

Constitutional Liberty Meets the “Progressive” Movement

At the end of the 19th century, as the so-called progressive movement grew in political strength, states passed statutes regulating and restricting all manner of economic activity. At the same time, “morals” legislation became more pervasive as well, although often such laws were enacted under the rubric of “public health,” a development the historian Ronald Hamowy has called the “medicalization of sin.”² All of this was part of an intellectual and political movement to improve upon the result of private, personal, and economic choices by aggressively using government power to enhance the general welfare.

As that sort of legislation gained in popularity, the Supreme Court resisted sporadically, striking down some but not all statutes restricting economic activities. *Lochner v. New York* was the most famous of those cases.³ There the Supreme Court struck down provisions of a state statute limiting the maximum hours bakeshop employees could work per week. The Court found the provisions violated the “liberty of contract” between employees and employers that was protected, it said, by the “liberty” portion of the Due Process Clause of the Fourteenth Amendment. In other cases, the Court struck down noneconomic legislation as well, such as state laws mandating English-only education of children⁴ or requiring parents to send their children to public schools,⁵ as arbitrary infringements of liberty.

In those cases the Court spoke simply of the liberty of the individual, then required the state to justify restricting that liberty. Not surprisingly, given their political agenda, progressives bitterly criticized the Court’s use of the Due Process Clause, especially in the economic sphere, as thwarting the democratic political process. Yet only a small fraction of progressive legislation was voided. Moreover, the Supreme Court did not categorically ban such statutes. Rather, it merely required that the government justify its regulations.

²See Ronald Hamowy, *Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America*, in *ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS* 33 (Randy Barnett & John Hagel III eds., 1977).

³198 U.S. 45 (1905).

⁴*Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵*Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

Indeed, the principal problem with the Supreme Court's jurisprudence during the Progressive Era was its lack of a coherent distinction between legislation upheld and legislation stricken. Had more statutes been found unconstitutional, the results would have been easier to explain.

Critics also claimed that those cases represented a revolutionary departure from the constitutional principles of the founding,⁶ but their case was weak. They offered little persuasive historical evidence, and what evidence they presented ignored the structural changes wrought by the enactment of the Fourteenth Amendment. Needless to say, those critics paid no attention to the original meaning of that provision. Today, even some constitutional scholars sympathetic to economic regulation acknowledge the continuity between the principles of the founding and what the Progressive Era Supreme Court was trying to do in circumscribing state power via the Fourteenth Amendment.⁷

With the Great Depression and the New Deal, however, the focus shifted to progressive measures enacted at the national level. The Court struck down several of those measures as exceeding the powers of Congress under the Commerce Clause.⁸ Yet eventually it reversed itself and upheld that legislation as constitutional. The story of that reversal is fascinating, but too complicated to summarize here. Suffice it to say that recent research has called into question the contention that the Progressive Era Court's jurisprudence was reversed only in 1937, under pressure of Roosevelt's Court-packing scheme, by the "switch in time that saved nine."⁹ Rather, as early as the beginning of the 1930s, Hoover appointees (Hoover considered himself a progressive) softened the Court's constitutional objections

⁶See, e.g., WALTON H. HAMILTON & DOUGLASS ADAIR, *THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW* (1937). I respond to their historical claims in Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 130–132 (2001).

⁷See especially HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

⁸See, e.g., *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

⁹See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998). Cf., WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REFORM: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995).

to progressive legislation, which had the effect of further undermining the coherence of the Court's earlier restrictive doctrines. Nevertheless, the final nail in the coffin of liberty did not come until the Supreme Court was thoroughly controlled by Roosevelt appointees in the early 1940s.

Enter the Presumption of Constitutionality

For present purposes it is significant that in 1931, years before the so-called Revolution of '37, Justice Louis Brandeis adopted a "presumption of constitutionality" when evaluating the exercise of state police powers. In *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*, Brandeis wrote:

The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, *the presumption of constitutionality* must prevail in the absence of some factual foundation of record for overthrowing the statute.¹⁰

Writing glowingly of this case in the *Columbia Law Review*, Walton Hamilton sang the praises of Brandeis's doctrinal maneuver—highlighting in the process the radical changes to come:

The demand is to find an escape from the recent holdings predicated upon "freedom of contract" as "the rule," from which a departure is to be allowed only in exceptional cases. The occasion calls not for the deft use of tactics, but for a larger strategy. The device of presumptions is almost as old as law; Brandeis *revives the presumption that acts of a state legislature are valid and applies it to statutes regulating business activity*. The factual brief has many times been employed to make a case for social legislation; Brandeis demands of the opponents of legislative acts a recitation of fact showing that the evil did not exist or that the remedy was inappropriate. He appeals from precedents to more venerable precedents; *reverses the rules of presumption and proof in cases involving the*

¹⁰282 U.S. 251, 257–58 (1931) (emphasis added).

control of industry; and sets up a realistic test of constitutionality. It is all done with such legal verisimilitude that a discussion of particular cases is unnecessary; it all seems obvious—once Brandeis has shown how the trick is done. It is attended with so little of a fanfare of judicial trumpets that it might have passed almost unnoticed, save for the dissenters, who usurp the office of the chorus in a Greek tragedy and comment upon the action. Yet an argument which degrades “freedom of contract” to a constitutional doctrine of the second magnitude is compressed into a single compelling paragraph.¹¹

As *O’Gorman* shows, well before the so-called Revolution of ’37 the Court was deferring to state legislatures. As the Brandeis quotation suggests, initially the presumption of constitutionality could be rebutted, at least in theory, by those objecting to a statute’s constitutionality. By the 1940s, however, the presumption became irrebuttable for all practical purposes, at least in the case of economic regulation. Thus, in the 1956 case of *Williamson v. Lee Optical*,¹² the Court reversed a lower court that had held unconstitutional portions of a state statute that made it unlawful “for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.”¹³ The district court had held that such a requirement was not “reasonably and rationally related to the health and welfare of the people.”¹⁴ The law thus violated the Due Process Clause by arbitrarily interfering with an optician’s right to do business.

Plainly, the trial court was not playing from the post-New Deal playbook. It still believed that the presumption of constitutionality was rebuttable. Thus, it had written:

¹¹Walton H. Hamilton, *The Jurist’s Art*, 31 Colum. L. Rev. 1073, 1074–75 (1931) (emphases added) (footnotes omitted). Hamilton coauthored, *THE POWER TO GOVERN*, discussed above, *supra*, note 6.

¹²348 U.S. 483 (1956).

¹³*Id.* at 485.

¹⁴*Lee Optical of Oklahoma v. Williamson*, 120 F. Supp. 128, 136 (1954).

It is recognized, without citation of authority, that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. *A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.*¹⁵

No, not even then, as Roosevelt-appointee and former New Dealer Justice William O. Douglas¹⁶ explained in his opinion for a unanimous Supreme Court, reversing the wayward district court.

[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.¹⁷

Justice Douglas's opinion made clear that when restricting liberty, the legislature need not have had good reasons. It is enough that it *might* have had good reasons:

The legislature *might* have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, . . . the legislature *might* have concluded that one was needed

¹⁵*Id.* at 132 (emphasis added).

¹⁶Before his appointment to the Court to succeed Justice Brandeis, Douglas was Roosevelt's nominee to chair the Securities and Exchange Commission in 1937. Prior to his appointment to the Commission, Douglas was a professor at Yale Law School. Roosevelt reportedly came close to picking Douglas as his running mate in the 1944 election.

¹⁷348 U.S. at 487–88.

often enough to require one in every case. Or the legislature *may* have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. . . .¹⁸

Consequently, Justice Douglas concluded, “[w]e cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds.”¹⁹ With *Lee Optical* as the norm, what then was left of judicial review?

Qualifying the Presumption of Constitutionality: The Theory of Footnote Four

As *Lee Optical* makes plain, post-New Deal deference to state legislatures and to Congress meant that courts simply would not guard against constitutional violations: “For protection against abuses by legislatures the people must resort to the polls, not to the courts,”²⁰ said Douglas. If applied consistently, this deferential attitude would obviously end the entire practice of judicial review. How then did the post-New Deal Court avoid that slippery slope? The answer is found in a single footnote that foreshadows the entire post-New Deal theory of judicial review and constitutional rights.

I allude, of course, to the famous Footnote Four of the 1938 case of *United States v. Carolene Products Co.*,²¹ which concerned legislative restrictions on the sale of a milk substitute that competed with the products of dairy farmers.²² In the text of his opinion, Justice Harlan Fiske Stone²³ strongly asserted the presumption of constitutionality.

¹⁸*Id.* at 477–88 (emphases added).

¹⁹*Id.* at 489.

²⁰*Id.* at 488.

²¹304 U.S. 144 (1938).

²²See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397.

²³Although a Coolidge appointee, Justice Stone was elevated to Chief Justice by President Roosevelt in 1941, the same year Stone authored the opinion of the Court in *United States v. Darby*, 312 U.S. 100 (1941). That opinion definitively expanded the powers of Congress under the Commerce and Necessary and Proper clauses in the same manner as the police power of states had been enlarged in 1937 in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). The 5–4 decision in *West Coast Hotel*, in which the Court abstained from policing the limits of the police power of the states, was among the cases that led to 1937 being identified as the year of the New Deal constitutional revolution.

“[T]he existence of facts supporting the legislative judgment is to be presumed,” he wrote,

for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.²⁴

Carolene Products is famous, however, for the footnote that immediately followed that passage,²⁵ which began as follows:

There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.²⁶

The note goes on to add two more exceptions to the presumption of constitutionality—for laws that restrict the political process, and laws that are directed at “discrete and insular minorities.”²⁷

²⁴*Carolene Prods.*, 304 U.S. at 152.

²⁵The fame of this footnote is illustrated by the fact it merits its own entry in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES*. See Dean Alfange, Jr., *Footnote Four*, in *OXFORD COMPANION* 306–07 (Kermit L. Hall et al. eds., 1992).

²⁶*Id.* at 152 n.4.

²⁷More fully, the text of the note reads:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152–53 n.4 (citations omitted).

After *Carolene Products*, legislation was presumed to be constitutional unless one of the three exceptions in Footnote Four was satisfied, in which case the Court would give the statute "heightened scrutiny." Due to the idiosyncracies of the first eight amendments, this doctrinal maneuver allowed the court to uphold economic regulations, as in *Lee Optical*, while preserving judicial review of such "personal" freedoms as those of speech, assembly, and press. That the personal right to bear arms, explicitly mentioned in the Second Amendment, has not been judicially protected shows the ideological nature of this maneuver, as does the uneven protection of property rights, explicitly mentioned in the Fifth Amendment.

Ironically, in recent years judicial conservatives like Robert Bork and Raoul Berger have been among the most stalwart in their allegiance to the judicial philosophy of Footnote Four. For all the reverence they express toward the Framers of the Constitution, jurisprudentially speaking, they are unreconstructed Roosevelt New Dealers.

Enter the Unenumerated "Right of Privacy"

Until the 1960s, the Supreme Court was content for the most part to confine judicial review to policing most of the enumerated rights contained in the Bill of Rights, while deferring to legislative power in all other arenas. As just noted, this post-New Deal jurisprudence of (partial) restraint is today the holy grail of judicial conservatives. Their posture came about, in part, in reaction to *Griswold v. Connecticut*,²⁸ a case in which the Court considered the constitutionality of a state using its police power to ban not only the "personal" liberty to use contraceptives but also the "economic" liberty to sell and distribute them.

The *Griswold* Court struck down the statute for violating an unenumerated right it called the "right of privacy." The task of justifying this extension of judicial review to a right not specified in the Bill of Rights, for the first time since *Carolene Products*, fell to Justice Douglas, author of the *Lee Optical* opinion.²⁹ He did so by attempting

²⁸381 U.S. 479 (1965).

²⁹Douglas took pains to distinguish *Griswold* from *Lee Optical* and other cases rejecting the Due Process Clause jurisprudence of the Progressive-Era Court:

[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York*, 198 U.S. 45, should be our guide. But we decline that invitation, as we did in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *Olsen v. Nebraska*, 313 U.S. 236; *Lincoln Union v. Northwestern Co.*, 335 U.S. 525; *Williamson v. Lee*

to connect, however tenuously, this unenumerated right to those that are enumerated:

The foregoing cases suggest that *specific guarantees in the Bill of Rights* have *penumbras, formed by emanations* from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”³⁰

That was probably the best he could do to reach the result in the case while ostensibly staying within the prevailing constitutional theory of Footnote Four. On the one hand, had Douglas grounded the decision in “liberty” (which is mentioned in the text) rather than “privacy” (which is not), it would have risked undoing the strong deference to Congress and state legislatures that he and his fellow-New Deal justices had previously established.

On the other hand, by narrowly construing the unenumerated right being protected, Douglas ensured that procreative rights, and later abortion rights, would be viewed as special interest rights. Had those liberties been protected as aspects of a general right to liberty, rather than based on the more narrow right to privacy, they might

Optical Co., 348 U.S. 483; *Giboney v. Empire Storage Co.*, 336 U.S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.

Id. at 481–82. Notice the rhetoric of “super-legislature” now associated with judicial conservatives.

³⁰*Id.* at 484 (emphasis added).

