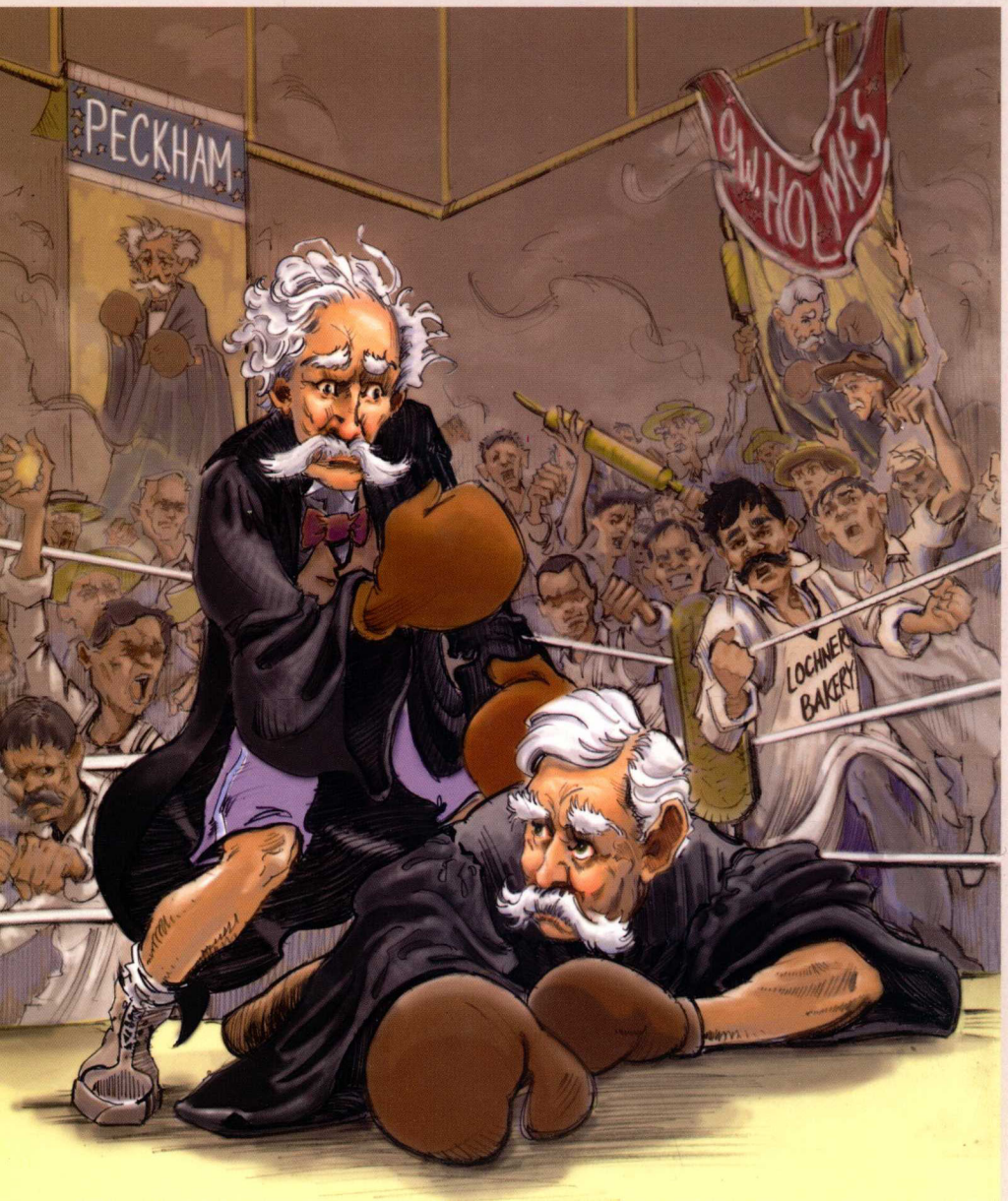
REHABILITATING LOCHNER

Defending Individual Rights against Progressive Reform

DAVID E. BERNSTEIN



DAVID E. BERNSTEIN is Foundation Professor at the George Mason University School of Law and the author of several books, including, most recently, *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws.*

The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London

Printed in the United States of America

20 19 18 17 16 15 14 13 12 11 1 2 3 4 5

ISBN-13: 978-0-226-04353-1 (cloth)
ISBN-10: 0-226-04353-3 (cloth)

Library of Congress Cataloging-in-Publication Data

Bernstein, David E. author.
Rehabilitating Lochner : defending individual rights against progressive reform / David E. Bernstein.
pages ; cm.
Includes bibliographical references and index.
ISBN-13: 978-0-226-04353-1 (hardcover : alk. paper)
ISBN-10: 0-226-04353-3 (hardcover : alk. paper) 1. Lochner, Joseph—Trials, litigation, etc. 2. New York (State)—Trials, litigation, etc. 3. Liberty of contract—United States—History. 4. Judicial review—United States—History. 5. Civil rights—United States. 1. Title.
KF228.L63B47 2011

♾ The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992.

REHABILITATING *LOCHNER*

ACKNOWLEDGMENTS

My sincere thanks to Charles Barzun, Les Benedict, Eric Claeys, Barry Cushman, Howard Gillman, Tom Grey, Philip Hamburger, Dan Harper, Michael Klarman, Noga Morag-Levine, Chris Newman, Victoria Nourse, Carol Rose, Stephen Siegel, Mark Tushnet, Ted White, Keith Whittington, John Witt, and Michael Allan Wolf, and to my students Nathaniel Canfield, Katrina Doran, Pasha Majdi, and David Pettit for providing helpful comments on chapters of this book. Special thanks go to Randy Barnett, Jim Ely, Bill Nelson, Julian Sanchez, David Schleicher, Nancy Woloch, and several anonymous referees for reading and commenting on entire draft manuscripts.

I also benefited from feedback on specific chapters at faculty workshops at the University of Arizona, George Mason University, and Washington University law schools; presentations to students and faculty at New York University and the University of Michigan; a presentation at the American Law and Economics Association annual conference; and comments on entire draft manuscripts provided at the Georgetown University Law Center's New Books on Constitutional Law seminar and the NYU Legal History Colloquium.

Portions of this book have been greatly revised from articles and review essays that appeared in the *Georgetown Law Journal*, *Journal of Supreme Court History*, *Law and Contemporary Problems*, *Michigan Law Review*, *Texas Law Review*, *Vanderbilt Law Review*, *Washington University Law Review*, and *Yale Law Journal*. The editors who worked with me on those articles made many helpful comments and suggestions, as did the many colleagues and friends who provided input on my various *Lochner*-related projects over the years.

Dean Daniel Polsby has been extremely supportive of this book project in a variety of ways, large and small. The Law and Economics Center at the George Mason University School of Law provided generous summer research funding for this project. The Searle Foundation paid for an invaluable semester of leave in the spring of 2009, which allowed me to complete an initial draft manuscript.

Finally, thanks go to my wife Sigal for her love and support, and to my daughters Natalie and Eden, for bringing rays of sunshine into my life every day.

CONTENTS

	Acknowledgments	*vii*
	Introduction	*1*
1.	The Rise of Liberty of Contract	*8*
2.	The *Lochner* Case	*23*
3.	Progressive Sociological Jurisprudence	*40*
4.	Sex Discrimination and Liberty of Contract	*56*
5.	Liberty of Contract and Segregation Laws	*73*
6.	The Decline of Liberty of Contract, and the Rise of "Civil Liberties"	*90*
7.	*Lochner* in Modern Times	*108*
	Conclusion	*125*
	Notes	*131*
	Index	*187*

Introduction

If you want to raise eyebrows at a gathering of judges or legal scholars, try praising the Supreme Court's 1905 decision in *Lochner v. New York*. *Lochner* invalidated a state maximum-hours law for bakery workers. The Court held that the law violated the right to "liberty of contract," a right implicit in the Fourteenth Amendment's ban on states depriving people of liberty without "due process of law."

Lochner is likely the most disreputable case in modern constitutional discourse. It competes for that dubious distinction with *Scott v. Sandford*, the "*Dred Scott* case."[1] Chief Justice Roger Taney in *Dred Scott* concluded that persons of African descent could not be American citizens because the Constitution's framers believed that blacks "had no rights which the white man was bound to respect." He helped precipitate the Civil War by adding that Congress may not ban slavery in federal territories.

That's rather ignominious company for *Lochner*, which had the much more modest effect of prohibiting New York state from imprisoning bakery owners whose employees worked more than ten hours in a day or sixty hours in a week. *Lochner*, moreover, was an outlier opinion from a Supreme Court that generally deferred to legislative innovation. The Court quickly limited *Lochner* to its facts in 1908 when it upheld a maximum-hours law for women, and then ignored *Lochner* in 1917 when it approved an hours law that covered all industrial workers. For three decades, the liberty of contract doctrine impeded the growth of the regulatory state to a limited degree, but federal and state government power and authority nevertheless grew apace.[2]

Lochner has since become shorthand for all manner of constitutional evils, and has even had an entire discredited era of Supreme Court jurisprudence named after it. More than one hundred years after their predecessors

issued the decision, Supreme Court justices of all ideological stripes use *Lochner* as an epithet to hurl at their colleagues when they disapprove of a decision declaring a law unconstitutional. Even Barack Obama has found occasion to publicly denounce *Lochner*, pairing it with *Dred Scott* as an example of egregious Supreme Court error.[3] And *Lochner*'s infamy has spread internationally, to the point where it plays an important role in debate over the Canadian constitution.[4]

The origin of today's widespread enmity to *Lochner* lies in Progressive-era legal reformers' hostility to liberty of contract. Progressive* critics contended that the Court's occasional invalidation of reformist legislation was a product of unrestrained judicial activism, politicized judicial decision-making, and the Supreme Court's favoring the rich over the poor, corporations over workers, and abstract legal concepts over the practical necessities of a developing industrial economy.

The Supreme Court withdrew constitutional protection for liberty of contract in the 1930s. Since then, a hostile perspective inherited from the Progressives has virtually monopolized scholarly discussion of the Court's liberty of contract decisions. From 1940 until the publication of Bernard Siegan's *Economic Liberties and the Constitution* forty years later, only one law review article expressed even mild support for constitutional protection of liberty of contract.[5]

Lochner has come to exemplify the liberty of contract cases, though the opinion did not always attract such disproportionate attention. Starting in the late 1930s *Lochner* languished in obscurity, cited almost exclusively as just one in a line of discredited cases invalidating legislation for infringing on freedom of contract. Its notoriety increased dramatically when both the majority and dissent in *Griswold v. Connecticut*—a high-profile, controversial case decided in 1965—used it as a foil. *Lochner* has since loomed ever larger in American constitutional debate. By the late 1980s it was perhaps the leading case in the constitutional "anti-canon," the group of wrongly decided cases that help frame the proper principles of constitutional interpretation.

* This book refers to the post-*Lochner*, pre–New Deal opponents of liberty of contract, and other pre–New Deal proponents of government activism, as "Progressives," and to their ideology as Progressivism, with a capital *P*. To the extent that "Progressive" is a less-than-precise descriptive term, it hopefully makes up for that lack of precision in consistency and brevity. Confusion sets in, of course, because many on the modern liberal left choose to call themselves progressives, and refer to their preferred policies as progressive. To avoid this confusion, the book refers to those on the post–New Deal liberal left as "liberals," and to their ideology as modern "liberalism." "Liberalism" is also used to describe the values of tolerance, racial and gender egalitarianism, and individual rights protected by law, in whatever era. Opposition to racial segregation, for example, constitutes racial "liberalism" regardless of its source.

Just as *Lochner* phobia was hitting its stride, historians began to discredit some elements of the dominant narrative about liberty of contract inherited from the Progressives. In particular, scholars showed that the Supreme Court justices who adopted the liberty of contract doctrine did not have the cartoonish reactionary motives attributed to them by Progressive and New Deal critics.[6] Rather, the justices, faced with constitutional challenges to novel assertions of government power, sincerely tried to protect liberty as they understood it, consistent with longstanding constitutional doctrines that reflected the notion that governmental authority had inherent limits.[7]

This book takes the revisionist project significantly further. It provides the first comprehensive modern analysis of *Lochner* and its progeny, free from the baggage of the tendentious accounts of Progressives, New Dealers, and their successors on the left and, surprisingly, the right.[8] *Lochner* must be fundamentally reassessed in part because much of our *Lochner*-related mythology is just that, with little if any basis in the actual history of the liberty of contract doctrine. *Lochner* is also due for reconsideration because modern sensibilities diverge significantly from those of the Progressives who created the orthodox understanding of the liberty of contract era.

This book shows that the liberty of contract doctrine was grounded in precedent and the venerable natural rights tradition.[9] The Supreme Court did not use the doctrine to enforce "laissez-faire Social Darwinism," as the traditional narrative asserts. Rather, the Court upheld the vast majority of the laws that had been challenged as infringements on liberty of contract. The Court's decisions that did vindicate the right to liberty of contract often had ambiguous or even clearly "pro-poor" distributive consequences. The bakers' maximum-hours law invalidated in *Lochner*, like much of the other legislation the Court condemned as violations of liberty of contract, favored entrenched special interests at the expense of competitors with less political power.[10]

This book also considers the available contemporary alternative to liberty of contract, the extreme pro-government ideology of liberty of contract's opponents among the Progressive legal elite, including such luminaries as Louis Brandeis, Roscoe Pound, Felix Frankfurter, and Learned Hand.[11] Progressive jurists generally opposed not just *Lochner*'s defense of economic liberty but any robust constitutional protection of individual or minority rights.

In sharp contrast to modern constitutional jurisprudence, neither Progressives nor their opponents typically recognized a fundamental distinction between judicial protection for civil rights and civil liberties, and judicial protection of economic liberties. Rather, both sides thought that Fourteenth

Amendment due process cases raised three primary issues: whether the party challenging government regulatory authority had identified a legitimate right deserving of judicial protection; the extent to which the courts should or should not presume that the government was acting within its inherent "police power"; and, finally, taking the decided-upon presumption into account, whether any infringement on a recognized right protected by the Due Process Clause was within the scope of the states' police power, or whether instead it was an arbitrary, and therefore unconstitutional, infringement on individual rights.

Leading Progressive lawyers believed in strong interventionist government run by experts and responsive to developing social trends, and were hostile to countervailing claims of rights-based limits on government power. Progressive legal elites also were extremely suspicious of the judiciary's competence and integrity in policing the scope of the government's authority to regulate. Progressive legal commentators therefore urged the courts to interpret the police power as sufficiently flexible to permit state-imposed racial segregation, sex-specific labor laws, restrictions on private schooling, and coercive eugenics.[12]

Many Progressives, products of their prejudiced times, actively sympathized with the racism, the paternalistic and often dismissive or condescending attitudes toward women, and the hostility to immigrants and Catholics that motivated these laws. But even unusually liberal Progressive jurists—and elite attorneys tended to be more liberal-minded than other Progressive intellectuals—generally opposed judicial intervention to support any given rights claim brought under the Due Process Clause. Progressive lawyers argued that the benefits of such intervention would likely be substantially outweighed by the damage that additional constitutional limits on the government's police power might ultimately cause to their core agenda of supporting economic—especially labor—regulation.

Meanwhile, advocates of liberty of contract believed that the Fourteenth Amendment set inherent limits on the government's authority to regulate the lives of its constituents. While this belief initially was adopted by the courts in the context of economic regulation, as early as 1897 the Supreme Court announced that the Fourteenth Amendment's Due Process Clause protected an individuals' right to be "free in the enjoyment of all his faculties [and] to be free to use them in all lawful ways."[13] Through the early 1920s, however, with the exception of a few outlier decisions like *Lochner*, the Court's majority was generally cautious about limiting the scope of the states' police power via the Due Process Clause.

But as with their Progressive critics, "conservative" Supreme Court justices' views on the scope of the government's power to infringe on constitutional protections for civil rights and civil liberties were generally consistent with their views on the government's power to interfere with liberty of contract.[14] Once the Court in the 1920s became more aggressive about reviewing government regulations in the economic sphere, the justices naturally began to acknowledge the broader libertarian implications of *Lochner* and other liberty of contract cases and to enforce limits on government authority more generally.

Indeed, the Court's liberty of contract advocates were sufficiently committed to the notion of inherent limits on government power and a limited police power that they voted for liberal results across a wide range of individual and civil rights cases. The *Lochner* line of cases pioneered the protection of the right of women to compete with men for employment free from sex-based regulations, the right of African Americans to exercise liberty and property rights free from Jim Crow legislation, and civil liberties against the states ranging from freedom of expression to the right to choose a private school education for one's children.[15]

Even justices who lacked sympathy for the individuals and groups that were challenging government actions often voted in their favor out of libertarian commitment; the unabashed racist James McReynolds, for example, voted to invalidate a residential segregation law, and wrote an opinion protecting the right of Japanese parents in Hawaii to send their children to private Japanese-language schools. Some of the other justices had equalitarian reasons for their votes. George Sutherland strongly expressed his longstanding support for women's legal equality in a 1923 opinion he wrote invalidating a women-only minimum wage law as a violation of liberty of contract. And sometimes a commitment to limited government seems to have led some jurists to a newfound empathy for groups suffering from what they saw as government overreaching.

With the triumph of the New Deal, the Progressives won the battle over whether the Supreme Court would engage in meaningful review of economic regulation. In that sense, modern Fourteenth Amendment jurisprudence is a product of Progressive ideology. But the New Deal Court and its successors did not fully adopt the Progressives' pro-government, antijudiciary views. The justices instead chose to divide the Old Court's due process opinions into two categories; the Court disavowed precedents that protected economic rights, but elaborated upon, reinterpreted, and most importantly preserved and expanded its civil rights and civil liberties precedents.

Some of the old due process cases were reincarnated during and just after the New Deal as "incorporation" cases applying the Bill of Rights against the states, or as equal protection cases. In later years, the Court revived some of the old cases as pure due process cases. It emphasized these cases' protection of "fundamental" unenumerated rights such as privacy, and ignored their close ties to the liberty of contract cases. Many post–New Deal liberal developments in Fourteenth Amendment jurisprudence can therefore trace their origins to *Lochner* and its progeny.

More generally, modern Fourteenth Amendment jurisprudence owes at least as much to the libertarian values of liberty of contract proponents as to its pro-regulation Progressive opponents.[16] Modern liberal jurists overwhelmingly reject the Progressives' hostility to using the Fourteenth Amendment to protect individual liberty and minority rights from government overreaching. Meanwhile, conservative jurists often favorably cite Progressive heroes like Frankfurter and Justice Oliver Wendell Holmes in support of "judicial restraint," but judicial conservatives like Justices Antonin Scalia and Clarence Thomas have refused to adopt anything approaching the sort of near-absolute judicial deference to the legislature advocated by elite Progressive lawyers.

While this book is an effort to correct decades of erroneous accounts of the so-called "*Lochner* era," even the soundest history cannot provide a theory of constitutional interpretation, nor can it dictate one's understanding of the proper role of the judiciary in the American constitutional system. History alone cannot tell us, therefore, whether *Lochner* was correctly decided; whether liberty of contract jurisprudence more generally was based on a sound theory of judicial review and constitutional interpretation; and whether *Lochner* or other cases protecting economic rights should be revived.

History is also inherently agnostic on the soundness of such modern outgrowths of *Lochner* and other liberty of contract cases as the incorporation of most of the Bill of Rights against the states via the Due Process Clause, the protection of unenumerated individual rights in cases like *Griswold* and *Lawrence v. Texas*, or other manifestations of what is known today as substantive due process.[17] I do not, therefore, reach any conclusions on these issues, but leave it to interested readers to apply the history presented here to their own understandings of proper constitutional interpretation and construction.

What history can tell us is that the standard account of the rise, fall, and influence of the liberty of contract doctrine is inaccurate, unfair, and anachronistic. *Lochner* has been treated as a unique example of constitutional pathology to serve the felt rhetorical needs of advocates for various theories

of constitutional law, not because the decision itself was so extraordinary, its consequences so bad, or its antistatist presumptions so clearly expelled from modern constitutional law. The history of the liberty of contract doctrine should be assessed more objectively and in line with modern sensibilities, and *Lochner* should be removed from the anticanon and treated like a normal, albeit controversial, case. That these rather modest propositions require an entire book in their defense is an indication of *Lochner's* remarkable status in constitutional debate—one that leaves plenty of room for rehabilitation.

CHAPTER ONE

The Rise of Liberty of Contract

Legal scholars across the political spectrum have long agreed that *Lochner v. New York* and other cases applying the liberty of contract doctrine to invalidate legislation were serious mistakes. This is hardly unusual. Many constitutional doctrines adopted by the Supreme Court have come and gone over the last two hundred–plus years. But the ferocity and tenacity of the liberty of contract doctrine's detractors is unique. For more than one hundred years, critics have argued that *Lochner* and its progeny did not involve ordinary constitutional errors, but were egregious examples of willful judicial malfeasance.

One common criticism is that the Court's use of the Fourteenth Amendment's Due Process Clause to protect substantive rights, including liberty of contract, was absurd as a matter of textual interpretation.[1] John Hart Ely famously quipped that "substantive due process" is a contradiction in terms, akin to "green pastel redness."[2] This line of attack has persisted even though it is anachronistic; the pre–New Deal Supreme Court's approach to interpreting the Due Process Clause did not recognize the modern categories of "substantive" and "procedural" due process.[3]

The liberty of contract doctrine's academic foes have also asserted that it sprang ex nihilo out of Supreme Court justices' minds in the 1890s with the intent to favor the interests of big business and suppress the working class.[4] The *Lochner* Court's justices are said to have been motivated by pernicious Social Darwinist ideology, and to have believed that "the strong could and *should* exploit the weak so that only the fittest survived."[5]

The true story of the development of a substantive interpretation of the Due Process Clause, and of Supreme Court's subsequent adoption of the liberty of contract doctrine, is a far cry from this traditional morality tale of a malevolent Supreme Court serving as a handmaiden of large-scale capital.[6]

This chapter synthesizes and elaborates on existing revisionist scholarship. I draw two major conclusions. First, the idea that the guarantee of "due process of law" regulates the substance of legislation as well as judicial procedure arose from the long-standing Anglo-American principle that the government has inherently limited powers and the individual citizen has inherent rights. Second, the liberty of contract doctrine, while controversial even in its own heyday, evolved from long-standing American intellectual traditions that held that the government had no authority to enforce arbitrary "class legislation" or to violate the fundamental natural rights of the American people.

THE DEVELOPMENT OF A SUBSTANTIVE INTERPRETATION OF "DUE PROCESS OF LAW"

Before the Civil War

In the early nineteenth century, leading American legal theorists recognized that the United States federal government was a government of limited and enumerated powers, restrained by a written Constitution. Some jurists also thought that the exercise of federal power was limited by unenumerated first principles.[7] Unlike the federal government, which could exercise only the powers delegated to it under the United States Constitution, states were thought to have inherent sovereign powers inherited from the British Parliament. State legislatures' power, therefore, could be restrained only by express federal or state constitutional provisions that limited their authority.[8] Litigants opposing exercises of state power naturally turned to these provisions to support their positions.

Many state constitutions banned their governments from taking people's liberty or property without "due process of law," or except according to the "law of the land"—concepts that dated back to the Magna Carta. These concepts became associated with the idea that legislatures acted beyond their inherent powers when they passed laws that amounted to arbitrary deprivations of liberty or property rights.[9]

Starting in the 1830s, a series of state court judicial opinions established that certain types of acts passed by legislatures could not be valid legislation, which naturally led to the conclusion that enforcing them could not be due process *of law*. Courts asserted that inherently invalid acts included legislation that purported to exercise judicial powers, such as by granting new trials; legislation that applied partially or unequally; and legislation that took or taxed private property for private purposes.[10]

By the late 1850s, significant judicial authority held that enforcing the

principle of due process of law required judges to carefully scrutinize the purpose of legislation and the means employed to achieve legislative ends.[11] The development of this broad conception of due process of law was uneven, accepted explicitly by only some American jurisdictions, and applied mainly to the protection of vested property rights.[12] Nevertheless, by 1857 numerous state constitutional law decisions held that due process or analogous constitutional provisions forbade legislatures from unjustly interfering with property rights.[13]

Chief Justice Roger Taney's invocation of due process of law to protect substantive property rights in his infamous 1857 Supreme Court opinion in *Scott v. Sandford* thus had a considerable pedigree.[14] Taney argued that the Fifth Amendment's Due Process Clause barred the federal government from banning slavery in the territories, because such a ban amounted to taking without due process of law the property of Southern slaveowners who traveled to those territories.

Robert Bork has claimed that *Scott* marked "the first appearance in American constitutional law of the concept of [what later came to be known as] 'substantive due process.'"[15] As we have seen, however, the role of due process in protecting substantive property rights was widely accepted before *Scott*.[16] In addition to the state court opinions referenced above, five years before *Scott* the Supreme Court had stated, albeit in nonbinding dicta, that Congress would violate the Due Process Clause if it enacted legislation that deprived an individual of lawfully acquired intellectual property.[17]

None of Taney's Supreme Court colleagues disputed the idea that the Due Process Clause protected substantive property rights. This notion was also widely accepted by *Scott*'s Republican critics.[18] Abraham Lincoln, like *Scott* dissenting justice John McLean, argued that the problem with Taney's opinion was not its protection of property rights, but Taney's erroneous belief that for federal constitutional purposes slaves were mere property, like hogs or horses.[19]

More generally, the Republicans and their ideological predecessors consistently relied on a substantive interpretation of "due process of law" to promote antislavery ends.[20] In 1843 the abolitionist Liberty Party adopted a platform resolution at its national convention stating that the Due Process Clause incorporated the Declaration of Independence's statement that all men are created equal and are endowed by their creator with inalienable rights.[21] Future Supreme Court Justice Salmon Chase told an 1845 antislavery convention that the Due Process Clause prohibited the federal government from sanctioning slavery, and from allowing it in any place of exclusive federal jurisdiction.[22]

The 1848 platform of the Free Soil Party—a precursor to the Republican Party that absorbed many Liberty Party members—suggested that any federal recognition of slavery violated the Due Process Clause.[23] The 1856 and 1860 Republican platforms also explicitly argued that permitting slavery in the federal territories violated the Due Process Clause because slavery took slaves' liberty without due process of law.[24]

After the Civil War

Before the Civil War, states were thought to have inherent sovereign or "police" powers. With the important exception of a clause prohibiting the impairment of contract, these powers were largely untouched by the federal Constitution. State constitutions' due process or law of the land clauses limited the exercise of the states' police powers only in some jurisdictions, and usually only with regard to vested property rights.

The Civil War, however, undermined the idea of autonomous, sovereign states in favor of the view that states' powers were inherently limited. Thomas Cooley's influential 1868 treatise *Constitutional Limitations* asserted that "there are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restrictions which the people impose by their State constitutions."[25] Courts could set aside a state law as invalid even if the written constitution did not contain "some specific inhibition which has been disregarded, or some express command which has been disobeyed."[26] In 1875, the United States Supreme Court declared that "there are limitations on [government] power which grow out of the essential nature of all free governments."[27]

Even strong advocates of judicial restraint acknowledged the existence of an unwritten American constitution that bound state legislators. For example, prominent attorney Richard McMurtie conceded "that there is an unwritten Constitution here quite as much as there is in England."[28] However, McMurtie claimed that courts had no power to enforce the unwritten American constitution against the legislature, just as English courts had no power to enforce the unwritten English constitution against Parliament.

Other commentators insisted that the American constitutional system's genius, and its improvement over the English system, was precisely that it allowed courts to review the constitutionality of legislation. A. V. Dicey, a leading English commentator on constitutionalism, wrote that judicial review was "the only adequate safeguard which has hitherto been invented against unconstitutional legislation."[29] American legal scholar and treatise author Christopher Tiedeman urged courts to seize upon "general declarations