Which Rights Are We Mediating?

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A Review of:

How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart, by Jamal Greene (Houghton Mifflin Harcourt), https://www.hmhbooks.com/shop/books/how-rights-went-wrong/9781328518118

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Other Views:

• Kurt Lash, *The Privileges or Immunities Clause and Unenumerated Rights*, Law & Liberty (Mar. 21, 2019), https://lawliberty.org/the-privileges-or-immunities-clause-and-unenumerated-rights/.

• Mark Pulliam, *The Pernicious Notion of 'Unenumerated Rights'*, American Greatness (Mar. 12, 2019), https://amgreatness.com/2019/03/12/the-pernicious-notion-of-unenumerated-rights/.

• Samuel Moyn, *Why Do Americans Have So Few Rights?*, The New Republic (Mar. 9, 2021), https://newrepublic.com/article/161561/americans-rights-jamal-greene-book-review.

• Thomas Koenig, *Review: Jamal Greene's "How Rights Went Wrong,"* Merion West (Apr. 10, 2021), https://merionwest.com/2021/04/10/review-jamal-greenes-how-rights-went-wrong/.

"Is that right in the Constitution?" Columbia law professor Jamal Greene thinks there is a big problem with that question. Not because he does not think the Constitution protects rights, or even that it protects too many rights. But because, he argues, under today's constitutional law, if the answer is "yes," then the person exercising the right near-automatically wins a court case regardless of the facts and the other interests involved, and if the answer is "no," then the opposite occurs. His alternative approach of rights "mediation" would require us to ask additional questions, such as: What other rights does that right conflict with? How can we come to a compromise between these conflicting rights? And how do the specifics of this case mean we might protect the right differently than we have protected it in other situations?

Professor Greene labels the either/or method he is attacking "rightsism." In his new book *How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart*,[1] he takes a cherished pillar of much of modern progressive legal doctrine—Footnote Four of *United States v. Carolene Products Co.*[2]—and blames it for what his fellow progressives see as dysfunctional in today's legal discourse. His diagnosis and suggested cure are multifaceted and open ended. He argues we rely too much on courts, and not enough on other institutions, to solve what he sees as conflicts of rights. He nevertheless thinks courts should feel empowered to order remedies federal courts are not used to ordering, such as funding positive rights like heath care. He likes compromise and recommends remedies that please no one, but would, he thoughtfully contends, turn down the temperature in our public life and public discourse. Along the way he looks to the experience in constitutional courts in other countries,

1 Jamal Greene, How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart (2021) [hereinafter How Rights Went Wrong].

2 304 U.S. 144, 152 n.4 (1938). The famous footnote reads:

> There may be 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.
>
> 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.

including Canada, Germany, India, and South Africa, for how their mediation of rights has led, in Greene's view, to superior outcomes both for the stakeholders involved and for their political cultures.

His solutions are sometimes very specific, but at other times frustratingly vague. He does give some concrete examples and solutions in a few culture war areas, including the religious liberties/same-sex marriage conflict, disability rights, affirmative action, and campus speech. Yet he also leaves a massive—yet tantalizing—question on the table: what might his approach offer those seeking to protect economic liberties? And along the way he discusses legal history that, although familiar to many students of the Supreme Court, contains new lessons.

I highly recommend the book to anyone interested in modern rights discourse, debates over the Supreme Court's role in our lives, the balance between the Court and other institutions, and where our current rights paradigm—whether you think of it as "rightsism" or not—came from. I enjoyed it very much, but also disagreed with many of its arguments. I also found a way that conservatives and libertarians might find common ground with Professor Greene.

There are many commentaries other critics can make about much of the book, and I leave most of those for scholars with a particular expertise. For example, his chapter on campus speech—where he calls for much more deference to institutions of higher learning in combating acts of perceived harassment and mediating that with free speech rights—is best tackled by those in the thick of that volatile area. This review's focus is on subjects where the book leaves me either unconvinced or inspired: I am unconvinced by Greene's disregard for the negative/positive rights distinction of the classical liberal tradition, but I am inspired by the possibilities of a "Justice Harlan" approach to economic liberties. We will turn to those subjects after a short summary of Greene's argument and some comments on his framing of the Bill of Rights.

I. More Rights than Most at the Founding

Greene begins with the Founding era, and although the book's purpose is not a detailed exegesis of the rights enumerated at that time—as a long-time critic of originalism,[3] the exact meaning of the Bill of Rights in 1791 is not his top concern—the way he explains the first ten amendments to the Constitution makes for rich reading. The various protections in the Bill of Rights, Greene contends, are not all simple guarantees for individuals standing up to the federal government, with judges looming in the background ready to enforce them. Instead, much of the language of those amendments hands off rights protections to other institutions, such as juries, the militia, and state legislatures.[4] Although a strong critic of the fact that many rights at that time only applied to white men, Greene states, "Still, the Founders had a point. A rights culture too focused on individuals outsources rights recognition and enforcement to judges, who are not well suited to performing the sensitive mediation needed to reconcile the rights of diverse citizens."[5] Other institutions can better mediate: "Managing the mass proliferation of rights claims requires institutions well suited to reconciling competing values."[6] He says the Founders' vision applied that reconciliation through preserving slavery and subjecting minorities and women to local forms of domination. But even so he thinks there is "great value" in these alternative methods of mediating rights without the ugly side of that vision.[7] His treatment of the jury as a method of applying community values to the criminally accused is particularly well taken, keeping in mind contemporary critiques of the modern breakdown of the criminal jury trial.[8]

But Greene is also missing a few pieces of that early rights history: state constitutions, the concept of powers delegation, and the contested meaning of the Ninth Amendment. And it undermines his later analysis. He spends little time on rights in state constitutions of the period, and in that short time points out that some of them often used aspirational words like "ought" whereas the Bill of Rights used mandatory language such as "shall,"[9] implying state rights guarantees were not as enforceable. But this aside depreciates the rich protection of rights found in those state constitutions. Examiners of early state constitutionalism have been busy lately,[10] and out of their examinations we can conclude that state declarations or bills of rights were taken seriously, including by judges.[11] Greene discusses how a right was not at the time understood to be a trump against a community's own "right" to regulate itself. And individual rights were not, it is true, seen as absolute trumps. But neither were they considered outside of judicial enforcement. Further, these early state declarations of rights included open-ended language, such as what Professor Steven Calabresi calls "Lockean Natural Rights Guarantees": words like those penned by George Mason in May 1776, shortly thereafter adapted by Jefferson for the Declaration of Independence, and straight out of the social contract philosophy of John Locke.[12] The seeds of unenumerated rights enforcement by judges—which entails a bigger role for judicial engagement

3 For one of many of Greene's thoughtful critiques of originalism, see Jamal Greene, *Fourteenth Amendment Originalism*, 71 Md. L. Rev. 978 (2012).

4 How Rights Went Wrong at 13 ("Rather, they cared about preserving the primacy of local representative bodies.").

5 *Id.* at 8.

6 *Id.* at 31.

7 *Id.*

8 *See, e.g.*, Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 Geo. Mason L. Rev. 719 (2020).

9 How Rights Went Wrong at 11.

10 *See, e.g.*, Andrew T. Bodoh, *The Road to "Due Process": Evolving Constitutional Language From 1776 to 1789*, 40 T. Jefferson L. Rev. 103, 121 (2018); Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299 (2015).

11 *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. Chi. L. Rev. 887, 929-39 (2003) (detailing the use of judicial review by state judges under state constitutions in the period before the 1787 Constitutional Convention).

12 *See generally* Calabresi & Vickery, *supra* note 10. We can find numerous examples of these clauses, descended from Mason's draft, even today. Perhaps the best is Pennsylvania's: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring,

in protecting individual liberty than does Greene's description of the Bill of Rights—were there from the beginning. Today's judge-centric view of rights enforcement thus has deep roots in our system.

Also, there is a nuance in how rights were understood in the early republic that Greene (like many others) does not mention. Although rights were seen as an important concept, so was powers delegation. That is, the delegation by the people to the government of a good deal of power *but not all power*. By this I do not mean the states' well-known delegation to the federal government of certain enumerated powers.[13] I mean the Lockean concept of the delegation of individual sovereignty to state governments—a social contract between man and state at its most basic level. For example, the Pennsylvania Constitution of 1790 proclaimed at the end of its declaration of rights that "[t]o guard against the transgressions of the high powers which we have delegated" to the Commonwealth of Pennsylvania, the declaration of rights was "excepted out of the general powers of government."[14] This implies a limitation on state power beyond just that of rights. This approach later appears in examinations of the scope of the police power, in which the concept of rights sometimes does not appear[15]—an absence which seems odd to our modern eyes. This language does not imply a nightwatchman state by any means, but it does demonstrate that during the Founding era legislative power was seen to be limited, and not just by rights. This non-absolute delegation of individual sovereignty adds to, not subtracts from, a role for judges in enforcing the resulting limitations because, as with enumerated rights, it indicates the political branches were not meant to wield plenary power and could not be relied on to self-police that fact. That is another reason for a judicial role in the Founding era beyond what Greene envisions.

Further, Greene asserts, without argument, that the Ninth Amendment was meant to assign the protection of "other" rights "retained by the people" to the states.[16] This implicitly takes a side in the long-running battles on the meaning of the Ninth Amendment. For decades, scholars have heatedly debated various views on the Ninth, some of which are more idiosyncratic than others. But the two most visible sides are those of scholars such as Kurt Lash[17] and Akhil Amar[18] who insist that the amendment is a tool of federalism, and those such as Randy Barnett[19] and Dan Farber[20] who argue the Amendment protects unenumerated rights just as strongly as other amendments protect enumerated rights. Scholars like Barnett and Farber disagree on *what* those unenumerated rights are, but the conclusion that those rights are constitutionally protected—plus the contention that they are judicially enforceable—puts judges in a much more central position than Greene's mediating-institutions view. This, again, has implications for his later argument when he points to the Ninth and Tenth Amendments in support of a positive rights understanding of the Constitution.

II. Anticanon Fodder

Greene moves on to the Civil War, Reconstruction, and later the Progressive era through telling the story of three cases in the "anticanon." Greene wrote on the anticanon in 2011 when a number of scholars were arguing about what should be included in that category.[21] These are cases that are not just wrongly decided, but "famously *wrong*, forming an 'anticanon' of cases that all mainstream lawyers must reject."[22] "Mainstream" is doing a lot of work there, it turns out. He includes *Dred Scott* and *Plessy v. Ferguson* and tells the story of how both used (and perverted) the concept of rights in enforcing white domination over minorities. But the third on the list, *Lochner v. New York*, is a very different case.

Greene uses *Lochner* as a jumping off point to discuss later developments, which makes it very fitting for the case to have a large role in his story, and there will be more to say about the case below. But it is worth briefly mentioning here that it seems odd to fit it in through the anticanon device, even on Greene's own terms. When Greene argued that *Lochner* belonged in the anticanon ten years ago,[23] he noted the recent revisionism on *Lochner* and its legacy.[24] This included discussing Professor David Bernstein's work on the case, which culminated in Bernstein's book (also published ten years ago).[25] Greene even admitted in the article—which many progressive scholars are loath to do—that "the *Lochner*-era Court upheld vastly more challenged state laws than it invalidated,"[26] and thus that it was not quite the bogeyman it is often made out to be.

possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. art. I, § 1.

13 *See* U.S. Const. art. I, § 8; *id.* amend. X.

14 Pa. Const. of 1790, art. IX, § 26.

15 *See, e.g.*, Dorsey v. State, 44 S.W. 514, 515 (Tex. Crim. App. 1898) (stating "We do not agree to the doctrine that under this power, or any other, the Legislature can make criminal the mixture or mingling of articles of food which are wholesome and nutritious, and prohibit the sale thereof" without using the term "right").

16 How Rights Went Wrong at 29.

17 Kurt T. Lash, The Lost History of the Ninth Amendment (2009).

18 Akhil Reed Amar, The Bill of Rights 120 (1998). Amar argues that the Ninth Amendment protects the collective right of self-government in the states, which can be called a "collective rights" view of the amendment, but which overlaps with the federalist views of Lash and others.

19 Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1 (2006).

20 Daniel Farber, Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have (2007).

21 Jamal Greene, *The Anticanon*, 123 Harv. L. Rev. 379 (2011). A number of scholars participated in a symposium (held on April Fools' Day, 2011) discussing what makes up the "anticanon." *See* Edward J. Larson, *Anti-Canonical Considerations*, 39 Pepp. L. Rev. 1, 1 (2013).

22 How Rights Went Wrong at 34.

23 Greene, *The Anticanon*, *supra* note 21, at 417-22.

24 *Id.* at 417 ("*Lochner* revisionism has become something of a cottage industry as libertarians have become more prominent at think tanks, in politics, and in the legal academy.").

25 David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (2011).

26 *Id.* at 419-20.

Greene certainly did not defend *Lochner*, and he clearly stated that despite the revisionism it "remains firmly within the anticanon."[27] But it was a bit odd that his more nuanced view of the case in that article did not transfer to this book. Indeed, Vanderbilt law professor Suzanna Sherry—no friend of *Lochner*—has stated she thinks the case is no longer in the anticanon because of work by those like Bernstein.[28] Yet in Greene's latest discussion, Sherry's work is not noted, nor is Bernstein's.

In any case, Greene uses *Lochner* in *How Rights Went Wrong* not to discuss the evils of protecting the right to contract or whether it was a concerted attack on social welfare legislation. Thankfully, he largely stays away from those stereotypes. Indeed, in keeping with his message of preferring mediation to absolutism, he says, "The sin of *Lochner* isn't that the Court identified *a right to contract*, protected by judges—a common view of its error—but rather that it didn't also see *a right to labor*, protected through politics."[29] Instead, he focuses on *Lochner* to examine the dissents in the case, of Justice John Marshall Harlan and Justice Oliver Wendell Holmes. Greene explicitly says Holmes is the bad guy, because he makes rights an either/or proposition, while Harlan is the hero because of his mediative approach.[30] Yet, it is Holmes' message that is the law today, while Harlan's is lost.[31]

Holmes' lone dissent dismissed Joseph Lochner's right to contract claim as simply not supported by the Constitution at all. To Holmes, other than a few narrow rights, the Constitution gives legislatures free rein (the Lockean spirit of the Pennsylvania Constitution of 1790 would have been an alien to him).[32] Harlan, on the other hand, recognized a right to contract, but he saw the state's police power as broadly allowing for economic and social legislation.[33] Some right to contract claims might succeed, but the Court should allow "reasonable" laws to survive. Greene claims we would be much better off if we had adopted Justice Harlan's method of mediating between the "rights," as Greene describes them, on both sides of our conflicts.[34] But Holmes' dissent carried the day, and we now have a world where everyone is scrambling to have their rights recognized, instead of having their rights weighed against other rights.

III. The Frankfurter Plot

It was through intrigue that Justice Holmes' *Lochner* dissent burst forth into our law in the form of Footnote Four of *United States v. Carolene Products Co.*[35] in 1938. The story of how this happened is a highlight of Greene's book. Greene first goes into some detail with the biographies of Holmes and Harlan (and pulls no punches on Holmes' well-known despicable character).[36] He then shifts to the real center of the story, Felix Frankfurter. Greene describes Frankfurter as an idolizer of Holmes who almost single-handedly popularized Holmes' *Lochner* dissent.[37] (He also brilliantly describes Frankfurter as "that guy,"[38] i.e. an obsessive social climber.) If not for his efforts, the dissent might have remained a forgotten lone opinion in an otherwise rather idiosyncratic right to contract case. Greene argues that through Frankfurter's informal and formal influence, both before and after FDR placed him on the Court, the modern bifurcation of rights as an on/off switch became our law, which Greene describes as follows: If a right is textually in the Constitution, is needed to protect democracy, or protects "discrete and insular minorities," it might receive a good deal of protection. If it is not one of those, it receives almost none. This then was expanded in the *Griswold*/*Roe* right to privacy cases (that Greene examines with no sacred cows[39]), but otherwise it remains how we look at rights today.

Thus, to Greene, Footnote Four is the problem. Rights are used as trumps over anything else, and the name of the game is to get your interest labeled a "right" so you can bludgeon the other side with it. And he is entirely correct to blame Footnote Four for much of what ails modern rights jurisprudence. The bifurcation of rights into being very protected or not at all protected has little justification and leaves far too many Americans high and dry in their interactions with the state.[40]

As for his solution to this problem, he takes a few wrong turns, especially when he ignores how we even get to referring to many of the interests he advocates as "rights." But he also is silent on an implication that seems to inevitably follow from his solution. And that implication—that there might be more of a role for economic liberty in the law—is something that many

27 *Id.* at 417.

28 Suzanna Sherry, *Why We Need More Judicial Activism*, *in* Constitutionalism, Executive Power, and the Spirit of Moderation 22 (Giorgi Areshidze et al. eds., 2016).

29 How Rights Went Wrong at 40.

30 *Id.* at 44.

31 Here and throughout this review "Justice Harlan" means the first Justice John Marshall Harlan, not his grandson, also named John Marshall Harlan, who served on the Supreme Court from 1955 to 1971. But it should be noted that Greene also approvingly discusses the second Harlan's jurisprudence as continuing his grandfather's mediative tradition—and how the Warren Court missed his lead. *Id.* at 84 ("Just as the older Harlan accepted a right to contract that had to be balanced, with care, against the need for reasonable regulation, his grandson recognized a right to privacy that likewise called for a temperate balance against government interests.").

32 Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

33 *Id.* at 76 (Harlan, J., dissenting).

34 How Rights Went Wrong at 54-56.

35 304 U.S. 144, 152 n.4 (1938).

36 How Rights Went Wrong at 44-54. Among Greene's many apt comments on Holmes is "The law can become grotesque in the hands of such a person." *Id.* at 48.

37 *Id.* at 63 ("If Holmes was the patron saint of the Progressive legal movement, Frankfurter was its high priest. His fingerprints were everywhere in the federal government during the New Deal era.").

38 *Id.* at 60.

39 *Id.* at 68-86.

40 Footnote Four critiques, and critiques of rights bifurcation, are their own cottage industry, but for a few highlights, see Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479 (2008); Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Calif. L. Rev. 685 (1991); Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985).

conservatives and libertarians (but perhaps not many progressive law professors) might be pleased with.

IV. What Is a Right?

But before moving to economic liberty, we must discuss something Greene advocates that conservatives and libertarians will find hard to accept. A fundamental difference between Greene's vision for American constitutionalism and the classical liberal view of the Constitution is what constitutes a "right." Greene never really answers this question. But he definitely thinks that the Constitution recognizes—maybe not outright protects, but at least recognizes—positive rights.[41] One example he discusses in his *Lochner* analysis is the right to safety in workplaces, and how the courts of the time could have incorporated that into a more mediative analysis: "Understanding turn-of-the-century labor and safety laws as *rights protective* could have helped align new thinking about equality and the basic trappings of a well-lived life with old thinking about legislatures rather than courts as the primary sites for turning those ideas into reality."[42] He sees this protection of what he calls rights (which in the context of *Lochner* itself would mean a right to be free from being offered to work more than sixty hours in a week or ten hours in a day) as part of the Constitution. How? He explains that "[l]egislatures seeking to shield vulnerable members of the community from the new dangers of the industrial age were attending to the rights of their citizens in just the way the Bill of Rights seemed to contemplate, most explicitly via the Ninth and Tenth Amendments."[43]

Of course, the Ninth and Tenth Amendments—to the extent they apply to the powers of state legislatures (again, Greene glosses over the opposing view that the Ninth Amendment protects individual rights)—recognize that the states have powers not surrendered to the federal government. The Tenth Amendment in particular does not recognize what has traditionally been called a "right" (it only uses the word "powers"), other than what is often loosely described as a people's "right to self-government."[44] That phrase is a perfectly fine way to describe popular sovereignty. But making the move from recognizing that states have legislative powers to seeing those *powers* as protecting *positive and constitutional* rights, such as the right of employees for employers not to require work weeks of a certain length, turns rights into more than just shields against the government. It dispenses with governmental powers and interests and turns everything into rights.

This may seem pedantic and linguistic. What does it matter if a legislature's attempt to regulate relations between private parties, such as work hours, wages, or birth control coverage, is called a power or a protection of rights? It matters because it affects what courts are seen as doing. If all Greene is asking for is that courts be given more leeway in mediating between what we normally see on one side as constitutional rights—free speech, freedom of religion, a right to privacy—and on the other side as the state's interest (as courts generally pair them up), then his solution would be straightforward. Probably some kind of intermediate scrutiny, or rational basis plus, or what have you, allowing for all kinds of nuance in looking at the competing interests and the granular intentions, effects, and potential compromises of the particular dispute.

But that is not what he wants. Instead, by framing what we normally call the government's side a "right," he sees the court's job as a mediation not between freedom and coercion, but between freedom and freedom, from different points of view. This allows for court-ordered remedies that require the deployment—not the abstention—of state power, like ordering the government to provide resources. But, in a more nuanced fashion, it also allows a different framing of the resolution of a case like *Lochner*. Instead of simply ruling for the government because the state has the power to make the challenged rule, like Holmes would have done, a court can defer to the legislature because the legislature has *already* performed a mediation between the rights of various groups, à la Harlan.

And this is where it seems Greene will likely lose many conservatives and libertarians. Not because he advocates more allowance for social welfare legislation than Justice Rufus Peckham, the author of *Lochner*, but because he brands so many more things constitutional rights than does the traditional Lockean view without much justification for the tectonic shift. It is a fine sentiment to believe that state legislatures and Congress protect *constitutional rights* when they adopt regulations that restrict business practices, curtail campaign finance spending, or require reasonable accommodations of the disabled. But the constitutional architecture needed to make this jump is not there. Just because the Tenth Amendment says that all powers the federal government does not have are reserved to the states or to the people does not mean that a vast amount of what those powers might be used to protect are therefore "rights." As for the Ninth Amendment, using it to get to "social welfare legislation equals constitutional rights" is an awfully big lift, even for those who see it as a federalism clause.

This vision of positive constitutional rights contrasts with the often maligned but irrepressible understanding of unenumerated—but almost wholly negative—constitutional rights. Ever since George Mason penned the first Lockean Natural Rights Guarantee, discussed above, American constitutions have—with substantial justification—tempted an interpretation that protects rights beyond those explicitly enumerated, but hardly ever strays far beyond those of the Lockean variety, i.e. rights against government coercion. Versions of Mason's clause were used to protect negative rights in the antebellum era.[45] And whatever the contested meaning of the Ninth Amendment itself, only a few decades after it was drafted, state constitutional

41 *See, e.g.*, How Rights Went Wrong at 182 ("The enforcement of positive rights in particular—rights to receive a benefit or support, as opposed to rights against being burdened—invites the political branches into a *conversation* about rights that has become too rare in our modern age of judicial supremacy.").

42 *Id.* at 42.

43 *Id.*

44 *See, e.g.*, Raoul Berger, *Benno Schmidt vs. Rehnquist and Scalia*, 47 Ohio St. L.J. 709, 710 (1986) ("Simply stated, the judicial creation of such 'individual rights' deprives the people and the states of the right to self-government guaranteed to them by the tenth amendment.").

45 *See generally* Calabresi & Vickery, *supra* note 10.

writers started sticking versions of it in their own bills of rights.[46] These provisions referred (and still refer) to rights "retained by the people" (meaning not delegated to the state) and, as I have elsewhere argued, have no defensible reading other than protecting individual rights.[47] Indeed, in the early 19th century, some courts espoused a general natural rights jurisprudence sometimes without any textual constitutional umbilical cord at all.[48] The *Lochner* era's use of the Due Process Clause to protect some—but by no means all—negative liberties is in line with this tradition, as is even the modern Court's protection of contraception and sexual intimacy.[49] The fact that constitution writers and judges from Mason to Justice Anthony Kennedy have outlined and enforced unenumerated constitutional rights from our earliest beginnings, but have done little to articulate them, let alone enforce them, as *positive* rights is evidence of what architecture is out there. Plenty for negative rights, not much for positive.

This is not to say that American constitutionalism has no experience with positive rights. Every state constitution provides for a public education in some way, often with explicit rights terminology.[50] And courts have in recent decades used remedial mechanisms to try to force legislatures to better guarantee that right.[51] Thus, when American constitutions want to recognize positive rights, they can do so. Indeed, states' experience with educational rights litigation—mixed, to put it mildly—counsels additional caution to any effort to judicially guarantee positive rights.[52] But in any case, given that the federal constitution does not textually protect positive rights (at least of the social welfare kind), there is really no justification for federal courts recognizing positive social welfare benefits as rights. Thus, for conservatives and libertarians worried about the textual or structural underpinning of any constitutional vision, jumping to Greene's rights framework seems to be a bridge that cannot be crossed. (It should be noted that equal protection is an area where the positive/negative rights division is much blurrier, and although conservatives and libertarians may not ultimately agree with them, Greene makes some thought-provoking arguments in his discussion of equal protection and disability.[53])

More fundamentally, in his calls for legislatures to play a greater role in mediating rights and for courts to order legislatures to provide those rights as a remedy, Greene's analysis lacks a skeptical realism. In his view of rights mediation, the individual right on one side is weighed against the legislature's interest (and the rights that the legislature is trying to protect) on the other. Greene acknowledges that legislatures sometimes have malign intentions, and he says those intentions should come into play in a court's analysis when, for example, a facially neutral law actually is designed to discriminate against a disadvantaged minority. Indeed, in many cases he thinks that malign outcomes—not just intentions—should come into play. But it seems that for most legislation—such as garden-variety social welfare legislation—Greene thinks the legislature should be assumed to be acting in good faith as voicing the actual wishes of its constituents to try to solve a social problem. He is not alone in this assessment, of course. However, if we truly are to get into the particulars and nuance of mediating, that calls for an honest critique of the sausage-making of legislatures, and not the "face of the statute" view that prevails in most constitutional challenges. And as decades of analysis in public choice economics will tell us,[54] that looks extremely messy, and often extremely detrimental to the government's cause in a court case.

Take a challenge to an occupational licensing law. We know from various studies that occupational licensing is generally pushed by those already in the occupation in order to raise barriers to entry and push prices higher.[55] This is commonly known as rent seeking.[56] Although there may sometimes be a public benefit to

46 Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Rights in State Constitutions Before the Civil War*, 68 Mercer L. Rev. 389, 403-17 (2017).

47 *Id.* at 433-43.

48 Susanna Sherry, *Natural Law in the States*, 61 U. Cin. L. Rev. 171, 182-221 (1992) (detailing numerous "natural law" cases from several states).

49 The rights to use contraception and to engage in private consensual sexual activity are both negative freedoms from government coercion. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003).

50 Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 Cornell L. Rev. 582, 582 (1996).

51 Areto A. Imoukhuede, *Enforcing the Right to Public Education*, 72 Ark. L. Rev. 443, 464-66 (2019).

52 *See, e.g.*, William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 Colum. L. Rev. 1897, 1907-15 (2017) (discussing legislative inaction in the face of judicial rulings). Greene provides examples from other nations where court recognition of positive rights has actually led, he claims, to real changes. India's experience with providing lunch to students is one he relies on. How Rights Went Wrong at 102. Yet even there the record of providing positive rights, especially in contrast to market alternatives, should be deflating to supporters of positive rights. The jaw-dropping fiasco of India's schools is beautifully told in James Tooley's book *The Beautiful Tree*, where he details the failures—unrelated to a lack of funding—of India's public schools to simply teach, let alone educate, the nation's children and the consequent heavy reliance on private schools by even the poorest of its citizens. James Tooley, The Beautiful Tree 21-25 (2013). All this with a judicial system enforcing the positive right to an education.

53 How Rights Went Wrong at 171-94 (chapter on disability rights).

54 For a short summary of this vast literature, see William F. Shughart II, *Public Choice*, The Library of Economics and Liberty, https://www.econlib.org/library/Enc/PublicChoice.html (under the heading "Legislatures" explaining how "[s]mall, homogeneous groups" lobby for benefits to the detriment of the uninformed general public).

55 *See generally* Morris M. Kleiner, Licensing Occupations: Ensuring Quality or Restricting Competition? (2006); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. Pub. Pol'y 209 (2016); Occupational Licensing: A Framework for Policymakers 22 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf (report of the Obama White House).

56 *See* Matthew D. Mitchell, *Rent seeking at 52: an introduction to a special issue of public choice*, 181 Pub. Choice 1, 1 (2019) ("When either economic surplus or real resources can be transferred involuntarily, individuals and groups who might be favored or disfavored have an incentive to expend effort seeking or opposing those transfers. Such efforts often are socially wasteful and ought to be considered alongside other costs of transfers such as deadweight losses. . . . [This idea] was eventually dubbed 'rent seeking.'").

licensing, in occupations as diverse as cosmetology[57] and funeral arranging,[58] licensing laws often not only leave consumers and prospective entrepreneurs worse off, but they are *designed* to do so.[59] The laws are generally pushed by the regulated industries themselves, not the general public, and there is no informed consensus among the public that these laws are the best way to protect any "right." Greene admits that this very kind of rent seeking happened in the infamous *Williamson v. Lee Optical of Oklahoma, Inc.*,[60] which formalized the modern rational basis test.[61] Under Greene's approach, it seems that the understanding that much legislation is of this nefarious variety should enter into any mediation by the courts. Yet Greene does not say how courts should account for this extremely common phenomenon which abounds in the legislative bodies that he claims the Constitution intends to be the primary protectors—and mediators—of our rights. He does not take this into account, even though it seems like an important part of the story.

V. A Grand Bargain?

But even though he does not challenge the anticompetitive seedy underbelly of real-world legislative power, Greene seems to offer a way that doing so could become part of our constitutional law. And that is through his praise for Justice Harlan's *Lochner* dissent. The theory underlying Harlan's dissent is not a more ecumenical alternative to that of Justice Holmes. It is in fact what courts commonly did in the *Lochner* era. If we adopted Justice Harlan's method of deferring to legislative judgments, we actually would go back to much of the larger jurisprudence of that era, not to a golden age of mediation that never happened. We would certainly want to update it to a more cosmopolitan understanding of the Constitution, as described below. But that updated-past-for-the-future might be something many people, from Greene to libertarians, could embrace. Perhaps.

A colleague of mine at the Institute for Justice once quipped that if the standard from Justice Harlan's dissent were the law in economic liberty claims today—instead of the modern rational basis test—we would win all of our cases. This might be an overstatement, but it is accurate in suggesting that Harlan's dissent would make winning cases in this area a lot easier than it is today. Harlan's dissent counseled deference to legislative judgments, but it permits more balancing of the rights and interests on both sides than the rational basis test of *Lee Optical*. It would be a world where entrepreneurs could challenge many currently unassailable restrictions on the right to earn a living, or the right to contract, or other economic liberties, with a greater chance of success. We can see this by examining a case Greene does not mention, but that has recently received a once-a-century level of news coverage: Justice Harlan's 1905 opinion in *Jacobson v. Massachusetts*.[62]

The relationship (or lack thereof) between *Jacobson* and our modern rights jurisprudence has been hotly debated since the COVID-19 pandemic began,[63] but that confusing conversation is outside of our present purposes. What is relevant here is the relationship between *Jacobson* and *Lochner*, its near-neighbor in the U.S. Reports. Mr. Jacobson's challenge to a vaccination mandate lost 7-2 at the Court, with no written dissent. Three days later, the Court heard oral argument in *Lochner*, and two months later, it issued its (in)famous 5-4 decision, along with the two (in)famous dissents.[64] As you might surmise considering those numbers, three Justices—Melville Fuller, Henry Brown, and Joseph McKenna—voted in the majority in both cases, agreeing both that a particular vaccination mandate did not violate the Due Process Clause and that a specific maximum-hours law for bakers did. Although to our modern eyes it might seem astonishingly inconsistent for a judge to vote as those three did, a comparison of the language used in the various opinions demonstrates otherwise.

In assessing the vaccination order's constitutionality, Harlan declared for the *Jacobson* Court:

> if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[65]

Harlan and six of his colleagues concluded that the state easily met this standard, and the opinion provided a slate of scientific data supporting the effectiveness of the smallpox vaccine.[66] When we move to *Lochner* itself, Harlan's approach was no different. Indeed, he quotes that exact sentence from *Jacobson* in his *Lochner* dissent.[67] Now there is some tension both within that sentence and between it and other language in each of Harlan's opinions. Which is more important: the "real and substantial" relationship (which sounds fairly demanding of the government), or the "beyond all question" requirement (which seems to counsel more judicial deference)? He says both "real and substantial" and variants of "there must be no doubt" multiple times.

But there is also similarly squishy (or should we say "mediative"?) language in Justice Peckham's majority opinion in *Lochner*. Peckham says the appropriate question to ask is:

> Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his

57 Dick M. Carpenter II, et al., License to Work 9 (2d ed. 2017), https://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf.

58 Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why it Matters*, 5 J. Bus. Entrepreneurship & L. 135, 137 (2011).

59 *See* Larkin, *supra* note 55, at 235, n.129.

60 348 U.S. 483 (1955).

61 How Rights Went Wrong at 67.

62 197 U.S. 11 (1905).

63 *See, e.g.*, *Recent Case, In re Abbott*, 134 Harv. L. Rev. 1228 (2021).

64 *Jacobson* was decided on February 20, 1905, while *Lochner* was argued on February 23 and 24 and decided on April 17.

65 *Jacobson*, 197 U.S. at 31 (citing Mulger v. Kansas, 123 U.S. 623, 661 (1887) (opinion also by Harlan, J.)).

66 *Id.* at 31 n.†.

67 *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).

> personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[68]

Thus, the difference between Peckham and Harlan—the Harlan of both *Jacobson* and *Lochner*—is one asks if a law is "unreasonable, unnecessary and arbitrary," whereas the other inquires if it has a "real and substantial" relation to valid ends or is "beyond all question" unconstitutional. There seems to be a difference there, but not a chasm. Both standards are in the same ballpark, indeed on the same infield. Justice Holmes is several blocks away, asking only if the right is fundamental.

How Peckham and Harlan then apply these standards to the Bakeshop Act depends, to a large degree, on their interpretation of the facts. As David Bernstein has pointed out, Peckham's largely fact-free opinion—where he purported to rely on "statistics regarding all trades and occupations"[69] without actually providing those statistics—probably was relying on Mr. Lochner's brief, which *did* provide statistics.[70] Lochner's attorneys cited a variety of medical articles, including one from *The Lancet*, providing evidence that bakers were not dissimilar in various health and workplace safety measures from other occupations that the New York legislature had left alone.[71] In contrast, Harlan cited explicitly his own contrary evidence.[72] Indeed, Harlan concedes that "the question is one about which there is room for debate and for an honest difference of opinion."[73] And it is because of this room for debate that Harlan disagreed with his colleagues, including the three who had signed on to his *Jacobson* majority.

Harlan further elucidated his views on the proper scope of deference three years later in *Adair v. United States*,[74] a challenge to a federal bar on firing employees based on union membership. The Court applied the "real and substantial" standard and found the mandate unconstitutional, with Harlan writing the majority opinion and Holmes authoring another dissent. How did Harlan square this result with *Lochner*?

> Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation. The minority were of opinion that the business referred to in the New York statute was such as to require regulation, and that, as the statute was not shown plainly and palpably to have imposed an unreasonable restraint upon freedom of contract, it should be regarded by the courts as a valid exercise of the State's power to care for the health and safety of its people.[75]

And how does that contrast with the law in the present case?

> While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.[76]

Far from offering an alternative to the jurisprudence of his time, here Harlan fits right in with the *Lochner* era.

The reason for the present comparison of these various opinions is not to emphasize that Harlan was different from Holmes. That everyone agrees with, and it is why Greene makes Harlan the hero. And it certainly is not to say that Greene thinks his approach would result in vitiating protections for union membership. Greene believes nothing of the kind. It is to say that Harlan's approach was in fact not so different from Peckham's. Thus, adopting Harlan's approach would give someone challenging an economic regulation—depending, of course, on the facts—a real and substantial chance to have it declared unconstitutional.

A response to this is that the *Lochner*-era Court applied this standard—whether it be Harlan's or Peckham's—selectively, and that it made some of the same "rightsism" errors Greene says courts do today. And that criticism is absolutely warranted. It was another two decades, after all, before the Court began its long beat-around-the-bush effort at incorporating the Bill of Rights.[77] As Gerard Magliocca has detailed, the Court of the late 19th century repeatedly shunned applying the rights of the accused against the states—perhaps (he argues) because of worries over labor agitation—while at the same time beginning its application of property rights and economic liberty to the states via the Fourteenth Amendment.[78] The Court did occasionally apply non-economic liberties against the states, such as in the parental choice cases of *Meyer v. Nebraska*[79] and *Pierce v. Society of Sisters*;[80] and it occasionally used property rights to protect minorities, as in

68 *Lochner*, 198 U.S. at 56.

69 *Id.* at 59.

70 David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 Wash. U. L.Q. 1469, 1495 (2005).

71 *Id.*

72 *Lochner*, 198 U.S. at 70-71 (Harlan, J., dissenting).

73 *Id.* at 72 (Harlan, J., dissenting).

74 208 U.S. 161 (1908).

75 *Id.* at 174.

76 *Id.*

77 *See* Gitlow v. New York, 268 U.S. 652 (1925) (first applying a right in the Bill of Rights to the states). The Court is often credited with having begun this earlier with the Takings Clause, but that was actually not an incorporation case, but simply a case applying the Due Process Clause of the Fourteenth Amendment. Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

78 Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 Minn. L. Rev. 102, 105-08 (2009).

79 262 U.S. 390 (1923).

80 268 U.S. 510 (1925).

Buchanan v. Warley[81] (but not in *Plessy v. Ferguson*,[82] of course). To our modern eyes, however, this overall imbalance is inexcusable.

So let's not excuse it. There is something of a Grand Bargain in Greene's endorsement of Harlan's approach. To be sure, Greene does not explicitly offer such a bargain, but it is lying there waiting to be picked up and examined. On the one hand, he is suspicious of the modern strict scrutiny approach for many rights. He also wants to raise up other rights that make some uncomfortable, including not just positive rights, but discrimination claims under disparate impact theories.[83] On the other hand, he seems open to allowing claims to go forward under a Justice Harlan standard that today are dead-on-arrival under the *Lee Optical* rational basis test. Of course, many libertarians would ask to keep strict scrutiny and apply it to every negative right. But libertarians and others who are open to viewing Harlan's standard as a pragmatic way to enhance the protection of Lockean rights such as economic liberty might think about what a balancing approach could give, for example, entrepreneurs who cannot start a business because of rent-seeking lobbyists and property owners who cannot build cheaper housing because of NIMBY zoning laws. Something that remains unclear is how the positive rights Greene also wants would work under this rubric—would they just nullify economic liberty in the end anyway? Would they reproduce rational basis by other means?

That's not in the book. But the book does include a tantalizing reference to a case the Institute for Justice brought challenging a Missouri law that required prospective African-style hair braiders to get a cosmetology license.[84] This required them to pay thousands of dollars to receive 1,500 hours of cosmetology training, almost none of which involved hair braiding.[85] The challenge to this senseless requirement was defeated in the Eighth Circuit Court of Appeals in an all-too-typical paean to judicial restraint and deference to the legislature. Greene mentions the case in his introduction as one that failed because of "rightsism." As I neared the end of the book, I kept hoping it would reappear, like an intriguing character from the first scene of a movie. But then, to my disappointment, it never did, not even in a secret scene after the credits closed.

I finished the book wondering how Greene's suggested approach might have brought hope to those braiders. If Greene wants to take Justice Harlan seriously, it seems that hope is there. Without endorsing a Grand Bargain, there is a grand amount that progressives like Greene and classical liberals like me can discuss in their mutual ire at the "rightsism" of Footnote Four and Justice Oliver Wendell Holmes. I look forward to discovering what common ground could be there.

81 245 U.S. 60 (1917).

82 163 U.S. 537 (1896).

83 How Rights Went Wrong at 104-07.

84 How Rights Went Wrong at xiii ("Two Missouri women, Ndioba Niang and Tameka Stigers, claimed the right to braid hair without completing a 1,500-hour training course and obtaining a cosmetology license. They lost.").

85 Niang v. Carroll, 879 F.3d 870, 874 (8th Cir. 2018), *vacated as moot*, 139 S. Ct. 319 (2018).