Federalism and the Conservative Ideology

J.M. Balkin*

Assistant Professor of Law, University of Missouri-Kansas City School of Law; A.B., Harvard University, 1978; J.D., Harvard University, 1981.

I. Introduction

DURING THE SUPREME COURT'S ill-fated attempt to resurrect the tenth amendment, from *National League of Cities v. Usery*[1] to *Garcia v. San Antonio Metropolitan Transit Authority,*[2] there was a delightful role reversal which spoke volumes about Supreme Court doctrine and politics. Here were the advocates of judicial activism, the liberal Justices, Brennan, Marshall (and later Blackmun), preaching respect for the acts of a majoritarian body, counselling caution in invoking the dreaded power of judicial review, and arguing that those dissatisfied with legislative decisions must resort to the polls and not to the courts.[3] Here were the advocates of judicial restraint, the conservative Justices, Rehnquist, Burger, Powell (and later O'Connor), exhorting the Court to preserve constitutional rights by striking down offensive legislation, defending the interests of a neglected group ("the States as States"),[4] and fearful that the political process would prove inadequate to protect that group's interests.[5]

Of course, the entire matter can be explained by the relative importance of states' rights to modern liberals and conservatives. The commonly received wisdom is that states' rights are favored by conservatives, so that it was natural that the conservative Justices would be

*I would like to thank my research assistant, Jan Dodd, for her assistance in the preparation of this article, and my colleagues, Dennis Corgill and John Scurlock, for their helpful comments.

1. 426 U.S. 833 (1976) (holding that the tenth amendment prevents Congress from extending minimum wage and overtime provisions of the Fair Labor Standards Act of 1938 to state and local governmental employees).
2. 469 U.S. 528 (1985) (holding that minimum wage and overtime provisions of the Fair Labor Standards Act of 1938 were constitutional as applied to employees of the San Antonio Metropolitan Transit Authority).
3. *Id.* at 546-47, 552, 1018; *National League of Cities*, 426 U.S. at 857-58, 868 n.9, 875-78 (Brennan, J., dissenting).
4. *National League of Cities,* 426 U.S. at 837.
5. *Garcia*, 469 U.S. at 566-67, 574-75 & n.18 (Powell, J., dissenting).

willing to scrutinize any threat to those rights carefully. Similarly, liberals tend to favor national power over state power, so that they would resist any attempt at searching judicial review of legislation under the tenth amendment.

All of this, however, assumes that there is something inherently attractive to conservatives about states' rights. We do, perhaps, sense this intuitively, probably because we recall that a standard conservative argument is that expansion of civil rights protections will unduly interfere with the prerogatives of state and local governments.[6] Still, it is worth investigating how the connection between federalism and conservative ideology came about. In this article, I will trace the development of the ideas of conservatism and states' rights. I will show how these ideas, which have not always been allied in American history, came to be associated in modern times.

II. Conservatism and Liberalism

I will begin with a brief description of modern conservatism. Most people think of conservatism as the natural opposite of modern liberalism. These political ideologies are seen as competing with each other over many diverse issues of public policy, often as bitter rivals. However, the two ideologies are really quite similar. Indeed, they are best thought of as subideologies of a more general ideology in modern American life, which we may refer to as Liberal Democratic Capitalism.[7] Both modern liberals and conservatives alike support private property, the free market system, democratic accountability of government officials, rights of conscience and personal autonomy, and the Rule of Law. In many of these respects they differ greatly from other belief systems that have existed before or exist presently. Therefore, in discussing the differences between a liberal like Justice Brennan and a conservative like Chief Justice Rehnquist, it is important to remember that they are much closer in their beliefs than either is to Josef Stalin or the Ayatollah Khomeini.

Indeed, the major difference between modern liberals and conservà-

6. *E.g.*, Los Angeles v. Lyons, 461 U.S. 95, 112–13 (1983); Ingraham v. Wright, 430 U.S. 651, 682 (1977); Meachum v. Fano, 427 U.S. 215, 229 (1976); Rizzo v. Goode, 423 U.S. 362, 380 (1976); Wolff v. McDonnell, 418 U.S. 539, 569 (1974); Younger v. Harris, 401 U.S. 37, 43 (1971).

7. By "Liberal" with a capital letter, I mean the basic political philosophy of the West, and not the subcategory of thought which constitutes American liberalism. For a sampling of quite different versions of Liberal Democractic Capitalism, compare J. RAWLS, A THEORY OF JUSTICE (1971) with F. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

tives is not so much the things they hold dear but the relative emphasis they tend to place on those things. Thus, a good way of explicating their differences is to identify the rights that modern liberals and conservatives think are (relatively) the most important to safeguard.

Consider, for example, the right of free speech. Both modern liberals and conservatives in America believe in free speech. However, the right of free speech includes with it the right to injure, offend, or harm others through its exercise. Thus, if we set a very high standard for plaintiffs to meet in libel cases, we will have more injury to reputation. If we require local governments to issue more permits for protest marches, we will have more disruption of traffic. If we allow the press to publish classified material, we risk a greater danger to our national security, and so forth.

Thus, any civil right is not only a right of individuals against the government, but a right which is opposed to rights of others in the community. A balance between the opposed rights must be struck, and herein lie the differences between modern liberals and conservatives on free speech. Conservatives are more willing to allow restrictions on expressive activities in order to protect other communal interests like reputation, military authority, national security, educational discipline, property, or social order in general. Liberals believe that all of these are good things to protect, but are less willing to engage in such a trade-off, although at some point they too will acknowledge that the individual's interest in expressive activity must yield to more pressing social concerns.

We can use a pair of shorthand expressions to describe this phenomenon. We will say that liberals take a more individualist position with respect to the right of free speech, and conservatives take a more communalist position. Individualism is the orientation that de-emphasizes the responsibility that an individual bears to others for the consequences of her behavior. Communalism is the orientation that emphasizes the responsibility that an individual bears to others for the consequences of her behavior.[8]

From the above example, one might conclude that modern liberals are always more individualistic than modern conservatives. However, this is not true. The modern conservative position on liberty of con-

8. For a discussion of these concepts and their larger significance in legal argument, *see* Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1987); Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 UMKC L. REV. 392 (1987).

tract is relatively individualist, and the modern liberal position is relatively communalist. That is, the liberal position more often holds that economic regulation is necessary to avoid harms that the naked exercise of economic power may cause. Liberals are more likely than conservatives to perceive forms of market failure that should be remedied by some form of market regulation, whether through strict enforcement of the antitrust laws, increased liability in tort, or redistributive social welfare programs. Conservatives, on the other hand, are more likely to think that a system of free enterprise unburdened by the hand of government will, in the long run, solve all of the problems perceived by liberals.

In general, then, neither liberalism nor conservatism is a purely individualist or communalist philosophy. Rather, each position is a melange of individualist and communalist stances on different preferred civil rights. In general, modern liberals are more individualist with respect to free speech, sexual autonomy, and the rights of criminal defendants. They tend to take relatively communalist positions with respect to the right of freedom of contract. Modern conservatives have precisely the opposite orientation. They tend to take relatively communalist positions regarding free speech, sexual autonomy, and the rights of criminal defendants, while they tend to take a more individualistic approach in economic matters, preferring freedom of contract to market regulation.[9]

The different treatment of economic liberty from other types of liberty leads to many delightful contradictions in both liberal and conservative ideologies. Liberals who dislike the felony murder rule in criminal law may advocate strict liability in tort law, and conservatives often take the opposite position. Conservatives are more happy to regulate consensual sexual behavior in the bedroom than consensual economic behavior in the marketplace. Liberals are less willing to accept the inevitable harms accruing from free contract than those accruing from free speech.

9. A consequence of the conservative distaste for restrictions on freedom of contract is relatively weaker support for civil rights statutes outlawing discrimination against blacks, women, and other minority groups. Anti-discrimination ordinances are by their very nature alterations of free market principles. The Civil Rights Act of 1964, for example, restricts the right of employers to decide the terms and conditions under which they will hire and fire people. A still more dramatic example is the doctrine of comparable worth in sex discrimination cases, which is opposed by conservatives on the grounds that it would greatly disrupt the free enterprise system's pricing of labor. The idea that the free market is a neutral register of people's wants and desires, and that the state is not responsible for the inequalities that result from the outcome of market forces is a recurrent theme in modern conservative thought.

A thumbnail sketch of the respective positions is given in the following diagram:

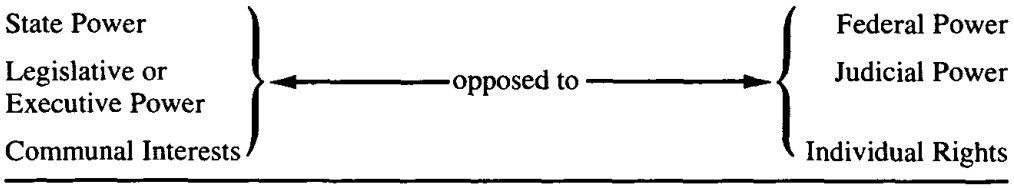
FIGURE 1

	Liberal	Conservative
Relatively Individualist	Freedom of Speech Sexual Autonomy Rights of Criminal Defendants	Freedom of Contract
Relatively Communalist	Freedom of Contract	Freedom of Speech Sexual Autonomy Rights of Criminal Defendants

III. The Standard Paradigm

This admittedly schematic and incomplete description suggests why states' rights would appeal so much to conservatives, at least in cases involving litigation over non-economic civil rights. For when a state statute or a state executive action is challenged as abridging a constitutionally protected right, the plaintiff's position is relatively individualist, and the state's position is relatively communalist. Moreover, federal judicial power is being invoked to protect the individual right from infringement by a state legislature or the state's executive machinery. This combination of three different oppositions (individualist versus communalist, federal power versus state power, judicial power versus legislative or executive power) I call the Standard Paradigm:

FIGURE 2—The Standard Paradigm



Under the Standard Paradigm, the conservative position is more likely to align with the communalist position, that is, the position that allows regulation of the individual right in order to serve asserted communal interests. However, a conservative defending the state statute need not simply rest upon arguments regarding the relative importance of the right. She can also argue (1) that deference to the political branches and their agents is essential if the court is to stay within its proper institutional role, and (2) that a federal court should defer to the

decisions of state actors, lest the federal government intrude too greatly upon state and local prerogatives.

Thus, the Standard Paradigm explains why states' rights would be a conservative argument in free speech, sexual autonomy, and criminal procedure cases. It also explains why, during the *Lochner* era, when the Court was much more conservative, and freedom of contract was considered a preferred liberty protected by the due process clause, states' rights was a *liberal* argument. In cases like *Adkins v. Children's Hospital*[10] and *Lochner*[11] itself, the liberal position supported regulation of the free market through minimum wage and maximum hour laws. Thus, liberals defended the right of state and local governments to enact such progressive legislation, while conservatives argued that this would contravene the individual's right of freedom of contract protected by the fifth and fourteenth amendments.

Ironically, it is the *Lochner* era that gives us the now standard rhetoric that states are laboratories for social and economic experimentation. This was an argument made by a liberal, Justice Brandeis, on behalf of a law that abridged freedom of contract.[12] After the New Deal, Justice

10. 261 U.S. 525 (1923) (striking down minimum wage laws for women and children).

11. Lochner v. New York, 198 U.S. 45 (1905) (striking down maximum hour law for bakers). For a discussion of the Supreme Court's jurisprudence during the years 1897–1937, referred to as the *Lochner* era, *see* Balkin, *Ideology and Counter Ideology from Lochner to Garcia*, 54 UMKC L. REV. 175 (1986) [hereinafter Balkin, *Ideology and Counter Ideology*].

12. New York State Ice Co. v. Leibmann, 285 U.S. 262 (1932). In *Leibmann,* the Supreme Court struck down an Oklahoma statute requiring that the equivalent of a certificate of public convenience and necessity be issued before the defendant could manufacture or sell ice. In his dissent, Brandeis noted that

> [t]he people of the United States are now confronted with an emergency more serious than war. Misery is wide spread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions . . . Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . . To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

285 U.S. at 306, 310–11 (Brandeis, J., dissenting). Brandeis's argument reflects the progressivist faith that social and economic science could solve societal problems; his dissenting opinion is filled with citations to statistics, reports, and social science tracts.

Brandeis's words were used to great advantage by *conservatives* resisting the expansion of civil rights by liberals.[13]

Because he was on the "correct" side of the *Lochner* era debates, Brandeis's argument has been sanctified by history. For that reason, few people remember the response that Justice Sutherland (who was on the "wrong" side) made in his majority opinion:

> [U]nreasonable or arbitrary interferences or restrictions cannot be saved from the condemnation of [the Fourteenth] Amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.[14]

In sum, under the Standard Paradigm, the preferred liberty is normally allied with federal power, and communal regulation is allied with states' rights. Because constitutional litigation over freedom of contract is rare after 1937, the preferred right and the individualist position is almost always a liberal one.[15] The communalist (and therefore the states' rights position) is almost always a conservative one.

The Standard Paradigm, however, is an incomplete explanation of the relationship between conservatism and states' rights. First, it does not explain debates over Congress's powers under the commerce clause, which involve a different combination of oppositions.[16] Second, it does not address issues of racial and sexual discrimination on which liberals

13. *See, e.g.*, Santosky v. Kraemer, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting) (court should refrain from interfering with state's decision to terminate parental rights); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) (federal courts should not interfere with unequal funding of Texas school districts); McGautha v. California, 402 U.S. 183 (1971) (federal courts should not interfere with state's decision to leave imposition of death penalty to untrammeled jury discretion); Duncan v. Louisiana, 391 U.S. 145, 175-76 (1968) (Harlan, J., dissenting) (application of sixth amendment jury trial right to states will unduly hamper state experiments with criminal justice system); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 751 (1964) (Stewart, J., dissenting) (federal courts should not interfere with decision of state to have nonproportional representation in state legislature).

14. 285 U.S. at 279-80. *See also* Duncan v. Louisiana, 391 U.S. 145, 170 (1968) (Black, J., concurring) ("I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights").

15. *But see* Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978), where the Burger court held that a Minnesota statute that attempted to prevent large corporations from leaving the state without guaranteeing certain pension benefits violated the contract clause. Besides manifesting a remarkable similarity to *Lochner*-era jurisprudence, the case follows the Standard Paradigm: a federal court protects impairment of individual (here corporate) contract rights from state economic regulation.

16. *See infra* text accompanying note 57.

and conservatives differ.[17] Third, the Standard Paradigm does not explain why even in modern cases involving social and economic legislation, conservatives routinely defer to majoritarian enactments and liberals occasionally seek more searching scrutiny.[18] Fourth, the discovery of a Standard Paradigm that explains certain forms of civil rights litigation simply begs the question how that particular paradigm arose. These questions can only be answered by an investigation of the historical development of both states' rights and conservatism.

IV. The Changing Faces of Conservatism

Historically, American conservatives have not always favored *laissez-faire* economic policies. Such a statement, of course, raises the important question of how we are to tell who the real conservatives were, if conservative positions on issues have changed over time. The answer is that we must understand American conservatism not in terms of its political positions at a given point in history, but in terms of its enduring principles. Robert McCloskey has argued that despite the shifting policies supported by conservatives throughout American history, several features of American conservative ideology have remained constant in each generation:

> In general, its advocates have defended the property right against all comers, exalting economic privilege to the status of an absolute. This is perhaps the leitmotiv, but other recurrent strains can be distinguished. In the same chorus we are almost certain to find those who deplore the rule of the majority in political decision making. . . . Finally, in this category are ordinarily discovered those who espouse an elitist doctrine, a concept of the natural superiority of the few—which is used, of course, to justify the defense of privilege and the limitations of the majority will.
>
> Historically, the partisans of such a set of attitudes have occupied a defensive position in the American political scene. The *status quo* has supported their claims, and deviations from the *status quo* have therefore called those claims into question. The defenders have, in the nature of things, based their case partly upon an appeal to the past and partly on a glorification of the golden present. Thus, it is pragmatically valid to call them conservatives, though it is important to observe that the really significant distinguishing characteristic is not the "conserving" element but adherence to the dogmas just outlined.[19]

McCloskey's identification of conservatism with anti-populism was written at a time when the struggles over the New Deal were still fresh. In light of the civil rights movement that followed the publication of his book, it is perhaps more correct to say that conservatism has only re-

17. *See infra* text accompanying notes 63–79.
18. *See infra* text accompanying notes 80–99.
19. R. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE 22–23 (1951). *See also* C. ROSSITER, CONSERVATISM IN AMERICA 61–62 (1955) (listing the "twenty-one points" of the Conservative Tradition).

sented majoritarian interference with the property rights of economically privileged classes.[20] Moreover, conservatives have only been concerned with majoritarian infringement of traditional forms of property, like land and capital. They have been less worried about protection of newer forms of property, such as government entitlements to welfare benefits.[21] Finally, as to interference with other types of rights, conservatives have either been equivocal or have actively supported majoritarian regulation.[22] In the wake of the civil rights advances of the last thirty years, we tend to forget that until quite recently questions regarding property rights were the quintessential "civil rights" issues both in politics and before the Supreme Court.[23]

---

20. This first manifested itself in direct opposition to universal manhood suffrage. *See* THE CONSERVATIVE TRADITION IN AMERICAN POLITICAL THOUGHT 80–83, 115–19 (J. Sigler ed. 1969) (containing selections by John Adams, *Distrust of Democracy* and by James Kent, *The Argument Against Universal Suffrage*). Later, when Jacksonian ideas had triumphed, the conservative strategy shifted to constitutionalism as a means of protecting property interests. MCCLOSKEY, *supra* note 19, at 22. The fear that popular bodies would attempt wholesale redistribution of income under the guise of progressive social legislation particularly worried the *Lochner* Court. *E.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905). ("It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives").

After the New Deal, when constitutional arguments for freedom of contract had been discredited, American conservatives continued to oppose redistributional social welfare programs on the grounds that they were too expensive, diverted too much money from national defense, and destroyed personal incentives. *E.g.*, B. GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 70–77 (1960).

21. Unlike "old" property rights in land and capital, "new" property entitlements to government benefits under social welfare programs are usually funded by progressive income taxation. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1963). Many conservatives advocate the reduction of these benefits and the curtailment of their related social welfare programs. Thus conservatives rarely are concerned with constitutional attacks on governmental actions that trench upon these benefits, and conservative judges have correspondingly applied lower levels of judicial scrutiny in these cases. *E.g.*, Rail Road Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (upholding revision of railroad pension plan which denied certain benefits to persons who were not connected with the railroad on a single day in 1974, despite evidence that Congress was misled by outside groups who were asked to draft the bill and that Congress did not realize the effect the legislation would have); San Antonio Indep. School Bd. v. Rodriguez, 411 U.S. 1 (1973) (upholding system of unequal funding of local school districts throughout the state of Texas); Dandridge v. Williams, 397 U.S. 471 (1970) (upholding maximum monthly grant of $250 under Aid to Families with Dependent Children regardless of family size). *See* the discussion *infra* at text accompanying notes 88–97.

22. This stems from the relatively communalist position of modern conservatism on issues other than freedom of contract.

23. The lack of non-economic civil rights litigation in the federal courts concerning actions by states was largely due to the fact that portions of the Bill of Rights were not incorporated into the fourteenth amendment until the twentieth century. The paucity of litigation surrounding non-economic civil rights violations by the *federal* government is more puzzling. There is, of course, no end of cases during the 1800s concerning *economic* rights that plaintiffs claimed were abridged both by state and federal actors.

Nevertheless, McCloskey's point is not completely without force. Although conservatives may claim to support majoritarian politics, and thus ally themselves with the forces of democracy, conservatives have generally been less sympathetic than liberals to claims that voting rights have been infringed,[24] even when supporting such claims would involve deference to the political branches.[25] This attitude is consistent with earlier conservative support for a limited suffrage.[26]

The basic strain in conservative thought—that conservatism has always traditionally defended rights of property and economic privilege from majoritarian interference—enables us to trace the development of conservatism from our country's founding to the present day. It allows us, for example, to explain why Alexander Hamilton and Daniel Webster are to be counted as conservatives, even though neither was an advocate of *laissez-faire*.

V. Antebellum Conservatism in the North

Before the Civil War, there were two varieties of conservatism: one in the North and one in the South. Northern conservatism is exemplified by Alexander Hamilton and the Federalist party, John Quincy Adams and the National Republicans, and Daniel Webster and the Whig party. Southern conservatism before the Civil War was usually (albeit not exclusively) found within the Democratic Party. Both types of conservatism sought to protect vested rights of property and privilege; however, each represented a different type of property. The northern conservatives spoke on behalf of business and mercantile interests; the southern conservatives on behalf of slaveowners and the plantation economy.

The various mercantile interests who supported Hamilton's Federalist party also had advocated the formation of a stronger federal union to replace the system created by the Articles of Confederation. Thus, from the very first days of the Constitution, northern conservatism supported

24. *E.g.*, Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 744; Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

25. *E.g.*, City of Rome v. United States, 446 U.S. 156, 200, 207 (1980) (Powell and Rehnquist, JJ., dissenting); Katzenbach v. Morgan, 384 U.S. 641, 659 (1966) (Harlan, J., dissenting).

26. McCloskey was also correct in asserting that conservatism has usually been elitist in its defense of the inequality of economic power in society: that human nature is more or less constant, that there are natural inequalities among human beings, and that the "best" persons deserve their greater shares. *See* ROSSITER, *supra* note 19, at 21–24, 60–61. However, this is not necessarily inconsistent with support for democratic institutions that infringe upon rights other than property rights.

a strong national government. Hamilton and his successors argued that the federal government and business should work together to promote industrial development, and the Hamiltonian policy of governmental cooperation with business set the tone for northern conservatism until the Civil War. This was no policy of *laissez-faire*. Northern conservatives from Hamilton to Webster supported the growth of industry through federal subsidies, construction of internal improvements, granting of corporate charters and monopolies, protective tariffs, and the creation of a national bank.[27]

The northern conservative argument, prior to the Civil War, was that active governmental cooperation with industry and mercantile interests would ultimately redound to the benefit of the entire country. Modern conservatism has also defended business through a "trickle down" theory, but has argued that it will occur through governmental nonintervention—precisely the opposite of Hamilton's economic policy.

Indeed, if we were to look for the advocates of *laissez-faire* during the antebellum period, we would find them among the liberals: first within the left wing of Jefferson's Democratic-Republican party, and later among the followers of Andrew Jackson and the still more radical Locofoco Democrats like Martin Van Buren. To the liberals, governmental cooperation with business meant the enshrinement of special privileges for a wealthy few. Earlier liberals like Jefferson argued that Hamilton's economic system simply aided the rich at the expense of farmers. The Jacksonians detested every form of special benefits for the wealthy,

27. There is an important connection between Hamiltonian principles and the Nationalist decisions of the Supreme Court under its Federalist Chief Justice, John Marshall. For example, in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), the Marshall Court protected a corporate charter from state interference through the use of the federal limitations on state power embodied in the contracts clause. The case itself presented only the question whether a private university operating under a corporate charter could be converted into a state university by legislative fiat, but its larger importance lay in the fact that it offered protection for business corporations from the popular sentiments of state legislatures.

The famous case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), also demonstrates the connection between nationalism and Hamiltonian economic policies. Marshall defended the constitutionality of the Second Bank of the United States using arguments similar to those first offered by Hamilton himself. Marshall also held that the bank was immune from state taxation, cribbing from Daniel Webster's brief the famous phrase that "the power to tax is the power to destroy." R. CURRENT, DANIEL WEBSTER AND THE RISE OF NATIONAL CONSERVATISM 32–33 (1955).

Even where Marshall's decisions appeared to violate Hamiltonian principles, the conflict was often only illusory. For example, although Marshall struck down a grant of monopoly in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), he gained a more important victory for conservative and nationalist policies by an expansive reading of federal power to regulate interstate commerce.

whether it be the exclusivity of corporate charters (we must remember that there were as yet no general incorporation statutes), tariffs to aid northern industry, or the Bank of the United States, that veritable symbol of eastern privilege. Jacksonians thus embraced *laissez-faire* "to take the grip of government granted privileges off the natural economic order."[28] The common man should be permitted a chance to rise in society by his own efforts, unhampered by the barriers erected by northeastern money and corporate privilege.

From the very beginning Jefferson's party had supported states' rights. Jefferson himself believed that decentralization of power was the best deterrent to tyranny and the best protector of individual rights. Certainly his experiences with the Alien and Sedition Acts of 1798, enacted by his Federalist opponents, confirmed in him that view.[29] In addition, Jefferson disagreed with Hamiltonian policies in aid of business, policies that required a strong central government. Although ironically both Jefferson's and Madison's administrations resulted in a strengthening of national power,[30] the Jacksonian Democratic-Republicans retained Jefferson's affinity for states' rights. This tendency reflected the Jacksonian distaste for the national economic policies of the northern conservatives.[31]

28. R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 78 (1948).

29. The Alien and Sedition Acts were widely condemned as unconstitutional restrictions on free speech. Act of June 18, 1798, 1 Stat. 566; Act of June 25, 1798, 1 Stat. 570; Act of July 6, 1798, 1 Stat. 577; Act of July 14, 1798, ch. 74, 1 Stat. 596. Jefferson's opposition to them led to his authorship of the Kentucky Resolutions of 1798, which were passed by the Kentucky legislature. These resolutions introduced the theories of nullification and interposition, of which later generations of southerners would make considerable use. Simultaneously, Madison drafted similar Virginia resolutions, which were adopted by the Virginia General Assembly.

30. As a result of the War of 1812 with England, the Anglophile Federalists began to preach states' rights and opposition to a war that eliminated business with New England's most important trading partner. By the time of the Treaty of Ghent, the Federalist party had been discredited, partly as a result of the secessionist rhetoric by Federalist leaders at the Hartford convention of 1816. Reference Note, *Interposition vs. Judicial Power,* 1 RACE REL. L. REP. 465, 480 (1956). Jefferson and Madison, in turn, had enacted most of the old Federalist economic program. Jefferson's party gradually divided into two factions, the National Republicans, who continued to advocate Hamiltonian policies, and the Democratic Republicans, who advocated states' rights.

31. When Chief Justice Marshall retired from the Supreme Court in 1835, Jackson appointed Roger Taney, the former Treasury Secretary who had assisted Jackson in his war on the Second Bank of the United States. Because of Taney's defense of slaveowners' rights in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), we tend to associate him with conservative proslavery politics. However, Taney was appointed to the Court primarily as an advocate of states' rights and an opponent of special privileges. His opinion in Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837), in which he held that corporate charters should be construed strictly to avoid monopolistic effects and in favor of the public interest, is quite consistent with Jackso-

VI. Southern Conservatism

In contrast to northern conservatism, southern conservatism almost always supported states' rights, an inclination that has remained constant to the present day.[32] This was fostered both by southern opposition to the protective tariff and southern support for the protection and expansion of slavery. As more and more states entered the union, the South felt increasingly isolated and increasingly concerned that its economic interests were being ignored by the North and the West. Thus, the South was naturally attracted to more radical states' rights positions, as the Nullification Crisis of 1832 demonstrated.[33]

Although the protective tariff was an initial source of concern to southern conservatives, the problem of slavery became equally important as time passed. Originally southerners resisted federal interference with their peculiar institution by arguing that slavery was a necessary evil that would inevitably disappear as economic conditions changed. However, as the southern economy became more and more dependent upon cotton, it became clear that slavery would not go away; southern rhetoric eventually became less apologetic and slavery was lauded as a positive good. The dependence of southern agriculture on slavery made southern conservatives increasingly concerned that northern and western states would gain a numerical advantage in Con-

nian principles. Of course, his pro-states' rights views, as evidenced in *Dred Scott* and in his opinions in The License Cases, 46 U.S. (5 How.) 504 (1847), and The Passenger Cases, 48 U.S. (7 How.) 283, 466 (1849) (Taney, C.J., dissenting), also made him acceptable to the southern wing of the Democratic party.

32. The major exception before the Civil War was during a brief period after the War of 1812, when southern manufacturers were concerned about competition in cotton goods from India and flirted with the possibility of constructing textile mills in the South. The southern interest thus lay in tariffs on imported cotton. Not surprisingly, this is the period in which John C. Calhoun was considered a nationalist. Within ten years, however, southerners had returned to their support of states' rights and free trade and a corresponding opposition to national power and protective tariffs. CURRENT, *supra* note 27, at 19–21, 50–51.

33. The nullification crisis arose from the 1828 "Tariff of Abominations," passed over southern objections. The South Carolina legislature, following the political theories of John C. Calhoun, nullified the 1828 tariff, claiming that each state, as a party to the compact that formed the Constitution, could decide for itself whether a given act of Congress was constitutional, and prevent enforcement of the act within its borders to protect the rights of its citizens. The nullification crisis showed how different was the commitment of Jacksonians and southern conservatives to states' rights: Jackson violently disagreed with the nullifiers, and threatened to have Calhoun, his former vice-president, hanged. The crisis was resolved when moderates led by Henry Clay passed a compromise lowering the tariff rates. Reference Note, *supra* note 30, at 484–89; HOFSTADTER, *supra* note 28, at 90–92.

gress that would tempt them to force antislavery policies upon the South.[34]

The vehemence of the southern defense of slavery escalated over time, and as it did, it became bound up both with the issues of states' rights and slavery in the territories. The southern conservative argument began as a claim that it was unwise to abolish slavery in the territories. Later it became an argument that the federal government could not abolish slavery in the territories, and finally, an argument that the Constitution itself defended and protected slavery and the rights of slaveowners.[35]

Opposition to slavery in the North came from two different sources. The first was the abolitionist movement, which opposed slavery on moral grounds. But the abolitionists, however dedicated they may have been, represented only a tiny fraction of the population in the North and West. The major opposition to slavery came from whites who feared that the spread of slavery into the territories would drive down the price of labor. The new Republican party of the 1850s and 1860s thus billed itself as the party of the free white working man. The Republican philosophy was a natural outgrowth of the Jacksonian concern for the right of the common man to better himself through his labor. The spread of slavery threatened the upward mobility of white laborers, and the Republicans frightened their constituents with the specter of an America where wages had decreased to subsistence levels and where both white and black workers were effectively reduced to slavery.[36]

By the time the Civil War began, both the pro- and antislavery forces could make constitutional arguments defending their respective positions, each relying on the due process clause of the fifth amendment. Southern conservatives argued that slaves were property, and that federal interference with state property rules regarding slavery was a taking of property without due process of law.[37] Thus, the southern argu-

34. Calhoun's celebrated theory of the "concurrent majority" was a response to the increasing isolation that southerners felt. Under Calhoun's theory, the Constitution would be amended so that each section of the country, North and South, would have a veto over policy issues; at one point he advocated a dual Presidency, consisting of a northerner and a southerner. Since each section would hold the power of the veto, each section would learn to accommodate the other's interests in order to avoid stalemate. Calhoun at first offered his proposal as a way of avoiding disunion, but his radical states' rights positions were adopted by others who advocated secession. *See* HOFSTADTER, *supra* note 28, at 110–11.

35. D. FEHRENBACHER, THE DRED SCOTT CASE 140–41 (1978).

36. HOFSTADTER, *supra* note 28, at 143–44.

37. *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (federal government had no power to prohibit slavery in the territories because such an act would deprive a person who brought a slave into free territory of property without due process of law).

ment was not only an argument for the natural rights of property, but a states' rights argument denying national power to rescind an economic property right recognized by certain states.

The antislavery argument, in contrast, focused on the interests of the slave. Laws permitting slavery in the federal territories violated the slave's fifth amendment due process right to liberty.[38] More important to the vast majority of whites (who cared little for blacks), the institution of slavery in both the states and the territories drove down the price of labor and thus violated the economic rights of the white worker to pursue his livelihood. These were not only arguments about natural rights of free labor; they were also arguments in favor of federal power to regulate the states and territories in order to preserve the individual liberty of the black slave and the white working man. The ambiguities of the individual rights argument are illustrated in the following diagram; the nonconstitutional arguments for the interests of free white workers appear in parentheses:

FIGURE 3—Who Protects Individual Rights?

	Proslavery	Antislavery
Individual Right	Property	Liberty (free labor)
Of	Slaveowner	Slave (and white workers)
Protected by	State Government	Federal Government
From Interference by	Federal Government	Territorial Government (State Government)

What is crucial about this ambiguity is that it permitted both the North and South to see themselves as protecting individual rights from governmental interference. Equally important is that it caused the North, the eventual winner of the Civil War, to believe that *it was the states, and not the federal government, that presented the greatest threat to individual liberties.*

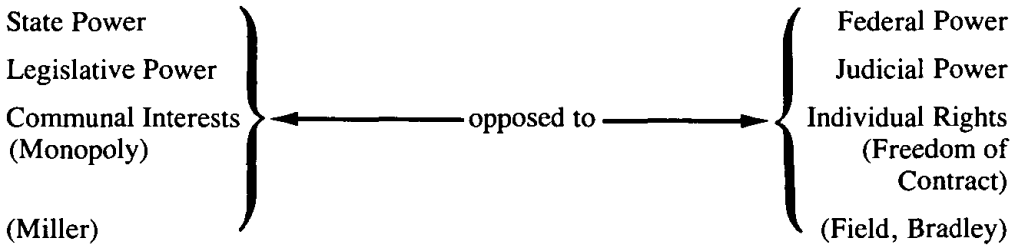
This new way of thinking was embodied in the language of the fourteenth amendment, which, along with the other Civil War amendments, drastically altered the balance of power between the states and the federal government. The fourteenth amendment provided that *state* governments could not deny due process, equal protection of the laws, or

38. This argument appeared in the platforms of the Liberty Party in 1844, the Free Soil Party in 1848, and the Republican Party in 1856 and 1860. FEHRENBACHER, *supra* note 35, at 141.

the privileges and immunities of national citizenship.

Justice Miller would soon write the privileges and immunities clause out of existence in *The Slaughterhouse Cases.*[39] However, he could not alter the new paradigm of thought concerning the protection of civil liberties. Indeed, Miller subtly relied on that new paradigm even as he denied the plaintiffs' claims. Miller argued that the plaintiffs' claim that the Constitution protected their civil rights from state interference would place too much power in the hands of the federal government and destroy the capacity of the states to govern effectively in a federal system.[40] The dissenters also accepted the new paradigm, for they argued that the assertion of federal power against state interests was necessary to protect the civil right of persons to choose a profession.[41] *The Slaughterhouse Cases,* then, are important not only because of their interpretation of the fourteenth amendment, but because they mark the appearance of the Standard Paradigm in constitutional litigation over civil liberties:

FIGURE 4—The Standard Paradigm in *The Slaughterhouse Cases*



Of course, in *The Slaughterhouse Cases,* the civil right involved is not yet a "liberal" civil right in the modern sense. The right to pursue a livelihood was, however, a civil right to the liberal Republicans of the 1850s and 1860s. In one of the great ironies of American history, however, the dissenters' arguments would soon become the new credo of conservatives.

VII. Laissez-Faire and the New Conservatism

Conservative and liberal ideologies were undergoing a remarkable transformation at the close of the Civil War. The war itself obscured this transformation, as both liberal and conservative northerners closed

39. 83 U.S. (16 Wall.) 36 (1873). In *Slaughterhouse,* the Court held that the Louisiana legislature's grant to a corporation of exclusive rights to operate slaughtering facilities did not violate the thirteenth or fourteenth amendments.

40. *Id.* at 77–78.

41. *Id.* at 87, 89, 96, 101–02 (Field, J., dissenting); *id.* at 113–14, 121–24 (Bradley, J., dissenting); *id.* at 127–29 (Swayne, J., dissenting).

ranks against the South. During the Reconstruction era, however, conservatives slowly began to see *laissez-faire* arguments as adaptable to their interests, while liberals would soon discover the need to curb the growing power of corporations through governmental regulation.

Before the Civil War, northern conservatism found the best defense of the rights of property and economic privilege to lie in a policy of active governmental cooperation with business. Protective tariffs, corporate charters, and subsidies to business helped foster industry and benefitted everyone in society, or so conservatives argued. After the Civil War, however, American business interests were strong enough to stand on their own. Governmental support was no longer necessary, and indeed, unnecessary governmental interference might seriously jeopardize property rights.[42]

The movement toward universal manhood suffrage and the elimination of property qualifications before the Civil War gradually presented a new danger: popular majorities consisting of voters with relatively little property, who might attempt to use government to control business and redistribute income and economic power. Conservatives thus found it necessary "to justify the rights of property in new terms, to find a new rationalization for the inequality of power and privilege."[43]

The doctrines of *laissez-faire,* which had previously served the liberal crusade against governmental aid to business, now were harnessed to prevent popular majorities from interfering with the growing power of corporate enterprise. Business no longer had need of governmental protection, save a need for protection from government itself. Moreover, the dogmas of *laissez-faire* possessed a veneer of scientific certitude that appealed to the secular materialism of the age; not only did economic science assure Americans that the free market produced the greatest good for the greatest number, but the followers of Herbert Spencer claimed that evolutionary theory itself supported a hands-off attitude toward business.[44]

The new conservative ideology took the agrarian populist individualism of Jefferson and Jackson—the notion of free and equal individuals seeking personal fulfillment and a just society—and turned it to a very

42. MCCLOSKEY, *supra* note 19, at 23–24.
43. *Id.* at 25.
44. C. COCHRAN & W. MILLER, THE AGE OF ENTERPRISE 124–28 (1942); MCCLOSKEY, *supra* note 19, at 26–30; *see generally,* R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1944).

different purpose: the support and defense of economic power in business and industry.

> The individualism of Jefferson had been an enormously liberating and democratizing force, encouraging movements for more social equality, suffrage for poor men, and even freedom for slaves.
>
> [The new conservative individualism brought] the steady divesting of individual liberty's broader, richer dimensions and their replacement by a narrow, egoistic individualism defined as competition, striving, and personal success. What Clinton Rossiter called "The Great Train Robbery of American intellectual history" became the means by which postbellum rugged individualists stole the word symbols of Jeffersonian liberalism, such as liberty, equality, progress, and opportunity, and glued them onto the platform planks of conservatism.
>
> These refurbished planks would undergird American conservatism for at least a century.[45]

The new individualism as practiced by conservatives was a purely economic individualism, in which liberty of contract was the single preferred right; it was the right that democratic states were formed to protect. Individual liberty thus came to be understood almost exclusively as economic liberty; its boundaries were defined by the common law rights of contract and property. Hence, the proper role of the courts was to protect these common law rights from unwarranted invasion by popularly elected legislatures.[46]

The reverse side of the metamorphosis of Jeffersonian individualism into economic individualism was a discounting of the importance of all other civil rights. Professor McCloskey argues that this is precisely what happened to the views of Justice Stephen Field as he grew increasingly conservative in the 1880s:

> [T]he property right is now defined so liberally that it tends to become almost exclusive, by a sort of Gresham's law of ideological currency. . . . Human rights must give way when they conflict with the rights of the property owner. And, even when there is no such conflict, individual rights are taken less and less seriously. From the moment it is conceded that economic liberty is the *main* value to be considered in social questions, the way is prepared for the conclusion that it is the *only* value really worth bothering about.[47]

Thus was born the peculiar mix of individualism and communalism that is characteristic of modern conservative ideology: individualist with respect to economic liberty, communalist with respect to all other individual rights.

---

45. J. BURNS, THE AMERICAN EXPERIMENT: THE WORKSHOP OF DEMOCRACY 156 (1985).

46. ROSSITER, *supra* note 19, at 156–57.

47. MCCLOSKEY, *supra* note 19, at 116 (emphasis in original). *See also* ROSSITER, *supra* note 19, at 141.

VIII. Laissez-Faire and Federalism

The Justices who decided *The Slaughterhouse Cases* were of a different generation from those who would soon dominate the Supreme Court.[48] These new justices were considerably more receptive to the Spencerian doctrines of progress through free competition, as well as the constitutional arguments of corporate counsel who appeared before them. From the 1880s to 1937, conservative lawyers and Supreme Court Justices pursued several different doctrinal strategies for achieving *laissez-faire*. The strategies depended upon whether they were faced with a state or a federal regulation of freedom of contract.

Where the Court was faced with a *state* regulation of freedom of contract, conservatives could use the due process clause to oversee the acts of state legislatures and ensure that these bodies did not usurp constitutionally protected contract and property rights.[49] In these cases the majority and dissenting opinions followed the Standard Paradigm of civil liberties litigation. The conservatives asserted federal judicial power over state legislative and executive power in order to protect individual rights, while their opponents argued for state sovereignty and judicial

48. At first the conservative economic positions espoused by *laissez-faire* advocates made little headway in the Supreme Court, as demonstrated by *The Slaughterhouse Cases* themselves. In the *Granger* cases decided in 1877, the Court upheld the rights of state governments to regulate the rates of railroads and grain elevators operating within their borders, and rejected the contention that rate regulation deprived the companies of property without due process of law. Winona & St. Peter R.R. v. Blake, 94 U.S. 180 (1877); Chicago, Milwaukee & St. Paul R.R. v. Ackly, 94 U.S. 179 (1877); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877); Chicago, Burlington & Quincy R.R. Co. v. Iowa, 94 U.S. 155 (1877); Munn v. Illinois, 94 U.S. 113 (1877). For a discussion of these cases see B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 63–92 (1942).

The complexion of the Court, however, changed radically within a few years. By 1883, ten years after the decision in *The Slaughterhouse Cases*, only three justices remained who had participated in that decision: Miller, Bradley, and Field. Field and Bradley, of course, had dissented in *Slaughterhouse*.

49. The most famous cases of the *Lochner* era follow this pattern: Coppage v. Kansas, 236 U.S. 1 (1915) (striking down state law prohibiting employers from requiring employees not to belong to labor unions); Lochner v. New York, 198 U.S. 45 (1905) (striking down state maximum hour law for bakers); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (striking down Louisiana statute making it a misdemeanor for state resident to use mails to enter into contract with foreign corporation not licensed to do business in state).

Allgeyer was preceded by cases in which the Court used the due process clause to allow closer judicial scrutiny of state regulatory schemes. Thus the court retreated from its deferential position in the *Granger* cases in Chicago, Milwaukee and St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890), when it held that the state's determination of reasonable rates was not final, but was subject to judicial review; in Smyth v. Ames, 169 U.S. 466 (1898), the Court held that railroads were entitled to reasonable profits under the due process clause.

deference to majoritarian attempts at remedying social problems caused by unregulated economic power.[50]

When the Court was faced with a *federal* regulation of economic liberty, conservatives could use two approaches. The first was scrutiny under the fifth amendment's due process clause. Here no federalism issue was involved. Conservatives argued for a high level of scrutiny of legislative means and ends, while their liberal opponents advocated deference to a coordinate political branch of government.[51] However, conservatives could also attack federal regulation by claiming that it was beyond Congress' powers under the commerce clause, and this argument did implicate federalism interests.[52]

The Justices who sat on the Court immediately before and after the Civil War had unwittingly prepared the way for the latter strategy. The Taney Court, desiring to preserve state sovereignty from federal encroachment (at a time when federal power was still associated with both northern conservatism and the antislavery movement), had argued for the concurrent power of Congress and the states to regulate interstate commerce. This position contended with the Marshallian (or Webster-

50. *E.g.*, New State Ice Co. v. Leibmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting); Coppage v. Kansas, 236 U.S. at 29–30 (Day and Holmes, JJ., and Hughes, C.J., dissenting); Lochner v. New York, 198 U.S. at 65 (Harlan, White, and Day, JJ., dissenting).

The Court could also use the dormant commerce clause as a means of protecting freedom of contract. In Wabash, St. Louis and Pacific Ry. v. Illinois, 118 U.S. 557 (1886), the Court's opinion, in effect, accepted the argument of railroad counsel that the power to regulate interstate railroad rates was exclusively vested in Congress even as to a segment of an interstate journey lying within the borders of the regulating state. By holding that state economic regulation created too great a burden on interstate commerce or was otherwise preempted, the Court protected economic liberty from state interference, leaving a less regulated or completely unregulated federal regime in place. The strategy of the railroads backfired, however, when Congress passed the Interstate Commerce Act the next year. TWISS, *supra* note 48, at 78, 82. Because the federal government soon became the major source of economic regulation, the dormant commerce clause lost much of its utility to conservatives after 1890.

51. *E.g.*, Carter v. Carter Coal, 298 U.S. 238 (1936) (striking down labor regulations under the Bituminous Coal Conservation Act of 1935); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down minimum wage law for women in the District of Columbia); Adair v. United States, 208 U.S. 161 (1908) (striking down federal statute prohibiting employers from requiring employees not to belong to labor unions). In both *Adair* and *Carter v. Carter Coal*, the regulations were also attacked as violative of tenth amendment limitations on the commerce clause.

52. *E.g.*, Carter v. Carter Coal, 298 U.S. 238 (1936); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (striking down Railroad Retirement Act of 1934); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down prohibition of shipment in interstate commerce of goods produced through child labor); Adair v. United States, 208 U.S. 161 (1908); Champion v. Ames (The Lottery Case), 188 U.S. 321, 373 (1903) (Fuller, C.J., dissenting) (arguing against congressional power to prohibit the shipment of lottery tickets in interstate commerce).

ian) view that the federal power to regulate interstate commerce was exclusive. The compromise reached in *Cooley v. Board of Wardens of the Port of Philadelphia*[53] allowed state regulation only of interstate commerce of a local nature, requiring diverse treatment in different states. This compromise proved doctrinally unwieldy, however.

The matter was complicated by the federal government's failure to attempt any major regulation of transportation or production prior to the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890. As a result, the burden of regulating the increasingly concentrated forces of American industry fell exclusively to state governments. The Supreme Court found it much easier simply to hold that a type of activity was not interstate commerce at all, and thus preserve the states' rights to regulate it, rather than grapple with the thorny doctrinal problems of preemption raised by *Cooley* and its progeny.[54]

The conservative Justices of the *Lochner* era built upon these earlier decisions and extended them, but for entirely different reasons. The result of holding that a particular activity, like manufacturing, was not interstate commerce,[55] was effectively to foreclose federal power to regulate the activity, and thus provide a bulwark of protection for freedom of contract from federal interference.[56]

53. 53 U.S. (12 How.) 299 (1851).

54. *E.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868) (issuance of policy of insurance is not interstate commerce).

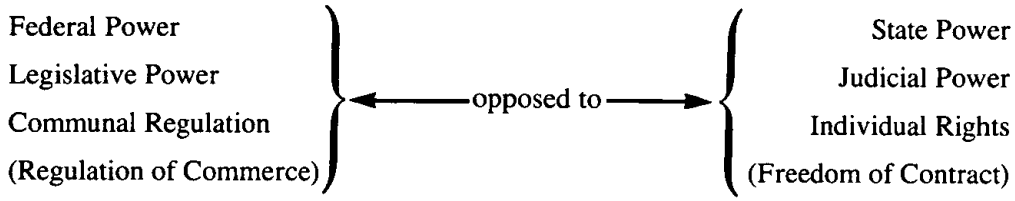
55. *E.g.*, United States v. E. C. Knight Co., 156 U.S. 1 (1895) (dismissing action brought under Sherman Act to set aside acquisition of four sugar companies by the Sugar Trust). According to *E. C. Knight*, manufacturing could be regulated by the federal government only where it had direct effects on interstate commerce. Ironically, the manufacture/commerce distinction had been created in a case upholding state regulation which had been attacked under the dormant commerce clause. Kidd v. Pearson, 128 U.S. 1 (1888) (upholding an Iowa law prohibiting the manufacture of intoxicating beverages to an Iowa distillery, where all of its output was sold out of state).

56. *E.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down prohibition of shipment in interstate commerce of goods produced by child labor). *See* Balkin, *Ideology and Counter-Ideology*, *supra* note 11, at 181–82.

The major exception to the antiregulatory trend in the commerce clause area concerns railroad regulation. *E.g.*, Houston, E. & W. Texas Ry. Co. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914) (Interstate Commerce Commission could prohibit discriminatory rates charges for intrastate transportation if such rates would affect interstate transportation); Southern Ry. v. United States, 222 U.S. 20 (1911) (upholding Federal Safety Appliance Acts as applied to intrastate movement of railroad cars); Baltimore & Ohio R.R. Co. v. Intrastate Commerce Comm'n, 221 U.S. 612 (1911) (upholding labor regulations of intrastate railroads also conducting interstate operations). For an argument that railroad companies actually welcomed regulation as a means of curbing competition by the time these cases were decided, *see* G. KOLKO, RAILROADS AND REGULATION 1877–1916 (1965).

In the commerce clause cases of that era,[57] the liberals and conservatives on the Court did not argue according to the Standard Paradigm, but a variant in which federal and state power arguments are reversed:

FIGURE 5—The Commerce Clause Paradigm



In sum, the proponents of economic regulation were caught in a remarkable Catch-22 during the *Lochner* era. State governments could not engage in economic regulation lest they run afoul of the due process clause. However, by the time the federal government finally entered the field of economic regulation, its attempts were rebuffed under both the fifth and tenth amendments, while the states were still limited by the due process clause of the fourteenth amendment.[58] A summary of the arguments available to conservative judges and lawyers appears in the following diagram:

57. The Court used the tenth amendment to limit not only Congress' regulatory power under the commerce clause, but also under the taxing and spending clause. *E.g.*, United States v. Butler, 297 U.S. 1 (1936) (striking down Agricultural Adjustment Act of 1933); Bailey v. Drexel Furniture (The Child Labor Tax Case), 259 U.S. 20 (1922) (striking down tax on articles produced through the use of child labor).

58. An important caveat must be made here. Not every economic regulation that came before the Court during the *Lochner* era was struck down, either because conservative Justices were unsuccessful in garnering enough votes, or because they themselves agreed that such regulations were constitutional. *E.g.*, Stafford v. Wallace, 258 U.S. 495 (1922) (upholding Packers and Stockyards Act of 1921); Bunting v. Oregon, 243 U.S. 426 (1917) (upholding maximum hour and overtime provisions); Muller v. Oregon, 208 U.S. 412 (1908) (upholding maximum hour law for women); Swift v. United States, 196 U.S. 375 (1905) (holding that Sherman Act could constitutionally be applied to price fixing in a livestock market). Despite the conceptualism of much of *Lochner* era jurisprudence, there was as much ad hoc judicial decision making in this period as in any other. Rather, the point is that conservative justices were more likely to be suspicious of regulations of freedom of contract than their liberal brethren, and conservative lawyers representing business interests were more likely to make freedom of contract and tenth amendment arguments on behalf of their clients.

FIGURE 6—Conservative Constitutional Arguments Against Economic Regulation In the *Lochner* Era

Source of Regulation	Devices Used	Asserting Right of
State	1. Due Process (14th Amendment)	Freedom of Contract
Federal	1. Due Process (5th Amendment)	Freedom of Contract
	2. Tenth Amendment (as limitation on Commerce, Taxing, and Spending Clauses)	State Sovereignty Limited Government

After the revolution in constitutional law that occurred in 1937, the Commerce Clause Paradigm still remained in force: conservatives still tended to argue against the extension of federal power to regulate the economy. After 1937, they were simply less and less successful in having federal legislation declared unconstitutional under the tenth amendment.[59] Nevertheless, the conservative identification with states' rights solidified as the federal government involved itself in more and more areas of economic regulation after the New Deal.

There was, however, an important change in the conservative position after 1937; it concerned individual rights litigation under the due process and equal protection clauses. The members of the Roosevelt Court, who were liberals on economic issues, adopted a toothless standard of scrutiny in economic regulation cases.[60] They retained a higher level of scrutiny only in the area of non-economic individual rights.[61] The new battlefield over the power of the federal courts to protect indi-

59. *See* Balkin, *Ideology and Counter Ideology*, *supra* note 11, at 186–93. The major exception, of course, was in 1976, when Justice Rehnquist was able to garner a five-person majority in *National League of Cities* to strike down federal minimum wage legislation.

Rehnquist's concurrence in Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 312–13 (1981), exemplifies the continuing conservative disapproval of the expansion of the commerce clause power even after 1937:

> [M]y difficulty with some of the recent Commerce Clause jurisprudence is that the Court often seems to forget that legislation enacted by Congress is subject to two different kinds of challenge, while that enacted by the States is subject to only one kind of challenge. Neither Congress nor the States may act in a manner prohibited by any provision of the Constitution. Congress must show that the activity it seeks to regulate has a substantial effect on interstate commerce.

60. *E.g.*, United States v. Carolene Prod. Co., 304 U.S. 144 (1938).

61. *Id.* at 152 n.4 (deference to legislature in matters of economic regulation; higher level of scrutiny when provisions of Bill of Rights are involved, or possible threat to proper functioning of the democratic process exists).

vidual rights would henceforth concern almost exclusively non-economic liberties.[62]

The post-Civil War conservative ideology, however, was individualist only with respect to freedom of contract. Hence, the conservative position on these issues allied with the states' rights position and a policy of judicial restraint, whereas in the *Lochner* era, conservatives had supported the expansion of federal judicial power.

As a result, in both commerce clause and individual rights litigation, conservatives found themselves supporting states' rights. Because federal regulatory power is still associated with restrictions on freedom of contract, there has been no basic change in the alliance of conservative interests with states' rights in commerce clause cases since the end of the nineteenth century. In individual liberties cases, however, states' rights became a conservative argument only after the decline of economic due process and the modern concern with non-economic civil liberties.

IX. The Rapprochement of Northern and Southern Conservatism

A discussion of the development of federalism and modern conservatism would be incomplete without explaining the relationship of northern and southern conservatism after the Civil War. The accommodation between the two branches of American conservatism had a profound impact on modern conservative attitudes toward antidiscrimination laws.

Immediately after the Civil War, provisional southern governments passed the Black Codes, which denied blacks the right to make contracts, own property, sue in the courts and give evidence against whites,

62. One factor that brought non-economic individual liberty cases into prominence after 1937 was the incorporation of the non-economic rights protected by the Bill of Rights into the fourteenth amendment. The process of incorporation actually began during the *Lochner* era. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897) (incorporating fifth amendment's just compensation clause). The "official" beginnings of incorporation doctrine came with the Court's assumption in Gitlow v. New York, 268 U.S. 652 (1925), that the first amendment's protection of free speech was applicable to the states. The assumption made no difference to the result in that case; however, it was later used by liberal Justices to press for greater protection of free speech rights against state governments.

Incorporation of a provision of the Bill of Rights normally resulted in greater protection for individual rights than a generalized due process inquiry, and involved a correspondingly greater limitation on state power and greater burdens on state resources. Thus, conservative justices generally resisted the incorporation of the Bill of Rights, and routinely asserted the right of state governments to adopt their own rules regarding criminal procedure.

engage in any occupation except husbandry, or rent or lease any property except in towns and cities. The Reconstruction Congress responded with a series of Civil Rights Acts in the late 1860s and early 1870s, designed to guarantee the civil rights of blacks.[63] However, as time passed, Reconstruction became increasingly unpopular in the North as well as in the South: northern whites saw increasing economic advantages to *rapprochement* with southern whites.

The watershed event in the alteration of northern attitudes was the disputed presidential election of 1876 between the Democrat Samuel J. Tilden and the Republican Rutherford B. Hayes. In what has become known as the Compromise of 1877, southern Democrats promised not to press their claims of election fraud in certain southern states, thus making Hayes president. In return the South was promised federal grants and subsidies for railroads, canals, and other improvements in the South, a healthy share of federal patronage, and the removal of federal troops from southern territory. The election of Hayes marked the end of Reconstruction and a victory for northern and southern conservative interests. Northern conservatives "could contemplate the possibility of recreating the old Whig alliance of northern and southern property, as southern entrepreneurs eagerly anticipated the uses of federal money and northern investors saw new prospects in the South."[64]

Equally important, the end of Reconstruction marked a growing conservatism on racial issues in both the North and South. Within thirty years the South would reinstitute a vicious system of white supremacy, while the North simply looked the other way:

> The Compromise [of 1877] merely left the freedman to the custody of the Conservative Redeemers upon their pledge that they would protect him in his constitutional rights. But as these pledges were forgotten or violated and the South veered toward proscription and extremism, Northern opinion shifted to the right, keeping pace with the South, conceding point after point, so that at no time were the sections very far apart on race policy. The failure of the liberals to resist this trend was due in part to political factors. . . . [S]ince the Negro was the symbol of sectional strife, the liberals joined in deprecating further agitation in his cause and in defending the Southern view of race in its less extreme forms. . . . Just as the Negro gained his emancipation and new rights through a falling out between white men, he now stood to lose his rights through the reconciliation of white men.[65]

Most northern whites had never possessed much love for blacks, even

63. Only small fragments of these acts remain in force today; they are presently codified at 42 U.S.C. §§1981–83, 1985 (1982) and 18 U.S.C. §§ 241–42 (1982).

64. BURNS, *supra* note 45, at 202.

65. C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW 69–70 (3d rev. ed 1974).

during the heyday of abolition, and so it was easy enough for northerners to lose interest in the developing southern system of white supremacy. There was, moreover, an important connection between the new conservative emphasis on freedom of contract and the accommodation between northern and southern positions on racial issues.

As we have seen, for the new conservative ideologues, the boundaries of individual liberty protected by the Constitution were defined by the common law rights of property and contract. Any abridgement of those rights was redistributive of power and wealth, and therefore suspect. This ideological view, moreover, presupposed that the common law provided a neutral baseline of rules of private exchange, a neutrality that was lacking in legislative regulation of the common law. Hence, the state was in no way responsible for the actions of persons exercising their common law rights. On the other hand, the state was responsible for any economic consequences that flowed from any derogation of common law rights.

All of these themes meshed nicely with the racial views of southern conservatives. Laws prohibiting private discrimination were obviously in derogation of the common law rule that the offeror could choose to contract with any person the offeror chose. Moreover, the state was in no way responsible for private discrimination; if the common law rights of both white and black were protected, the state had not violated any civil rights of any individual.

This theory of civil rights as common law rights features prominently in Justice Bradley's opinion in *The Civil Rights Cases.*[66] Bradley, of course, had argued in *The Slaughterhouse Cases* that the privileges and immunities clause of the fourteenth amendment prevented the states from interfering with freedom of contract and other common law rights.[67]

Under Bradley's theory, the federal government was empowered, under the fourteenth amendment, to prevent any state from violating the civil rights of any individual. Thus, it was constitutional for Congress to pass laws guaranteeing blacks their common law rights to contract with others, and to own real property, if these rights were threatened by state

66. 109 U.S. 3 (1883) (holding unconstitutional Civil Rights Act of 1875, which required nondiscrimination in theaters and places of public amusement).

67. 83 U.S. (16 Wall.) at 113–14, 116–17. Bradley also cast the deciding vote on the electoral commission that gave Hayes the presidency as part of the Compromise of 1877.

interference.[68] Similarly, if a state passed a law permitting innkeepers and common carriers to refuse service to blacks, Congress could veto this alteration of traditional common law rights by corrective legislation.[69] However, it was beyond Congress's powers to require other businesses, such as places of public amusement, to contract with blacks.

The result was a reassertion of the role of state governments as the primary protectors of civil rights. Thus, if a black person were refused service by an innkeeper in violation of the black's common law rights, the proper avenue of redress was to the state courts for enforcement, and if the state refused enforcement, that might be a violation of the fourteenth amendment. However, the failure of the innkeeper to serve the black would not be an abridgement of a civil right by the state, as long as the state courts stood ready to enforce common law rights.[70] Finally, the refusal of persons other than innkeepers and common carriers to contract with blacks would not touch upon common law rights, and therefore would violate no individual civil right.

The logic of *The Civil Rights Cases* was thus in perfect harmony with a states' rights position. Any state or federal rule which attempted to outlaw private discrimination altered the relative power of blacks and whites in society; it was therefore in derogation of common law rights, and highly suspect under the new jurisprudence of the conservative Justices. However, there were few instances of antidiscrimination statutes in the South after Reconstruction.[71] Rather, the developing trend of state legislation was

68. *See id.* at 22. Bradley's argument, that the Civil Rights Act of 1866 only guaranteed blacks the same common law rights of contract and property as enjoyed by whites, was adopted by conservatives like the second Justice Harlan to hold that 42 U.S.C. §§ 1981 and 1982, passed under the thirteenth amendment, did not outlaw private discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 452 (1968) (Harlan, J., dissenting).

69. *The Civil Rights Cases*, 103 U.S. at 25.

70. *Id.* at 24-25. The public/private distinction was not quite as simple as this, however. If the refusal of state courts to enforce common law rights was due to legislative alteration of substantive rules, it seems clear, under Bradley's theory, that the fourteenth amendment would have been violated, and Congress could pass remedial legislation. It is less clear what the result would have been had state *courts* changed the common law rules so as to permit discrimination against blacks by innkeepers and common carriers.

71. The Supreme Court could and did strike down Reconstruction legislation using the dormant commerce clause. An example is Hall v. DuCuir, 95 U.S. 485 (1877) (striking down as an unconstitutional burden on interstate commerce Louisiana Reconstruction statute requiring integration on railroads travelling through the state). The Court could play the doctrinal game both ways, however. *Compare* Louisville, New Orleans & Texas Ry. Co. v. Mississippi, 133 U.S. 587 (1890), which upheld a Mississippi law requiring segregation on all railroads travelling through the state. The Court, over a vigorous dissent by the first Justice Harlan, held that there was no burden on interstate commerce because the ordinance only applied to intrastate railroads. After

to enforce segregation of the races. Thus, after Reconstruction, the major assault on discrimination came from either federal legislation or attacks on state legislation under the Civil War amendments. The conservative position in each case would be consistent with an assertion of states' rights: conservative members of the Court could hold federal civil rights legislation beyond the power of Congress as the Court had in *The Civil Rights Cases.*[72] Conservatives could also take a limited view of the prohibitions against discrimination in the Civil War amendments, thus upholding state sovereignty against an assertion of federal judicial power.

There was a superficial source of conflict between racial conservatism, states' rights, and the protection of common law rights. The problem arose where the state enforced segregation of the races. Private discrimination was, of course, sanctioned by the common law,[73] but if a state deliberately tried to prevent the races from voluntary association with each other, there was a theoretical danger that common law rights would be infringed. The Supreme Court occasionally vindicated the rights of freedom of contract in such cases during the *Lochner* era;[74] however, in *Plessy v. Ferguson,*[75] the conservative majority on the Court upheld the constitutionality of separate but equal facilities, disregarding an argument by Justice Harlan that this would violate the associational rights of both whites and blacks.[76]

Louisiana's antidiscrimination provision was struck down in *Hall*, the state passed a law *requiring* discrimination on railroads—this statute was upheld in Plessy v. Ferguson, 163 U.S. 537 (1896). Note that discrimination in accommodations among passengers served by a common carrier was not seen as necessarily inconsistent with the duty of a common carrier to accept all passengers.

72. *Cf.* United States v. Harris, 106 U.S. 629 (1882) (criminal conspiracy sections of Ku Klux Klan Act of 1871 did not reach purely private conduct; Congress could not constitutionally punish members of lynch mob who seized prisoners held by deputy sheriff); United States v. Cruikshank, 92 U.S. 542 (1875) (conspiracy provisions of 1870 Civil Rights Act did not apply to private persons convicted of lynching blacks and interfering with their right of peaceable assembly). In more modern times, conservatives have unsuccessfully attacked federal civil rights legislation as beyond Congress' commerce clause powers. *E.g.*, EEOC v. Wyoming, 460 U.S. 223 (1983); City of Rome v. United States, 446 U.S. 156 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

73. *Cf.* Corrigan v. Buckley, 271 U.S. 323 (1926) (upholding racially restrictive private covenant). *Corrigan* was overruled in Shelley v. Kraemer, 334 U.S. 1 (1948).

74. *See* Buchanan v. Warley, 245 U.S. 60 (1917) (holding that racial zoning plan violated freedom of contract). *Accord* Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1927). Interestingly enough, in *Buchanan*, the Court held in favor of a white buyer who demanded specific performance of a contract for a parcel of land after a black seller raised the racially discriminatory zoning ordinance as a defense.

75. 163 U.S. 537 (1896).

76. *Id.* at 557–58 (Harlan, J., dissenting).

Despite the apparent conflict with *Lochner* ideology, the majority's argument in *Plessy* bore an allegiance to deeper principles in conservative thought. It was based upon the assumption that inequalities between persons are the result of natural forces, and that attempts to alter natural differences are doomed to failure. This had always been a part of the conservative defense of economic privilege, first with respect to the rights of property, and later in support of *laissez-faire.*

Thus, the conservative majority in *Plessy* saw the use of the equal protection clause to abolish segregation as an "enforced commingling of the races."[77] This perspective assumed that social segregation of the races was a natural outgrowth of free choice. Social equality, argued the Court, "must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[78] Viewed in this light, the statute at issue in *Plessy* was not in derogation of common law rights; rather, it preserved the right of each individual to associate only with those of his or her own choosing.[79]

The treatment of race during the *Lochner* era created the paradigm for issues of discrimination not only with respect to blacks, but with respect to other minorities as well. In the modern era, conservatives have continued to oppose federal anti-discrimination legislation on the grounds of interference with state prerogatives and with freedom of contract. Even after losing the battle over the constitutionality of such measures, conservatives have tended to read such provisions narrowly. Arguments for federalism and economic freedom have thus become allied against arguments for national power and the protection of minorities against private discrimination, as depicted in the following diagram:

FIGURE 7—The Private Anti-Discrimination Paradigm

Federal Power		State Power
Right not to be discriminated against	← opposed to →	Right of Individual Choice and Freedom of Association
(Communal Regulation)		(Freedom of Contract)

77. *Id.* at 551.
78. *Id.*
79. There was, of course, a more sinister aspect to conservative support of the separate but equal doctrine, quite unrelated to freedom of contract: the avoidance of commingling of white and black races socially, because of the fear of miscegenation, especially between black males and white females. The classic study of the relationship of the taboo against miscegenation to the perpetuation of a racial caste system is G. MYRDAL, AN AMERICAN DILEMMA (1962).

X. Modern Developments: State Freedom of Contract and The New Property

The last twenty years have produced two developments in the relationship between states' rights and conservatism that are worthy of note. The first is an artful reassertion of the principle of freedom of contract at an institutional level. The second is the modern trend toward judicial restraint by conservatives in economic as well as non-economic due process and equal protection cases.

In the 1976 decision in *National League of Cities v. Usery,*[80] Justice Rehnquist announced a new conservative principle that can best be described as "State Freedom of Contract."[81] This is the theory that states have the right to engage in economic transactions free from federal interference even if private citizens would have to obey the federal regulatory mandate. In *National League of Cities* itself, Justice Rehnquist argued that minimum wage laws restrict the flexibility of state employers. He noted that the same arguments would apply to private employers, who have long been covered by the Fair Labor Standards Act. The difference, according to Rehnquist, was that the states were not merely private actors but a "coordinate element" in the federal system of government.[82] In this way, Rehnquist argued that considerations of state sovereignty and freedom of contract, each insufficient by itself as a constitutional argument against federal regulation, were successful when considered together in the case of market behavior by the states themselves.

A related development is the "market participant" exception to dormant commerce clause doctrine, announced by the Court in the very same year as *National League of Cities.* In *Hughes v. Alexandria Scrap Corp.,*[83] the Court held that where the state acts as a market participant (that is, as a contracting party), as opposed to a market regulator, the restrictions of the dormant commerce clause do not apply to it. In *Reeves, Inc. v. Stake,*[84] the Court explained that the market participant exception

> is also counseled by considerations of state sovereignty, the role of each State "as guardian and trustee for its people," . . . and "the long recognized right of trader or

80. 426 U.S. 833.
81. *See* Balkin, *Ideology and Counter Ideology, supra* note 11, at 197.
82. 426 U.S. at 849.
83. 426 U.S. 794 (1976).
84. 447 U.S. 429 (1980).

> manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.[85]

At least as a constitutional doctrine, the state freedom of contract theory has been repudiated by a bare majority of the Court in *Garcia v. San Antonio Metropolitan Transit Authority.* However, Justice Rehnquist has noted that its time may come again soon.[86] Of course, what is important here is its appearance as a conservative argument, not its ability to command a majority of the Court.[87]

The second modern development worth mentioning is the relationship between conservative politics and judicial restraint. It seems clear enough, after 1937, why conservatives have advocated deference to state and federal legislative and executive acts in non-economic civil liberties cases. However, in the last twenty years, conservatives have also counseled judicial restraint even in economic regulation cases.[88] Indeed, in one of his most important opinions for the Court, *Railroad Retirement Board v. Fritz,* Chief Justice Rehnquist argued for a virtually complete abdication of judicial scrutiny in economic equal protection cases.[89]

In fact, modern conservatives have not completely abandoned the interests that conservative ideology holds most dear. This is clear both from modern takings clause cases and the renaissance of the contracts clause during the Burger Court era.[90] What has happened is that fewer

85. *Id.* at 438–39 (quoting Heim v. McCall, 239 U.S. 175, 191 (1915), and United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

86. *Garcia*, 469 U.S. 528, 580 (1985).

87. I have argued that this theory is an attempt to reassert state sovereignty theories reminiscent of those used before 1937, albeit in a limited area of constitutional doctrine. Balkin, *Ideology and Counter Ideology, supra* note 11.

88. Of course, even here there are exceptions. Some modern-day economic libertarians, like Richard Epstein, still do advocate a return to heightened scrutiny even in social and economic legislation, reminiscent of judicial practice in the *Lochner* era. R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). For a discussion of these issues, *see* Balkin, *Learning Nothing and Forgetting Nothing: Richard Epstein and the Takings Clause,* 18 URBAN LAW. 707 (1986).

89. 449 U.S. 166 (1980). On the other hand, in cases like *National League of Cities* and its progeny, Rehnquist has been very much a judicial activist, if by an activist we mean one who believes the Court should stand ready to enforce limitations on the power of legislatures and government officials. He has also been much less deferential to the political branches in constitutional challenges to affirmative action plans and federal voting rights legislation. *E.g.*, Fullilove v. Klutznick, 448 U.S. 448, 531 (1980) (Steward, J., dissenting, joined by Rehnquist, J.) (arguing that the government-created affirmative action plans should be struck down as unconstitutional); City of Rome v. United States, 446 U.S. 156, 213–14 (1980) (Rehnquist, J., dissenting) (arguing that Congress lacks power to reach conduct under Civil War Amendment enforcement powers absent proof or unrebutted presumption of intentional discrimination).

90. *E.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 142 (1978) (Rehnquist, J., dissenting); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

and fewer of the economic due process and equal protection cases that appear before the Court concern direct regulations of freedom of contract. Instead, most of the cases involve constitutional questions affecting entitlements created by redistributive social welfare programs enacted during and after the New Deal.

There is a great difference between a case like *West Coast Hotel v. Parrish*[91] in 1937, and *Dandridge v. Williams*[92] in 1970, or *Railroad Retirement Board v. Fritz*[93] in 1980. Conservatives owe no great fealty to the interests threatened in the latter two cases: welfare payments and employee pension benefits. This is not to say that if the minimum-wage law in *West Coast Hotel* were presented today, any member of the Court would vote to strike it down.[94] The point is rather that such cases no longer make up a significant portion of the docket of the federal courts. With respect to most modern social and economic regulatory cases, a general policy of judicial restraint serves conservative interests quite effectively. Conservatives have long been philosophically opposed to the creation of social welfare programs in the first place; it would be remarkable indeed if conservative Justices used federal judicial power to order additional protections for the receipt of benefits and the distribution of even more government monies.

"New" property interests are also involved in the procedural due process cases that have figured so prominently during the Burger Court years.[95] Here too, the conservative position has been in favor of states' rights and judicial restraint. The liberal position has consistently supported greater procedural protections,[96] while conservatives have argued that such protections are not only costly and unwieldy, but unduly hamper the administrative freedom of state and local governments.[97]

---

91. 300 U.S. 379.
92. 397 U.S. 471.
93. 449 U.S. 166.
94. Assuming, of course, that it did not apply to state and local governmental employees. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557, 580 (1985) (Powell, J., dissenting) (O'Connor, J., dissenting); National League of Cities v. Usery, 426 U.S. 833 (1976) (Majority Opinion of Rehnquist, J.).
95. *E.g.*, Matthews v. Eldridge, 424 U.S. 319 (1976); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).
96. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).
97. *E.g.*, Ingraham v. Wright, 430 U.S. 651, 680, 682 (1977) (requiring due process safeguards before school officials may inflict corporal punishment "would significantly burden the use of corporal punishment as a disciplinary measure;" "[a]ssessment of the need for, and the appropriate means of maintaining school discipline is committed generally to the discretion of school authorities subject to state law"); Meachum v. Fano, 427 U.S. 215, 228-291 (1976) ("holding that [movement of a prisoner from a medium security to a maximum security cell is] within reach of the procedural protections of the

Finally, many of the most recent economic due process and equal protection cases really involve attempts to give protection to new types of fundamental rights or suspect classes.[98] Once again, these cases are quite different from the regulations of freedom of contract that the Supreme Court faced in the 1940s and 1950s; they are only classified as economic regulation cases because the Supreme Court has refused to recognize new rights or suspect categories that would lead to a higher level of judicial scrutiny. In such cases, it is perfectly consistent with modern conservative ideology to pursue a policy of judicial restraint and respect for state institutions, and a correspondingly lower level of scrutiny.[99]

XI. Conclusion

The modern-day alliance between American conservatism and states' rights has resulted from the confluence of four distinct developments: (1) the pre-Civil War debates over slavery and the creation of the post-Civil War paradigm of federal protection of individual liberties from state abridgement, (2) the shift by northern conservatives after the Civil War to a philosophy of economic individualism coupled with a communalist attitude toward all other civil rights, (3) the accommodation of northern *laissez-faire* ideology with southern views on race relations, and (4) the post-1937 Court's success in reversing the *Lochner* era

Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges''); Bishop v. Wood, 426 U.S. 341, 349 (1976) (''[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.''); Paul v. Davis, 424 U.S. 693, 701 (1976) (giving due process protection to plaintiffs injured by the torts of state officers ''would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States'').

98. *E.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (rejecting age as a suspect classification); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting education as a fundamental right); James v. Valtierra, 402 U.S. 137 (1971) (rejecting poverty as a suspect classification); Dandridge v. Williams, 397 U.S. 471 (1970) (rejecting welfare as a fundamental right).

99. *Compare Rodriguez*, 411 U.S. at 17 (applying traditional rational basis test to justify differential expenditures for education in local school districts) with *id.* at 98 (Marshall, J., dissenting) (arguing for sliding scale approach with higher levels of scrutiny in equal protection cases where majority applies nonexistent scrutiny of traditional rational basis test); *compare* Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (applying enhanced rational basis test in case involving discrimination against mentally retarded persons) with *id.* at 3263 (Marshall, J., concurring in part and dissenting in part) (arguing for higher level of scrutiny); *compare* Plyler v. Doe, 457 U.S. 202 (1982) (holding that denial of free public education to children of illegal aliens violates enhanced rational basis test) with *id.* at 248 (Burger, C.J., dissenting) (arguing for application of ''traditional'' rational basis test).

Court's emphasis on economic liberty, while simultaneously conferring preferred status on non-economic liberties.

Of these influences, the impact of slavery is perhaps the most profound. It was slavery, after all, that divided northern and southern conservatives from each other, and led to our present view of the federal government as the primary guarantor of civil liberties. Succeeding developments in American history have operated within this framework: even the New Deal has not altered the basic patterns of institutional argument that were formulated by the time of *The Slaughterhouse Cases.*

However, because the modern alliance of states' rights and conservatism has resulted from a confluence of historical forces, there is no reason to expect it to be permanent. The conservative interest in America has always been, and will continue to be, in the protection of vested rights of property and economic privilege. Whichever form of government, state or federal, best supports the aims and goals of conservative ideology will, in turn, win the support of American conservatives.