit from road for which assessment made); *Road Improvement Dist. v.*

was a 1936 decision declaring it arbitrary to use pre-Depression numbers to value the plaintiff's property.⁷⁹ Still another seemed to blur substantive due process and equal protection rationales while striking down a state tax on chain stores.⁸⁰ Five more involved various federal tax measures.⁸¹

E. The "Regulated Industries" Cases

With its 1877 decision in *Munn v. Illinois*,⁸² which upheld a state law regulating the rates charged by grain elevators, the Supreme Court established the doctrine that businesses "affected with a public interest" are subject to extensive state regulation.⁸³ Included within that category are businesses such as railroads, electric utilities, gas companies, street railways, telephone companies, and water companies.⁸⁴ But while the states had extensive powers to regulate these businesses, their

Missouri Pac. R.R., 274 U.S. 188, 189-95 (1927) (amount for which railroad assessed for road parallel to its tracks exceeds benefit railroad derived from that road); *Myles Salt Co. v. Board of Comm'rs.*, 239 U.S. 478, 479-85 (1916) (drainage district's taxation of plaintiff's land deprives him of property without due process because land did not benefit from district's activities). Cf. *Norwood v. Baker*, 172 U.S. 269, 275-97 (1898) (municipality's assessment of costs of condemning property for road on landowner whose land the road crossed violates principle that land must be specially benefitted by the activity funded by the assessment; case seems to partly proceed on a takings rationale).

79. *Great N. Ry. v. Weeks*, 297 U.S. 135, 145-53 (1936).

80. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 533-36 (1933) (striking down one portion of a Florida anti-chain store tax that laid an additional tax on chains with stores in different counties). See also *Road Improvement Dist.*, 274 U.S. at 194 (containing an equal protection holding distinct from the substantive due process holding described in *supra* note 78).

81. Three of these cases involved certain presumptions created by federal tax law. See *Handy v. Delaware Trust Co.*, 285 U.S. 352, 354-55 (1932); *Heiner v. Donnan*, 285 U.S. 312, 322-29 (1932); *Schlesinger v. Wisconsin*, 270 U.S. 230, 239-40 (1926). Another held it unconstitutional to assess against a husband an income tax based on his income plus his wife's income. *Hoeper v. Tax Comm'n*, 284 U.S. 206, 214-18 (1931). The last case involved a federal tax on gifts. *Untermeyer v. Anderson*, 276 U.S. 440, 445-46 (1928).

82. 94 U.S. 113 (1877). For descriptions of *Munn*, of the historical roots of the doctrine, and of its subsequent evolution, see, for example, Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759 (1930); Walton H. Hamilton, *Affection with Public Interest*, 39 YALE L.J. 1089 (1930). The affected-with-a-public-interest doctrine is usually regarded as having met its demise in *Nebbia v. New York*, 291 U.S. 502, 531-39 (1934). But see *Townsend v. Yeomans*, 301 U.S. 441, 449-51 (1937) (applying the doctrine while finding the business of tobacco warehousing to be affected with a public interest).

83. 94 U.S. at 125-36.

84. E.g., WRIGHT, *supra* note 6, at 100-01, 155. The definitive statement of the categories of businesses deemed affected with a public interest occurred in *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 534-44 (1923).

powers were still subject to constitutional checks. For example, in *Smyth v. Ames*,⁸⁵ the Court affirmed the judiciary's power to review the reasonableness of rate decisions by utility regulators,⁸⁶ setting forth standards that courts followed with greater or lesser fidelity for over forty years.⁸⁷ The details of the tests in *Smyth v. Ames*, the challenges to them, and their subsequent modifications fortunately need not concern us here.⁸⁸ What is important is that, *Smyth v. Ames* included, the Court struck down state or federal rate regulations on some thirty-nine occasions between 1897 and 1937 inclusive.⁸⁹ During that period, it

85. 169 U.S. 466 (1898). On the Court's early rate regulation cases leading up to and including *Smyth*, see, for example, ELY, *supra* note 5, at 83-89.

86. 169 U.S. at 522-50.

87. The Supreme Court's decision in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), is widely regarded as ending serious constitutional review of utility rate regulation. *E.g.*, Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031, 2031-33 (1989).

88. For a detailed discussion of these and other relevant matters, see, for example, Siegal II, *supra* note 5, at 215-59.

89. *Smyth v. Ames*, 169 U.S. 466, 522-50 (1898) (railroad rates); *The Minnesota Rate Cases*, 230 U.S. 352, 433-73 (1913) (railroad rates); *The Missouri Rate Cases*, 230 U.S. 474, 507-09 (1913) (railroad rates); *San Joaquin & Kings River Canal & Irrigation Co. v. County of Stanislaus*, 233 U.S. 454, 458-61 (1914) (water rates); *Northern Pac. Ry. v. North Dakota ex rel. McCue*, 236 U.S. 585, 595-605 (1915) (railroad rates); *Norfolk & W. Ry. v. Conley*, 236 U.S. 605, 608-14 (1915) (railroad rates); *Rowland v. Boyle*, 244 U.S. 106, 107-11 (1917) (railroad rates); *City of Denver v. Denver Union Water Co.*, 246 U.S. 178, 185-94 (1918) (water rates); *Detroit United Ry. v. City of Detroit*, 248 U.S. 429, 434-37 (1919) (street railway fares); *Groesbeck v. Duluth, South Shore & Atl. Ry.*, 250 U.S. 607, 611-15 (1919) (railroad rates); *Vandalia R.R. v. Schnull*, 255 U.S. 113, 118-22 (1921) (railroad rates); *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 174-78 (1922) (gas rates); *City of Houston v. Southwestern Bell Tel. Co.*, 259 U.S. 318, 321-25 (1922) (telephone rates); *City of Paducah v. Paducah Ry.*, 261 U.S. 267, 275 (1923) (electric street car fares); *Prendergast v. New York Tel. Co.*, 262 U.S. 43, 50-51 (1923) (telephone rates); *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 262 U.S. 276, 287-89 (1923) (telephone rates); *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n*, 262 U.S. 679, 684-95 (1923) (water rates); *Pacific Gas & Elec. Co. v. City of San Francisco*, 265 U.S. 403, 405-16 (1924) (gas rates); *Ohio Utils. Co. v. Public Utils. Comm'n*, 267 U.S. 359, 362-64 (1925) (gas and electric rates); *Northern Pac. Ry. v. Department of Pub. Works*, 268 U.S. 39, 42-45 (1925) (railroad rates); *Banton v. Belt Line Ry.*, 268 U.S. 413, 419-25 (1925) (street railway fares); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 590-92 (1926) (telephone rates); *Board of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23, 31-32 (1926) (telephone rates); *Patterson v. Mobile Gas Co.*, 271 U.S. 131, 134-35 (1926) (gas rates); *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 410-21 (1926) (water rates); *Ottinger v. Brooklyn Union Gas Co.*, 272 U.S. 579, 580-81 (1926) (gas rates); *Chicago, Milwaukee & St. Paul Ry. v. Public Utils. Comm'n*, 274 U.S. 344, 350-52 (1927) (railroad rates); *Denney v. Pacific Tel. & Tel. Co.*, 276 U.S. 97, 101-04 (1928) (telephone rates); *United Rys. & Elec. Co. v. West*, 280 U.S. 234, 249-54 (1930) (street railway rates); *Railroad Comm'n v. Maxcy*, 282 U.S. 249, 250-51 (1931) (water rates); *Central Ky. Natural Gas Co. v. Railroad Comm'n*, 290 U.S. 264, 275 (1933) (gas rates); *Columbus Gas & Fuel Co. v. Public*

also invalidated at least fifteen other laws affecting regulated businesses; typically the regulations in question ordered a railroad or a utility to take some expensive or burdensome action.⁹⁰ On six occasions, finally, the Court overturned civil recovery or civil remedy provisions aimed at railroads.⁹¹

Utils. Comm'n, 292 U.S. 398, 404-14 (1934) (price for natural gas); *West Ohio Gas Co. v. Public Utils. Comm'n*, 294 U.S. 63, 67-77 (1935) (gas rates); *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 668-80 (1935) (telephone rates); *West Ohio Gas Co. v. Public Utils. Comm'n*, 294 U.S. 79, 80-83 (1935) (gas rates). See also *Chicago, Rock Island & Pac. Ry. v. United States*, 284 U.S. 80, 96-100 (1931) (ICC order regarding charges for switching cars between railroads); *City of San Antonio v. San Antonio Pub. Serv. Co.*, 255 U.S. 547, 555-58 (1921) (confiscatory nature of rates assumed in decision holding that government and utility had not made contract on this subject); *Southern Iowa Elec. Co. v. City of Chariton*, 255 U.S. 539, 542-46 (1921) (same); *Lake Shore & Mich. S. Ry. v. Smith*, 173 U.S. 684, 691-99 (1899) (statute compelling railroad to sell 1000-mile tickets for a set fee), *overruled by Pennsylvania R.R. v. Towers*, 245 U.S. 6 (1917).

90. *Dobbins v. City of Los Angeles*, 195 U.S. 223, 235-41 (1904) (arbitrary ordinance forbidding construction of gas works that city previously granted company right to build); *Cleveland Elec. Ry. v. Cleveland*, 204 U.S. 116, 142 (1907) (compelled transfer of street railway's rails, poles, and appliances to another street railway after termination of first railway's franchise); *Louisville & N. R.R. v. Central Stock Yards Co.*, 212 U.S. 132, 143-45 (1909) (constitutional provision compelling railroad to deliver cars to, and accept cars from, other railroads); *Missouri Pac. Ry. v. Nebraska*, 217 U.S. 196, 205-08 (1910) (statute requiring railroad to build or maintain side track to grain elevators); *Washington ex rel. Oregon R.R. & Navigation Co. v. Fairchild*, 224 U.S. 510, 527-33 (1912) (order that tracks of competing railroads be connected at various points); *South Covington & Cincinnati St. Ry. v. City of Covington*, 235 U.S. 537, 548-49 (1915) (regulation that temperature of railroad cars never should fall below fifty degrees); *Great N. Ry. v. Minnesota*, 238 U.S. 340, 345-47 (1915) (order for railroad to install scale at its stockyards); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 489-91 (1915) (court decision striking down statutory penalty against terminated phone customer); *Chicago, Milwaukee & St. Paul R.R. v. Wisconsin*, 238 U.S. 491, 497-502 (1915) (statute requiring that railroad not let down upper berth in sleeping cars before berth actually sold); *Mississippi R.R. Comm'n v. Mobile & Ohio R.R.*, 244 U.S. 388, 393-96 (1917) (order that financially distressed railroad restore six passenger trains to service); *City of Los Angeles v. Los Angeles Gas & Elec. Corp.*, 251 U.S. 32, 37-40 (1919) (order that electric company remove its poles and property, so that city could build its own system); *Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 398-400 (1920) (order to operate narrow-gauge railroad at a loss); *Great N. Ry. v. Cahill*, 253 U.S. 71, 73-77 (1920) (order for railroad to install scales at its stockyard); *Chicago, St. Paul, Milwaukee & Ohio Ry. v. Holmberg*, 282 U.S. 162, 166-67 (1930) (order that railroad install underground pass to connect two portions of farmer's farm); *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 68-81 (1937) (gas proration order limiting wells' production).

91. *St. Louis, Iron Mountain, & S. Ry. v. Wynne*, 224 U.S. 354, 358-61 (1912) (statute giving double liability plus attorney's fees to owner of livestock allegedly killed by railroad, if railroad refused demand for compensation); *Missouri Pac. Ry. v. Tucker*, 230 U.S. 340, 346-51 (1913) (civil liquidated damages provision for violating rate schedule for shipping petroleum products); *Chicago, Milwaukee & St. Paul Ry. v. Polt*, 232 U.S. 165, 167-68

These cases formally proceeded on due process grounds. Yet the basic rationale for the rate cases was that by depriving regulated industries of a reasonable return on their property, excessively low rates take that property without just compensation.⁹² Indeed, some commentators class these decisions as Takings Clause cases.⁹³ Some of the cases striking down regulations other than rate regulations also employed Takings Clause reasoning.⁹⁴ Although they did not use the term, therefore, both classes of cases can be regarded as incorporation decisions. Like the incorporation cases discussed earlier, both probably should be regarded as at the periphery of *Lochner*-era substantive due process because both apply values that derive from another constitutional provision. However, the six civil recovery and civil remedy cases tended to involve notions of fairness unique to due process and not expressed by some other constitutional provision.⁹⁵ For this reason, I class them as "core" applications of substantive due process.

F. Land-Use Regulation

Despite the support it gave to zoning through its landmark decision in *Village of Euclid v. Ambler Realty Co.*,⁹⁶ the *Lochner* Court struck down four land-use regulations on due process grounds. Because in each the main theme was the arbitrariness of the challenged regulation, these cases qualify as true substantive due process decisions. In one of these

(1914) (same general type of statute at issue in *Wynne*); *Chicago, Milwaukee & St. Paul Ry. v. Kennedy*, 232 U.S. 626, 627 (1914) (following *Polt*); *Chicago & N.W. Ry. v. Nye Schneider Fowler Co.*, 260 U.S. 35, 46-48 (1922) (statute allowing recovery of attorney fees against carrier upon appeal, under certain circumstances); *Western & Atl. R.R. v. Henderson*, 279 U.S. 639, 642-44 (1929) (presumption that railroad liable for injuries resulting from its operations, unless railroad could prove that it observed reasonable care).

92. *E.g.*, *West*, 295 U.S. at 671 ("the due process clauses . . . safeguard private property against a taking for public use without just compensation," and the "just compensation assured by these constitutional provisions is a reasonable rate of return upon . . . [the property's] value"). *See also Smyth*, 169 U.S. at 526 (question is "whether . . . [the rates] are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law"); *United Rys. & Elec. Co. v. West*, 280 U.S. 234, 249 (1930) (neither utility's property nor use of that property "constitutionally can be taken for a compulsory price which falls below the measure of just compensation").

93. *E.g.*, *Pierce*, *supra* note 87, at 2033. *See also ELY*, *supra* note 5, at 104 (remarking on the confused relationship between the Takings Clause and substantive due process around the turn of the century).

94. *See, e.g.*, *Missouri Pac. R.R. v. Nebraska*, 217 U.S. 196, 205-06, 208 (1910); *City of Los Angeles v. Los Angeles Gas & Elec. Co.*, 251 U.S. 32, 37, 39-40 (1919).

95. *E.g.*, *Polt*, 232 U.S. at 168 ("the rudiments of fair play required by the Fourteenth Amendment are wanting" under the challenged statute).

96. 272 U.S. 365, 386-97 (1926).

decisions, *Nectow v. City of Cambridge*,⁹⁷ the Court applied *Euclid* to conclude that a zoning scheme's classification of certain land lacked a substantial relation to the public safety, health, morals, and welfare.⁹⁸

In two other cases, however, the arbitrariness of the challenged measure lay more in its standardless delegation of power to private parties than in its failure to satisfy means-ends review. One of these cases, *Eubank v. City of Richmond*,⁹⁹ struck down an ordinance requiring that the city establish a specified building line on a street whenever two-thirds of the property owners on that street requested it.¹⁰⁰ In *Washington ex rel. Seattle Title Trust Co. v. Roberge*,¹⁰¹ the Court invalidated an ordinance that, as applied, made the construction of a home for the aged poor contingent on the consent of two-thirds of the property owners living within 400 feet of this proposed building.¹⁰² A major theme in both *Eubank* and *Roberge* was that the challenged ordinances effectively gave one group of landowners power over other owners' use of their land. An owner's ability to dispose of her property as she wishes also was central in *Buchanan v. Warley*,¹⁰³ where the Court struck down an ordinance preventing a black person from moving to a block in which over half of the property owners were white.¹⁰⁴

G. Price Regulation

During the *Lochner* era, as we have seen, businesses affected with a public interest could be subjected to significant government regulation. What about businesses that were *not* so affected? During the 1920s, the Court asserted that for those businesses, the regulation of prices was unconstitutional.¹⁰⁵ On this basis, it struck down state price-fixing schemes for the resale of theater tickets, the fees charged by employment agencies, and the retail sale of gasoline.¹⁰⁶ Without using the affected-

97. 277 U.S. 183 (1928).

98. *Id.* at 187-89.

99. 226 U.S. 137 (1912).

100. *Id.* at 143-44.

101. 278 U.S. 116 (1928).

102. *Id.* at 120-23.

103. 245 U.S. 60 (1917).

104. *Id.* at 74-82.

105. "[T]he power to fix prices . . . ordinarily, does not exist in respect of merely private property or business, . . . but exists only where the business or the property involved has become 'affected with a public interest.'" *Tyson & Bro. v. Banton*, 273 U.S. 418, 430 (1927).

106. *Williams v. Standard Oil Co.*, 278 U.S. 235, 239-45 (1929) (retail sale of gasoline); *Ribnik v. McBride*, 277 U.S. 350, 355-59 (1928) (fees charged by employment agencies); *Tyson & Bro.*, 273 U.S. at 429-45 (resale of theater tickets). See *McAllister*, *supra* note 82, at 775-86; *Hamilton*, *supra* note 82, at 1101-04.

with-a-public-interest doctrine, moreover, the Court also invalidated a state law forbidding price discrimination between localities in the purchase of milk products.¹⁰⁷ Because they proceeded on the theory that price regulation is a most serious interference with economic liberty and therefore requires considerable justification,¹⁰⁸ these four cases are central to *Lochner*-era substantive due process.

H. Entry Restrictions and Related Measures

Although the point remains somewhat obscure, a business's classification as private, rather than as affected with a public interest, probably limited the government's regulatory power in other areas besides price. A possible example is the Court's 1932 decision in *New State Ice Co. v. Liebmann*,¹⁰⁹ which struck down an Oklahoma law limiting entry to the state's ice industry.¹¹⁰ The other five *Lochner* Court decisions invalidating restrictions on entry did not involve the affected-with-a-public-interest doctrine.¹¹¹ Perhaps the best known of these is *Louis K. Liggett Co. v. Baldridge*,¹¹² which invalidated a state statute basically requiring that every pharmacy or drug store established after the statute's passage be wholly owned by a licensed pharmacist or pharmacists.¹¹³ Of the four other cases striking down entry restrictions, three involved trucking industry regulations that treated private carriers like common carriers,¹¹⁴ and one involved a Texas law forbid-

107. *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 8-11 (1927). Earlier versions of the statute had created liability only when the price discrimination was accompanied by an anticompetitive purpose, but the law at issue in the case did not contain this requirement. This evidently was the key to the Court's decision, for it intimated that the earlier versions would have passed constitutional muster. The apparent basis of the decision was that the revised law would forbid innumerable contracts that had no anticompetitive effect or purpose. *See id.* at 8-9.

108. *E.g., Tyson & Bro.*, 273 U.S. at 430-31. *See also* Hamilton, *supra* note 82, at 1091-92.

109. 285 U.S. 262 (1932). Although technically it considered whether the Oklahoma ice industry was "charged with a public use." *Id.* at 273. *Liebmann* generally is regarded as a case applying the affected-with-a-public-interest doctrine. *E.g.,* WRIGHT, *supra* note 6, at 167-68. For an extended discussion of the case and Justice Brandeis's famed dissent in it, see Phillips II, *supra* note 5, at 440-47.

110. 285 U.S. at 273-80.

111. On these cases, see Phillips II, *supra* note 5, at 434-40. But the old Court upheld many more entry restrictions, most of which were occupational licensing provisions governing the various professions. *See id.* at 431-38.

112. 278 U.S. 105 (1928), *overruled by* *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156 (1973).

113. *Id.* at 111-14.

114. *Smith v. Cahoon*, 283 U.S. 553, 561-68 (1931); *Frost v. Railroad Comm'n*, 271 U.S. 583, 591-99 (1926); *Michigan Pub. Utils. Comm'n v. Duke*, 266 U.S. 570, 576-78 (1925).

ding a person from acting as a freight train conductor without having previously served for two years as a conductor or foreman on a freight train.¹¹⁵

Although they did not always say so, these entry restriction cases effectively protected an economic right which the old Court clearly regarded as central to due process: the right to pursue the trade or occupation of one's choice.¹¹⁶ For that reason, and because they obviously attacked the substance of the laws they struck down, these cases are within the core of *Lochner*-era substantive due process. The same is true of a related decision striking down a law that impeded one's ability to carry on a business and to compete. This was the Court's 1926 decision in *Yu Cong Eng v. Trinidad*,¹¹⁷ which negated a Philippine statute making it a crime to keep business account books in any language other than English, Spanish, or a local dialect, and which had been challenged by Chinese businesspeople.¹¹⁸

I. Other General Economic Regulations

Because it is said to mark the Supreme Court's first use of due process to invalidate the substance of government action, *Allgeyer v. Louisiana*¹¹⁹ often is regarded as opening the *Lochner* era.¹²⁰ In *Allgeyer*, the Court considered a Louisiana statute forbidding, inter alia, any act to obtain marine insurance on in-state property from any carrier that had not in all respects complied with Louisiana law.¹²¹ The defendant in that case allegedly had violated the statute by writing a New York insurer concerning 100 bales of cotton that were to be shipped to foreign ports.¹²² But the statute, the Court held, was unconstitutional because it deprived defendant of the liberty protected by the Fourteenth Amendment—specifically, the freedom to contract for insurance outside the state.¹²³ In the years following *Allgeyer*, the Court struck down three other laws of a roughly similar nature. Taken alone, these cases

115. *Smith v. Texas*, 233 U.S. 630, 636-42 (1914).

116. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (due process liberty includes right of the individual to engage in any of life's common occupations).

117. 271 U.S. 500 (1926). This case was decided under the due process and equal protection provisions of the Philippine Constitution, provisions the Court regarded as substantially similar to their United States counterparts. *Id.* at 524.

118. *Id.* at 524-27.

119. 165 U.S. 578 (1897).

120. *E.g.*, *TRIBE*, *supra* note 9, at 567.

121. 165 U.S. at 579.

122. *Id.*

123. *Id.* at 589-93; *see especially id.* at 591.

are not clearly substantive due process decisions.¹²⁴ Still, their similarity to *Allgeyer* arguably justifies their categorization as central to *Lochner*-era substantive due process.

Three other decisions involving general economic regulations deserve the same categorization because they apply some kind of means-ends review to those regulations. Two of these cases are well-known. In *Jay Burns Baking Co. v. Bryan*,¹²⁵ the Court struck down a state statute regulating the weights at which loaves of bread could be sold, because this law was insufficiently well-adapted to the protection of consumers against short-weight loaves.¹²⁶ In *Weaver v. Palmer Brothers*,¹²⁷ it invalidated a state law forbidding the use of "shoddy" in mattresses, pillows, bolsters, feather beds, upholstered furniture, and the like, because the law could not be defended either as a health measure or as an antideception provision.¹²⁸ A less-known decision, *Manley v. Georgia*,¹²⁹ struck down a state law creating a rebuttable presumption that bank directors are criminally liable for fraud upon the insolvency of their bank. It did so because there was too little rational connection between the presumption and the fact on which it was based.¹³⁰

124. In *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 367-77 (1918), the Court considered a Missouri statute forbidding the forfeiture of a life insurance policy for nonpayment of premiums, valuing the policy, and using this to establish a single premium for temporary insurance for the amount stated in the policy, and held that the statute could not constitutionally govern a loan contract apparently made in New York and stating that it would be governed by New York law. The Court discussed *Allgeyer*, but decided the case on the basis of *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914), which did not make Frankfurter's list. *Head's* rationale, moreover, resembles the rationale for the cases discussed in *supra* note 63, which involved a state's power to declare rules of decision for transactions occurring in another state. See 246 U.S. at 375-77 (quoting *Head*, 234 U.S. at 161). Indeed, this concern may be the real inspiration for *Allgeyer* itself. CURRIE, *supra* note 6, at 46.

Here I also include two Holmes decisions that, despite appearing on the Frankfurter list, did not clearly employ due process. Like *Allgeyer*, each struck down a state statute that arguably disfavored out-of-state insurers. See *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 433-36 (1926) (state law forbidding any insurance company authorized to do business in the state from paying anyone not so authorized to place insurance on in-state risks); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 348-49 (1922) (state statute imposing five percent tax on amounts paid to insure in-state property, where insurer not registered to do business within the state).

125. 264 U.S. 504 (1924).

126. *Id.* at 513-17.

127. 270 U.S. 402, 412-15 (1926).

128. *Id.* Shoddy is any material spun into yarn, knit, or woven into fabric; and then cut up, torn up, broken up, or ground up. *Id.* at 409.

129. 279 U.S. 1 (1929).

130. *Id.* at 5-7.

J. The Employment Decisions

As Wright observed in 1942, “[w]hile the number of cases in which the Court has held unconstitutional statutes seeking to ameliorate the conditions of labor has not been large, these decisions have a significance out of all proportion to their quantity.”¹³¹ Although one might wonder whether this significance is completely justified, most of the thirteen cases here regarded as employment-related are very familiar ones. The most familiar of the group, of course, is *Lochner* itself. There, the Court struck down a maximum-hours law for bakery employees, primarily because that measure did not promote worker health with sufficient directness.¹³²

Lochner, it is often said, was overruled *sub silentio* by the Court’s 1917 decision in *Bunting v. Oregon*.¹³³ But the Court reaffirmed *Lochner*’s validity six years later in *Adkins v. Children’s Hospital*,¹³⁴ when it struck down a District of Columbia minimum wage law for women.¹³⁵ Before finally overruling *Adkins* in 1937,¹³⁶ the Court followed it in three subsequent cases.¹³⁷

Although *Adkins* probably was a broader ruling, the Court also struck down another minimum wage law in 1923. In *Chas. Wolff Packing Co. v. Court of Industrial Relations*,¹³⁸ it invalidated portions of the Kansas Court of Industrial Relations Act empowering that body to fix wages and other terms of employment within industries declared affected with a public interest.¹³⁹ A 1924 follow-up to this case accepted its holding while refusing to decide whether a provision of the

131. WRIGHT, *supra* note 6, at 172.

132. *Lochner v. New York*, 198 U.S. 45, 57-64 (1905).

133. 243 U.S. 426 (1917). According to David Currie, for example, *Bunting* “buried *Lochner* without even citing it.” CURRIE, *supra* note 6, at 103.

134. 261 U.S. 525, 545-62 (1923), *overruled by* *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Regarding *Lochner*, Justice Sutherland’s opinion for the Court declared that while subsequent cases had distinguished it, “the principles therein stated have never been disapproved.” *Id.* at 550. Nonetheless, Sutherland still felt constrained to distinguish the minimum wage law at issue in *Adkins* from maximum hours laws. *Id.* at 553-54.

135. *Id.* at 545-62. In *Stettler v. O’Hara*, 243 U.S. 629 (1917), a per curiam decision by an equally divided Court had affirmed lower court decisions upholding minimum wage laws.

136. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding a minimum wage law for women).

137. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 603-18 (1936); *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927); *Murphy v. Sardell*, 269 U.S. 530 (1925).

138. 262 U.S. 522 (1923). This muddled decision for a unanimous Court defies succinct restatement.

139. *Id.* at 534-44.

Kansas act forbidding any union officer from inducing another to violate the act was separable from the provision struck down in *Chas. Wolff*.¹⁴⁰ A year later, the Court struck down a maximum-hours provision contained in a writ of mandamus issued by the Kansas Supreme Court following *Chas. Wolff's* return to that court.¹⁴¹ But it explicitly left open the question whether such a provision would be constitutional in a different context.¹⁴²

Two *Lochner* Court decisions involving the implications of union membership are almost as well known as *Lochner* and *Adkins*. In *Adair v. United States*,¹⁴³ the Court struck down a federal law that prohibited certain common carriers from firing or otherwise discriminating against a worker for his union affiliation.¹⁴⁴ The main basis for this ruling was that the law unreasonably interfered with freedom of contract. Relying on *Adair*, the Court in *Coppage v. Kansas*¹⁴⁵ rejected a Kansas statute banning "yellow dog" contracts: contracts conditioning employment on an employee's promise not to join or remain a union member.¹⁴⁶ In another "labor" case, *Truax v. Corrigan*,¹⁴⁷ the Court considered a state statute restricting the use of injunctions and restraining orders in labor disputes. The law had been applied to allow union picketing and handbilling that libelled a restaurant owner and threatened injury to his customers. This, the Court held, deprived the owner of property without due process.¹⁴⁸

Rounding out our list of *Lochner* Court employment decisions are two miscellaneous cases. In *Adams v. Tanner*,¹⁴⁹ the Court struck down a state initiative whose virtual effect was to ban employment agencies. It did so because the law unduly restricted the liberty to engage in a useful business.¹⁵⁰ The second case, *Railroad Retirement Board v. Alton Railway*,¹⁵¹ invalidated the compulsory retirement and pension provisions of the Railroad Retirement Act.¹⁵² The *Alton* decision usually is treated as involving Congress's regulatory power under the Commerce

140. *Dorchy v. Kansas*, 264 U.S. 286, 289-91 (1924) (returning the case to the state court for a decision on the separability issue).

141. *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 566-69 (1925).

142. *Id.* at 569.

143. 208 U.S. 161 (1908).

144. *Id.* at 172-75.

145. 236 U.S. 1 (1915).

146. *Id.* at 8-20.

147. 257 U.S. 312 (1921).

148. *Id.* at 327-30.

149. 244 U.S. 590 (1917).

150. *Id.* at 593-97.

151. 295 U.S. 330 (1935).

152. *Id.* at 346-61.

Clause.¹⁵³ But the case contains little or no traditional Commerce Clause reasoning and has many passages that strongly resemble substantive due process.¹⁵⁴

K. Three "Personal Rights" Cases

The three cases that conclude this summary have a special claim to be considered central to *Lochner*-era substantive due process. Not only do they display the means-ends analysis and the expansive conception of due process liberty that the doctrine sometimes exhibits, but they remain influential today. Specifically, they have helped justify the modern constitutional right of privacy.¹⁵⁵ First in this line of cases is the Court's 1923 decision in *Meyer v. Nebraska*,¹⁵⁶ which struck down a state statute that forbade the teaching of any subject in any language other than English in any public or private school and the teaching of any such language *as a language* to any student who had not completed the eighth grade. This law, the Court said, infringed a variety of due process liberties, and did so without a reasonable relation to some purpose within the legislative competence.¹⁵⁷ The second decision in our trio is *Bartels v. Iowa*,¹⁵⁸ a little-known companion case to *Meyer*. In the final case, *Pierce v. Society of Sisters*,¹⁵⁹ the Court rejected a state law requiring that all children between the ages of eight and sixteen attend a public school. This measure was unconstitutional because it restricted the liberty often said to characterize this group of cases—the freedom of parents and guardians to direct the upbringing

153. *E.g.*, GUNTHER, *supra* note 4, at 116.

154. Early in his majority opinion, Justice Roberts stated that the commerce power "must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment." 295 U.S. at 347. Then he said that the parties' contending views "open two fields of inquiry which to some extent overlap." *Id.* These were: (1) whether Congress has properly exercised a granted power, and (2) whether such an exercise transcends due process. *Id.* at 347 n.5. Much of the majority's subsequent analysis of the act's various provisions, with its occasional declarations of their arbitrariness, its clear willingness to second-guess Congress, and its scarcity of anything resembling traditional Commerce Clause analysis, suggests that the latter concern was foremost in the Justices' minds. See *id.* at 348-61. At the conclusion of this discussion, Roberts said that it "sufficiently indicates our agreement with the holding of the trial court respecting the disregard of due process exhibited by a number of the provisions of the Act." *Id.* at 361.

155. *E.g.*, GUNTHER, *supra* note 4, at 446, 491-92.

156. 262 U.S. 390 (1923).

157. *Id.* at 399-403.

158. 262 U.S. 404, 409-11 (1923).

159. 268 U.S. 510 (1925).

and education of the children under their control—and did so without some reasonable relation to a valid state purpose.¹⁶⁰

IV. IMPLICATIONS

Of the 228 decisions on my adjusted Frankfurter list, sixty-nine (30%) simply are not substantive due process cases. This group consists of thirty-five procedural due process decisions, thirty-three equal protection decisions, and one privileges-and-immunities case.¹⁶¹ The biggest group of decisions within Frankfurter's collection consists of the 104 adjudications (46% of the total) earlier dubbed peripheral, penumbral, or borderline substantive due process cases. Here, the most numerous subgroup involves rate regulations for businesses affected with a public interest (39 decisions), followed by the bulk of the due process tax cases (32), the "incorporation" decisions (18), and the decisions involving regulatory orders directed at businesses affected with a public interest (15).¹⁶² Only fifty-five cases (24%) fit within the core of *Lochner*-era substantive due process. These include the cases involving: employment (13 such decisions), miscellaneous general economic regulations (7), entry restrictions and related measures (7), civil recovery and civil remedies against railroads (6), land use (4), price regulations (4), and "personal" rights (3).¹⁶³ This last group also includes eleven of the due process tax cases.¹⁶⁴ Except for a few well-known decisions upholding regulation, the cases typically found in modern discussions of *Lochner*-era substantive due process come from this list of fifty-five.¹⁶⁵

A. *The Dilemma*

The preceding discussion does not support the claim that *Lochner*-era substantive due process was effective on some 200 occasions. Instead, as Frankfurter's description of his list made clear,¹⁶⁶ the 200 figure approximates the number of times the old Court struck down state action on *Fourteenth Amendment* grounds rather than on substantive due process grounds. Nonetheless, that figure does roughly describe substantive due process's impact if we add to the fifty-five core substantive due process cases the 104 decisions previously deemed

160. *Id.* at 534-35.

161. *See supra* notes 43-63 and accompanying text.

162. *See supra* notes 64-77, 82-95 and accompanying text.

163. *See supra* notes 96-159 and accompanying text.

164. *See supra* notes 78-81 and accompanying text.

165. *See supra* notes 13-30 and accompanying text.

166. *See supra* text accompanying note 37. Similarly, Wright's description of his compilation extended well beyond due process. *See supra* text accompanying notes 33-34.

peripheral. But whatever else might be said for it, this tactic tends to undermine long-settled views about *Lochner*-era substantive due process. By including the peripheral decisions, we render that doctrine considerably less fearsome. By making oldtime substantive due process quantitatively more significant, in other words, we simultaneously make it more acceptable to modern sensibilities.

The First and Sixth Amendment incorporation cases illustrate this dilemma most vividly.¹⁶⁷ Virtually no one would reject these decisions today. Yet if *Lochner*-era substantive due process is a bad thing, and if these cases are part of it, maybe that position deserves re-evaluation. Or does the goodness of these cases mean that there was something good about the old Court's approach to due process after all? Also illustrating the dilemma, though perhaps less forcefully, are the due process tax cases earlier classified as peripheral.¹⁶⁸ Because these decisions appear to have counterparts today,¹⁶⁹ it is difficult to tar them with the *Lochner* brush.

At first glance, however, the old Court's many decisions involving railroads and other businesses affected with a public interest do appear consistent with the accepted stereotypes.¹⁷⁰ This is particularly true of the approach taken in the Court's many rate cases, which has not endured.¹⁷¹ To all appearances, those cases present a classic clash between wealthy private interests (the utilities, their shareholders, and their bondholders) and the general public. But judicial review of rate regulation was motivated at least in part by the fear that legislatures and regulatory bodies would destroy the value of regulated firms' property by setting rates too low.¹⁷² The facts of some of the old Court's rate decisions suggest that this fear may have been justified.¹⁷³

167. See *supra* note 68 and accompanying text.

168. See *supra* notes 72-75 and accompanying text.

169. See *TRIBE*, *supra* note 9, at 441-53.

170. See *supra* notes 82-95 and accompanying text.

171. The Supreme Court's substantive review of utility rate regulation largely ceased after its decision in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). See *supra* note 87. On the minimal substantive review that has prevailed since then, see *PIERCE & GELLHORN*, *supra* note 4, at 98-101.

172. "During the late nineteenth and early twentieth centuries, the Court believed that serious political malfunctions existed in the utility regulatory process and that the judiciary was institutionally capable of reducing the harmful effects of those malfunctions with tolerable error and resource costs." *PIERCE*, *supra* note 87, at 2045. See also *ELY*, *supra* note 5, at 88; *Siegel II*, *supra* note 5, at 206-09.

173. See, e.g., *Detroit United Ry. v. City of Detroit*, 248 U.S. 429, 434-36 (1919) (municipal ordinance regulating street railway fares is unconstitutional because its enforcement would result in a deficit to the company; no need to value company's property under these circumstances).

Another consideration pushing the Court toward substantive review of rates was the fear that excessive state regulation would inhibit private investment in railroads and, thus, their ability to expand and improve their services.¹⁷⁴ The approach taken in the old Court's rate cases, moreover, may have been abandoned less because it was later seen as illegitimate, than because it could not be effectively implemented.¹⁷⁵

Some of the problems that the rate cases purported to address, furthermore, remain with us today (as do some of the tests and principles used in those cases¹⁷⁶). For example, in a 1989 article on electric utility regulation, Richard J. Pierce found it

easy to conclude that utility regulation in the 1980s is afflicted by the political malfunction Madison feared most—majoritarian bias based on unequal distributions of property. In constitutional law terms, the inference seems inescapable that, on an aggregate basis, state governments are 'taking' billions of dollars worth of property through the regulatory process.¹⁷⁷

As Pierce recognized, however, during the 1950s and 1960s, the same utilities that later suffered from this "majoritarian bias" benefitted from the "minoritarian bias" resulting from their influence over then-friendly state regulators.¹⁷⁸ Undoubtedly the same was sometimes true during the *Lochner* era, but this does not obviate the problem of majoritarian bias.

During the *Lochner* era, moreover, minoritarian bias occasionally worked to the disadvantage of particular regulated industries. Perhaps the most blatant example is presented by the Court's 1904 decision in *Dobbins v. City of Los Angeles*,¹⁷⁹ which struck down a municipal ordinance that contradicted an earlier ordinance by forbidding the

174. See Ely, *supra* note 4, at 125, 129-30; Porter, *supra* note 10, at 143.

175. "Although other factors undoubtedly contributed to the Court's 1944 decision [to abandon serious judicial scrutiny of rate regulation] in *Hope*, the dominant factor seems to have been the Court's recognition of its institutional limitations." Pierce, *supra* note 87, at 2046. On those limitations, see *id.* at 2045-46. But see Siegel II, *supra* note 5, at 258-59 (putting more emphasis on the changed composition of the Court and a resulting "revolution in the conception of judicial method").

176. See PIERCE & GELLHORN, *supra* note 4, at 101-02 (observing that some of the old Court's rate-evaluation principles continue to be used by modern agencies and courts).

177. Pierce, *supra* note 87, at 2051-52 (footnotes omitted). See also *id.* at 2048-53. Because he doubted their institutional capacity to address the problem, however, Pierce did not recommend that the courts intervene to abort this process. See *id.* at 2053-70. Instead, he placed his bet on federal legislation deregulating the electric utility industry. See *id.* at 2071-75.

178. See *id.* at 2047-48.

179. 195 U.S. 223, 242 (1904).

building of gasworks within a particular area after the beneficiary of the first ordinance had begun construction. The Court overturned the second ordinance not because a municipality could never reverse itself in this way, but because there was no apparent justification for the second ordinance and considerable evidence that the political influence of a monopoly competitor lay behind it.¹⁸⁰

B. The Substantive Due Process Decisions of Mr. Justice Holmes

So far, this section of the Article has made three main contentions. First, it simply is wrong to say that on some 200 occasions the *Lochner* Court used substantive due process to invalidate economic regulations. To make that claim even remotely plausible, moreover, we must include the "peripheral" substantive due process cases within the total. But this makes *Lochner*-era substantive due process much less noxious to liberal sensibilities than if a smaller sample of old-Court substantive due process cases were employed. Also supporting this third conclusion is another fact that emerges from even the most superficial examination of our 104 peripheral substantive due process cases. No less a supposed foe of substantive due process than Justice Oliver Wendell Holmes joined most of them. Indeed, Holmes also joined in a significant number of our fifty-five decisions at the core of *Lochner*-era substantive due process.

Holmes did not dissent in any of the eighteen incorporation cases, but nearly half of them occurred after he left the Court.¹⁸¹ Furthermore, he wrote two of the eighteen—his landmark decision in *Pennsylvania Coal Co. v. Mahon*¹⁸² and a due process case that appears to incorporate Contract Clause reasoning.¹⁸³ However, he dissented much more frequently—nine times specifically—from the thirty-two "peripheral" decisions among the old Court's due process tax cases.¹⁸⁴ But then

180. See *id.* at 237-41.

181. For those cases, see *supra* notes 64-71 and accompanying text.

182. 260 U.S. 393 (1922).

183. *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338, 338-42 (1922).

184. See *supra* notes 72-77 and accompanying text. Holmes's dissents took place in: *First Nat'l Bank v. Maine*, 284 U.S. 312, 331-34 (1932) (joining Justice Stone's dissent), *overruled by State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942); *Coolidge v. Long*, 282 U.S. 582, 606-38 (1931) (joining Justice Roberts's dissent); *Baldwin v. Missouri*, 281 U.S. 586, 595-96 (1930); *Farmers' Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 216-18 (1930); *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 96-98 (1929); *Cudahy Packing Co. v. Hinkle*, 278 U.S. 460, 467-70 (1929) (joining Justice Brandeis's dissent); *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 262 (1911); *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 52-56 (1910); *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 211 (1905).

again, he wrote three of those decisions as well.¹⁸⁵ Holmes also wrote for the Court in one rate case and three regulation cases involving utilities.¹⁸⁶ And he dissented only six times in the fifty-four utility decisions listed earlier.¹⁸⁷

Thus, of the 104 decisions classified as peripheral substantive due process cases, Holmes wrote nine, dissented in fifteen, and joined most of the others. (Holmes served on the Court from 1902 until 1932, and this Article's tally of substantive due process cases covers the years 1897-1937 inclusive.) Although this pattern does not repeat itself when we turn to the "core" substantive due process decisions, Holmes did not invariably dissent in these cases either. For example, he joined five and wrote one of the six "utility" decisions classified as central to *Lochner*-era substantive due process: those involving civil rights and remedies against railroads.¹⁸⁸ In addition, he joined all four of the real estate decisions.¹⁸⁹ In the eleven tax cases treated as central to the old Court's substantive due process, furthermore, Holmes joined in five and dissented three times.¹⁹⁰ Finally, Holmes wrote for the Court in two of the cases classified as involving miscellaneous general regulations.¹⁹¹ Within this category, Holmes also joined two decisions while dissenting in two others.¹⁹²

185. *Wallace v. Hines*, 253 U.S. 66 (1920); *Atchison, Topeka, & Santa Fe Ry. v. O'Connor*, 223 U.S. 280 (1912); *Fargo v. Hart*, 193 U.S. 490 (1904).

186. *Brooks-Scanlon v. Railroad Comm'n*, 251 U.S. 396 (1920); *San Joaquin & Kings River Canal & Irrigation Co. v. County of Stanislaus*, 233 U.S. 454 (1914); *Missouri Pac. Ry. v. Nebraska*, 217 U.S. 196 (1910); *Louisville & N. R.R. v. Central Stock Yards Co.*, 212 U.S. 132 (1909). On the utility rate and utility regulation cases, see *supra* notes 82-95 and accompanying text.

187. *Chicago, R.I. & Pac. Ry. v. United States*, 284 U.S. 80, 100-24 (1931) (joining Justice Stone's dissent); *United Rys. & Elec. Co. v. West*, 280 U.S. 234, 255-88 (1930) (joining Justice Brandeis's dissent); *Pacific Gas & Elec. Co. v. City of San Francisco*, 265 U.S. 403, 425 (1924); *Detroit United Ry. v. City of Detroit*, 248 U.S. 429, 437-46 (1919) (joining Justice Clarke's dissent); *City of Denver v. Denver Union Water Co.*, 246 U.S. 178, 195-98 (1918); *Chicago, Milwaukee & St. Paul R.R. v. Wisconsin*, 238 U.S. 491, 502 (1915).

188. For these cases, see *supra* notes 89, 93 and accompanying text. Holmes wrote for the Court in *Chicago, Milwaukee & St. Paul Ry. v. Polt*, 232 U.S. 165 (1914).

189. For these decisions, see *supra* notes 96-103 and accompanying text.

190. For these cases, see *supra* notes 78-81 and accompanying text. The dissents came in *Hooper v. Tax Comm'n*, 284 U.S. 206, 218-21 (1931); *Untermeyer v. Anderson*, 276 U.S. 440, 446 (1928); and *Schlesinger v. Wisconsin*, 270 U.S. 230, 241-42 (1926).

191. *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926); and *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922). However, I include these decisions among the "core" group only because of their apparent relationship to *Allgeyer v. Louisiana*. See *supra* note 124.

192. Holmes joined the majority in *Manley v. Georgia*, 279 U.S. 1 (1929), and *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918). He dissented in *Weaver v. Palmer Bros.*, 270 U.S. 402, 415-16 (1926), and *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517-34 (1924)

The thirty-seven decisions involving employment, price regulations, entry restrictions, and personal rights are among those that modern commentators treat as representative of *Lochner*-era substantive due process.¹⁹³ Holmes dissented in fifteen of these cases.¹⁹⁴ Although the figure is a bit misleading, he joined the majority in nine others.¹⁹⁵ Three of these decisions occurred after Holmes's departure from the Court in 1932.

Perhaps, then, modern discussions of the old Court's substantive due process decisions take their cue from Holmes (and, later, Brandeis and Stone). Another, perhaps more persuasive, explanation of why modern commentators emphasize the cases they do is that many of those decisions involve issues and constituencies on which liberals and conservatives sharply differ. (The other "core" cases, on the other hand, involve less politically charged matters.) But liberal politics cannot explain *Holmes's* tendency to dissent in the old Court's high-profile substantive due process decisions.¹⁹⁶ In fact, a question exists whether

(joining Justice Brandeis's dissent). See *supra* notes 125-29 and accompanying text.

193. Compare *supra* notes 105-115, 119-59 with *supra* notes 13-28 and accompanying text.

194. *Williams v. Standard Oil Co.*, 278 U.S. 235, 245 (1929); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 114-15 (1928), *overruled by North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *Ribnik v. McBride*, 277 U.S. 350, 359-75 (1928) (joining Justice Stone's dissent); *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 11 (1927); *Tyson & Bro. v. Banton*, 273 U.S. 418, 447-54 (1927) (joining Justice Stone's dissent); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 600-02 (1926); *Bartels v. Iowa*, 262 U.S. 404, 412 (1923); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Adkins v. Children's Hosp.*, 261 U.S. 525, 567-71 (1923), *overruled by West Coast Hotel v. Parrish* 300 U.S. 379 (1937); *Truax v. Corrigan*, 257 U.S. 312, 342-44 (1921); *Adams v. Tanner*, 244 U.S. 590, 597-616 (1917) (joining Justice Brandeis's dissent); *Coppage v. Kansas*, 236 U.S. 1, 26-27 (1915); *Smith v. Texas*, 233 U.S. 630, 642 (1914); *Adair v. United States*, 208 U.S. 161, 190-92 (1908); *Lochner v. New York*, 198 U.S. 45, 74-76 (1905).

195. *Smith v. Cahoon*, 283 U.S. 553 (1931); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552 (1925); *Michigan Pub. Util. Comm'n v. Duke*, 266 U.S. 570 (1925); *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923). Holmes also concurred in *Murphy v. Sardell*, 269 U.S. 530 (1925), but only because he felt himself bound by *Adkins v. Children's Hospital*. Thus, his joining the Court in another minimum wage case, *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927), no doubt was reluctant. Because Holmes dissented in *Meyer v. Nebraska*, furthermore, stare decisis might also explain his vote in *Pierce*.

196. "His opposition [to substantive due process decisions based on liberty of contract] did not imply any enthusiasm for the legislation it was being invoked to challenge. Holmes repeatedly expressed skepticism about the efficacy of hours and wages legislation, child labor reform, and other policy goals of 'progressives.'" G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 320 (1993).

any single factor differentiates the substantive due process cases he wrote or joined from those which he dissented. For instance, Holmes's dissents were not confined to substantive due process cases in which freedom of contract was explicitly made the protected right. Contrary to popular belief, those cases were not especially numerous.¹⁹⁷ Worse yet, Holmes *joined* at least two of these freedom-of-contract cases.¹⁹⁸ Nor were Holmes's dissents confined to cases when liberty, rather than property, received substantive due process protection.¹⁹⁹

197. In its substantive due process decisions, the old Court did not always bother to identify the exact property right or liberty implicated in the case. The cases involving property or some liberty other than freedom of contract, however, almost certainly outnumbered those involving freedom of contract. In fact, I estimate that of the 55 substantive due process decisions, only 11 clearly involved freedom of contract. They are: *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897) (right to contract for insurance outside of state); *Lochner v. New York*, 198 U.S. 45, 53, 56 (1905); *Adair v. United States*, 208 U.S. 161, 172 (1908) (apparently deriving freedom of contract from both liberty and property); *Coppage v. Kansas*, 236 U.S. 1, 14 (1915); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 377 (1918); *Adkins v. Children's Hosp.*, 261 U.S. 525, 545 (1923), *overruled by West Coast Hotel v. Parrish* 300 U.S. 379 (1937); *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 533 (1923); *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552, 561-69 (1925) (because it applied the Court's holding in the first *Chas. Wolff* case); *Murphy v. Sardell*, 269 U.S. 530 (1925) (which followed *Adkins*); *Donham v. Nelson Mfg. Co.*, 273 U.S. 657 (1927) (which also followed *Adkins*); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 610 (1936). Because they mainly involve utility rates, utility regulation, taxation, and incorporation, whether many of my "peripheral" substantive due process cases involved freedom of contract is doubtful.

However, some *Lochner*-era substantive due process cases arguably involved freedom of contract in substance even if they formally invoked some other liberty or property right. For example, if the bundle of rights comprising property ownership includes the right to freely alienate the property on one's own terms, then property includes freedom of contract. *See, e.g., Tyson & Bro. v. Banton*, 273 U.S. 418, 429 (1927) (right of owner to fix price for sale of property is an attribute of that property); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (property includes rights to acquire, use, and dispose of it).

198. *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 533 (1923); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 377 (1918). In addition, Holmes joined two later applications of the first *Chas. Wolff* case, and each case arguably was based on freedom of contract. *See Dorchy v. Kansas*, 264 U.S. 286, 289-90 (1924) and *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 267 U.S. 552 (1925). As we saw *supra* in note 195, moreover, Holmes joined two minimum wage cases that probably were based on freedom of contract, but only because he felt himself bound by *stare decisis*.

199. For example, Holmes dissented in the following cases, each of which apparently found that the claimant had been deprived of property without due process: *Hooper v. Tax Comm'n*, 284 U.S. 206, 214-16, 218-21 (1931); *Williams v. Standard Oil Co.*, 278 U.S. 235, 239, 245 (1929); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111-13, 114-15 (1928), *overruled by North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *Tyson & Bro. v. Banton*, 273 U.S. 418, 429, 445-47 (1927); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 589, 600-02 (1926); *Schlesinger v. Wisconsin*, 270 U.S. 230, 238, 241-42 (1926); *Truax v. Corrigan*, 257 U.S. 312, 322, 327,

C. Three Standard Criticisms of the *Lochner* Court

As G. Edward White observed in a recent article, commentators have tended to ignore the extent that Holmes "joined Taft, VanDevanter, McReynolds, Sutherland, and Butler in extending and refining the categories of orthodox early-twentieth century jurisprudence."²⁰⁰ The previous discussion is consistent with this claim. That discussion also casts some doubt on certain other accepted views about the *Lochner* era. This Article's Introduction noted three standard criticisms of *Lochner*-era substantive due process, each affected by the frequency with which government action fell before the doctrine. These were: (1) that the judicial activism permitted by substantive due process offends democratic values, (2) that the *Lochner* Court's substantive due process decisions furthered business interests, and (3) that they were intended to do so.²⁰¹ In light of the previous discussion, what can we say about these three criticisms?

1. ***Lochner*-era Substantive Due Process and Democratic Values.** A constitutional doctrine's susceptibility to the charge that it is antidemocratic, one would think, is a matter of degree. Among other things, the charge's validity depends on the number of times the doctrine is used to overcome legislative enactments. If we limit ourselves to the cases that were central to *Lochner*-era substantive due process, the old Court invalidated state or federal laws some fifty-odd times over a forty year period. This amounts to slightly over one such episode per year. Of course, the impact of one strategic Supreme Court decision can be immense. The federal courts and the states may follow it innumerable times, and the decision may also deter legislatures from enacting certain kinds of statutes. In assessing the impact of *Lochner*-era substantive due process, moreover, it would be most useful to know how many laws *survived* when challenged on that basis.²⁰² For these reasons, the number of "kills" attributable to substantive due process is an imperfect measure of its impact. But it hardly is useless information either. And, fifty or so kills are far fewer than the official estimate of 200.

Of course, if we include the "peripheral" decisions in the total, *Lochner*-era substantive due process claimed almost 160 victims.

328, 342-44 (1921).

200. G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 578 (1995) (speaking also of Brandeis).

201. See *supra* notes 7-10 and accompanying text.

202. See *supra* note 12 (describing two early Twentieth Century studies that did attempt such an analysis, but that did not cover the entire *Lochner* era).

Primarily because the standards they apply usually derive from other constitutional provisions, however, a question remains whether these cases should be treated as substantive due process decisions at all. Whatever the proper categorization of these cases, moreover, many of them have significant justifications. In this connection, perhaps it suffices to say that no less an advocate of judicial restraint than Holmes signed on to most of the "peripheral" decisions.

2. The Pro-Business Consequences of *Lochner*-era Substantive Due Process. Within the list of cases contemporary commentators regard as typifying *Lochner*-era substantive due process, the employment cases are well represented. These cases are commonly regarded as increasing business power over working people by striking down laws intended to protect them from that power.²⁰³ If, as the standard sources seem to suggest, old-time substantive due process worked some 200 times, and if these cases resemble those the sources discuss, the doctrine's pro-business consequences would have been impressive indeed. But as we now know, *Lochner*-era substantive due process did not inflict 200 casualties. Still, many of the peripheral and core substantive due process cases obviously benefitted business. This is true of all or virtually all the utility rate and utility regulation decisions.²⁰⁴ Some of the various due process tax cases probably enabled businesses or wealthy individuals to avoid tax liability.²⁰⁵ The incorporation cases involving the Contract and Takings Clauses probably aided business interests as well.²⁰⁶ Turning to core substantive due process decisions, the employment, price regulation, and general economic regulation cases all seemed to tangibly assist some business firms.²⁰⁷

Thus, the claim that *Lochner*-era substantive due process benefitted business seems justified by the cases discussed here. Whether it *unjustifiably* benefitted business is another question. Many of the decisions just discussed arguably had important justifications. For example, the utility rate and utility regulation cases involved asserted malfunctions of democratic governance,²⁰⁸ and many of the due process tax cases presented questions of interstate power relations.²⁰⁹ In other cases, the motives underlying the challenged legislation may not have been what they seemed. This is especially true of the cases involving

203. See *supra* note 9.

204. See *supra* notes 82-95 and accompanying text.

205. See *supra* notes 72-81 and accompanying text.

206. See *supra* notes 64-67, 69-70 and accompanying text.

207. See *supra* notes 105-08, 119-54 and accompanying text.

208. See *supra* notes 170-78 and accompanying text.

209. See *supra* notes 76-77 and accompanying text.

minimum-wage and maximum-hours legislation, which possibly reflected the interests of male dominated unions and business competitors, respectively.²¹⁰

3. The Question of Motive. The immediately preceding remarks go some way toward undermining the last suggested criticism of *Lochner*-era substantive due process: that it was primarily motivated by the desire to advance business interests. Another reason for questioning this view about the old Court is that some of its substantive due process decisions did not visibly assist business. This is true of some of its incorporation decisions, its land-use cases, its three "personal rights" cases, and its entry restriction cases.²¹¹ Indeed, the entry restriction cases can be regarded as *antibusiness*, or at least as hostile to established economic interests that use state power to suppress competition.²¹² The simplest and most general explanation for the old Court's substantive due process decisions is that most of its Justices were exactly what they seemed and claimed to be: exponents of personal freedom and limited government.²¹³

V. CONCLUSION

Standard accounts of *Lochner*-era substantive due process tend to focus on the same twenty or so high profile cases. They also seem to say that the old Court struck down approximately 200 laws on substantive due process grounds. In the process, they implicitly suggest that the

210. See, e.g., SIEGAN, *supra* note 5, at 148-49 (suggesting that minimum wage laws for women were motivated in part by male workers' and male-dominated unions' desire to suppress the competition created by female workers). See also *id.* at 115-18 (suggesting that the law struck down in *Lochner* would have tended to give larger bakeries an edge over smaller ones). But see KENS, *supra* note 5, ch. 5 (not mentioning these influences while discussing the New York legislature's passage of the law at issue in *Lochner*).

211. See *supra* notes 68, 96-103, 109-17, 155-59 and accompanying text.

212. See, e.g., Phillips II, *supra* note 5, at 407-17, 438-47 and the sources cited there.

213. Another possibility, whose merits and relationship to my own interpretation I cannot consider here, is that the old Court was less devoted to laissez-faire than to an ideal of neutral government that proscribed "class legislation"—legislation benefitting particular economic interests (often at the expense of competitors) and not the general interest. This view is developed at considerable length in GILLMAN, *supra* note 5, at 7-11, 20-21, 61-62, 114, 199. See *id.* ch. 3-4 for his interpretations of several important *Lochner*-era substantive due process decisions. Although they would seem to support his thesis, however, Gillman does not emphasize the old Court's entry restriction cases. Perhaps this is because they are inconsistent with his belief that *Lochner*-era neutrality became incongruous in an age when corporate power created conditions of economic dependency requiring corrective social legislation. See, e.g., *id.* at 76-86, 114-18, 147-58. But entry restrictions are not laws of this kind; if anything, they reflect superior corporate power.

approximately 180 cases they do not discuss resemble the ones they specifically examine. In reality, of course, the *Lochner* Court claimed nowhere near 200 substantive due process victims. In fact, only by greatly stretching the definition of substantive due process does the figure reach 160. Under a more restricted conception of the term, the Supreme Court invalidated slightly over fifty laws on substantive due process grounds during the *Lochner* era.

These findings create a significant problem for foes of the old Court. If these people define substantive due process with any rigor, they are left with relatively few cases to criticize. But if they broaden the definition of that term, they are forced to include many decisions joined by such supposed enemies of substantive due process as Holmes, as well as a few cases almost no one would reject today. This broader notion of *Lochner*-era substantive due process renders it much more of a mainstream doctrine than is generally realized. The idea that economic regulations are subject to some form of substantive due process review commanded assent from all the Court's members for some forty years; even Holmes did not have a principled objection to substantive due process as such.²¹⁴ And if Holmes could stomach some substantive due process review of economic regulations, why should today's Court refuse to do the same?

214. See *supra* notes 181-99 and accompanying text. In addition, several of Holmes's famed dissents clearly accept some kind of substantive due process review, however minimal. See, e.g., *Louis v. Liggett Co. v. Baldridge*, 278 U.S. 105, 114-15 (1928) (state entry restriction for pharmacy business is constitutional because it has some tendency to promote safer operation of such businesses), *overruled by* *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *Adkins v. Children's Hosp.*, 261 U.S. 525, 567-68 (1923) (apparent test for validity of minimum wage law for women is whether reasonable man could believe that it is needed to protect women against certain evils), *overruled by* *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Coppage v. Kansas*, 236 U.S. 1, 27-28 (1915) (apparent test for validity of challenged law is whether a reasonable man could believe that it enables workers to bargain freely and get a fair deal); *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (liberty perverted when held to prevent the triumph of a dominant opinion, unless the challenged law would infringe on fundamental principles as understood by our traditions and our law). See also BORK, *supra* note 7, at 45-46 (decrying Holmes's acceptance of substantive due process in *Lochner*); WHITE, *supra* note 196, at 323-24 (discussing Holmes's first statement of his approach to substantive due process in *Otis v. Parker*, 187 U.S. 606 (1902)).