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Contents

Nearly a century on, the New Deal still looms large for Democratic politicians, journalists, and legal academics. Comparisons encouraged by candidate Joe Biden on the campaign trail, led scholars and journalists to draw linkages, at the 100-day mark of Biden's presidency, to FDR's transformational program.[1] Senator Bernie Sanders pitched his 2016 presidential campaign as an extension of FDR's call for an economic bill of rights—a campaign that helped spur the creation of a sweeping package of proposed (some enacted) policy reforms, such as the Green New Deal.[2] And it is the New Deal that two progressive legal

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[1] Charlotte Alter, "How Joe Biden is Positioning Himself as a Modern FDR," *Time*, October 28, 2020; Jonathan Alter, "How FDR's Heir is Changing the Country," *New York Times*, April 12, 2021. Journalists had done the same, if with better reason, in the aftermath of Barack Obama's landslide victory in 2008. See Theda Skocpol and Lawrence Jacobs, "Reaching for a New Deal," in *Reaching for a New Deal: Ambitious Governance, Economic Meltdown, and Polarized Politics in Obama's First Two Years*, Skocpol and Jacobs, eds. (Russell Sage, 2011), 1.

[2] Sanders effectively stands at the vanguard of the party's left-wing. Luke Mayville, "Is Bernie Sanders a New Deal Liberal?," *Commonweal*, November 24, 2015; "Ocasio-Cortez, Markey Reintroduce Green New Deal Resolution," Press Release, April 20, 2021, available at:

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scholars point to as providing the template for a new constitutional political economy in their recent book.[3]

Consonant with this is the hold FDR's court-packing plan still has on many Democrats and most progressives. In response to Senator Mitch McConnell's constitutional hardball and Donald Trump's three subsequent appointments, modern-day court-packing plans were back on the table.[4] The parallel attacks on the Court went for the jugular. Not only was this a Court captured by corporations—reminiscent of FDR's excoriation of "economic royalists"—but one also supportive of the Christian right (even Christian nationalism) and propping up the GOP's minoritarian political position.[5] And this revanchist Court, Democrats and progressives worry, threatens to undo the work of their judicial reference point: the Warren Court.[6] That Court's rights revolution, along with abortion rights and affirmative action, was not only the pinnacle of American constitutionalism but inviolable precedent, the *law*.[7]

In short, Democrats and progressives tell themselves a rise-and-fall story about modern American constitutional development. A conservative Court predominated in the first few decades of the twentieth century—often referred to as the "Lochner Era." That era gave way with the triumph of FDR's New Deal via the Constitutional Revolution of 1937. FDR remade the Supreme Court, marking the triumph of legal liberalism. This liberalism was eventually worked pure by the Warren Court. If this was the rise, the story since then has been all fall. The declension starts with Richard Nixon, the fracturing of the New Deal coalition, and Ronald Reagan's 1980 election.[8] And, as sketched

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https://ocasio-cortez.house.gov/media/press-releases/ocasio-cortez-markey-reintroduce-green-new-deal-resolution-0.

[3] Jospeh Fishkin and William Forbath, *The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy* (Harvard University Press, 2022).

[4] See Tara Leigh Grove, "The Supreme Court's Legitimacy Dilemma," *Harvard Law Review* 132 (2019): 2240-76.

[5] Adam Feldman, "Empirical SCOTUS: The Big Business Court," *SCOTUSBlog*, August 8, 2018; "Christian Nationalism Is 'Single Biggest Threat' to America's Religious Freedom," *Center for American Progress*, April 13, 2022; Nancy Gertner and Laurence Tribe, "The Supreme Court Isn't Well. The Only Hope for a Cure is More Justices," *Washington Post*, December 9, 2021.

[6] Jesse Wegman, "How to Teach Students About a Politicized Supreme Court," *New York Times*, March 3, 2024.

[7] Wegman, "How to Teach Students About a Politicized Supreme Court." See Erwin Chemerinsky, *The Case Against the Supreme Court* (Viking, 2014), 155.

[8] See Jack Balkin, *The Cycles of Constitutional Time* (Oxford University Press, 2020).

above, with the advent of the Roberts Court in 2005 and Trump's election(s), the declension deepens with no end in sight.

Ken Kersch's first book identified this story and the intellectual-cum-political work it did for "constitutional scholars," as he designated them.[9] Kersch fleshed this out in a chapter of his co-edited volume on *The Supreme Court & American Political Development*, arguing that many legal academics treat "The New Deal Triumph as the End of History."[10] In his collective early scholarship, then, Kersch argued that the New Deal was their pivot point, the key moment of "a linear, teleological trajectory of barrier, breakthrough, and apotheosis": the Lochner Era, the Constitutional Revolution of 1937, and then the Warren Court as a triptych.[11] The political point of this scholarship—much of which was "Whig history," Kersch argued—is "defending the New Deal constitutional regime" and its extension by the Warren Court.[12] Put differently, many constitutional scholars, especially those in the law schools, *naturalized* the rise-and-fall story such that it seamlessly conflated progressive sensibilities with constitutional law as it once was and should be again.

Even if one did not agree with all the specific interpretations of Kersch's critiques and arguments in his early scholarship, it is hard to gainsay his overarching insight into the politically inflected rise-and-fall story of modern American constitutional law.[13] In much constitutional scholarship, there is a tension that juxtaposes, as he put it, "the forces of progress against the forces of reaction."[14] Indeed, this seems especially difficult to deny in light of the reaction from law schools to Trump and the Supreme Court he reconstituted. Thus, Kersch was no doubt unsurprised to read in the *New York Times* of constitutional law professors "literally bursting into tears" while making their syllabi or

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[9] Ken Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge University Press, 2004), 1 (hereafter *CCL*).

[10] Kersch, "The New Deal Triumph as the End of History? The Judicial Negotiation of Labor Rights and Civil Rights," in Ronald Kahn and Ken Kersch, eds. *The Supreme Court & American Political Development* (University Press, of Kansas 2004), 169-226.

[11] Kersch, *CCL*, 1-2.

[12] Kersch, *CCL*, 2.

[13] For example, Kersch provocatively argued that "New Deal labor constitutionalism represented a direct assault on American blacks" and was "a barrier to the cause of civil rights." Kersch, *CCL*, 10. Yet, there are good reasons to think that the reality was more complex. See Eric Schickler, *Racial Realignment: The Transformation of American Liberalism, 1932-1968* (Princeton University Press, 2016), ch. 6.

[14] Kersch, *CCL*, 2.

teaching students that the current Court's work product is in effect anti-law—"what the law isn't."[15]

This essay argues that the contribution of his early scholarship was to highlight the potential empirical pitfalls and blind spots of a story about the modern Supreme Court, which is often incomplete, and at certain points deeply so. Rather than summarize and recapitulate Kersch's early scholarship, this essay leverages two short case studies that extend his critique of the standard story. These two developmental episodes fall on each end of the still predominant "rise and fall" story. First, I argue that the Lochner Era is at bottom a fiction, one devised decades later by liberal Justices and progressive law professors to justify and protect their constitutional gains—and for libertarian legal scholars to bemoan their losses. The Lochner Era, that is, allowed (and allows) liberal Justices and academics to couch modern American constitutional history as "barrier" and "breakthrough," even though it abrades how Progressives contemporaneously described constitutional development. The second case study takes up the ostensible fall: the election of Nixon and the conservative turn in constitutional law in the 1970s. But when we free ourselves from the rise-and-fall story and revisit even briefly the Supreme Court's jurisprudence alongside the public law and civil society landscape, the 1970s emerge as the *zenith* of legal liberalism. Seen in this way, one has to struggle mightily, leaving substantial empirical evidence on the cutting room floor, to depict these years as conservative, whether constitutionally or in relation to that decade's public law.

But before filling out these claims, it is worth placing the empirics within their larger disciplinary context in the fields of constitutional scholarship and American political and constitutional development. Implicit in what Kersch called the "narrative constraints" of the rise-and-fall story is an understanding of conservative-and-American political development, wherein conservatives often become a sideshow or are reduced to playing the antagonist to liberals' protagonist role.[16] Taking conservatism seriously—the focus of Kersch's later scholarship—means being cognizant of these tendencies.[17] Thus, the section immediately below sketches out how we might follow Kersch's lead here as well, by thinking carefully about conservatism and its scholarly inquiry. Following the case studies, the conclusion advocates leaving behind the rise-and-

[15] Wegman, "How to Teach Students."

[16] Kersch, *CCL*, 18.

[17] Ken Kersch, *Conservatives and the Constitution: Imagining Constitutional Restoration in the Heyday of American Liberalism* (Cambridge University Press, 2019).

fall story and reorienting ourselves to the political development of public law over the past century.

I. CONSERVATISM WITHIN AMERICAN POLITICAL DEVELOPMENT AND CONSTITUTIONAL SCHOLARSHIP

Within the field of American Political Development (APD), the state is often the protagonist as such. Is it weak or strong, and when did the transition take place, and across which institutions? How did a certain policy regime or institution-building effort expand the reach or capacity of the state (or come up short)? How did a social movement affect (or fail to fully) achieve its goals?[18] Identifying patterns in state-building is perhaps the core of the enterprise. Conservatives and conservatism are often the side attraction to these institutional and ideological battles. As Stephen Skowronek puts it, far more often, "scholarly attention has focused on alternative governing visions generated by the dissenting left," attention often meant to "illustrate the limits of the Left."[19]

Put differently, one might argue that the implicit normative valence of this orientation is that liberals are often characterized as having lacked the imagination, wherewithal, or simply the political will to thoroughly restructure the state and institution-build to the extent progressives and radicals pushed for. Conservatives' governing vision(s), insofar as they are addressed, are often the foil, the anti-statist antagonist, or sometimes simply reactionary. At the same time, there is often a lack of scholarly interest in revisiting incomplete or failed liberal and progressive policy experiments or exploring pathologies of governing institutions.[20] If, to be sure, one recurring pattern of modern American conservatism has been efforts to gum up policy experiments and institutions, or let policy "drift" and thus stagnate, not all of the blame can be placed at their feet.[21] Indeed, there is right now an internecine liberal-versus-left battle over

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[18] See Brian Glenn and Steven Teles, "Introduction: Studying the Role of Conservatives in American Political Development," in Glenn and Teles, eds., *Conservatism and American Political Development* (Oxford University Press, 2009), 3-18.

[19] Stephen Skowronek, "Afterword: An Attenuated Reconstruction: The Conservative Turn in American Political Development," in Glenn and Teles, eds., *Conservatism and American Political Development*, 348-64.

[20] There are salient exceptions, including no less than the foundational work of APD. See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1870-1920* (Cambridge University Press, 1982); Eric Patashnik, *Reforms at Risk: What Happens After Major Policy Changes Are Enacted* (Princeton University Press, 2008).

[21] Glenn and Teles, "Conclusion: Conservatism and American Political Development," in *Conservatism and American Political Development*, 324-347; Daniel Galvin and Jacob Hacker,

how "new class" progressives, especially lawyers, *restricted* state capacity over the past fifty years in critical ways, a debate that is increasingly ripe for an intervention by APD scholars.[22]

Safe to say, though, APD scholars' lack of attention to conservatives and conservatism is most often driven by the questions they ask and the institutions and actors that most interest them. If this is understandable given the nature of the APD enterprise, by contrast, in his early scholarship, Kersch argued that the normativity of much "barrier, breakthrough, and apotheosis" constitutional scholarship does not simply lead to questions yet unanswered. Rather, the protagonist-antagonist bent revealed a body of scholarship that in many respects obscured modern American constitutional development. For example, one of Kersch's key case studies in his first book showed that there was no steady evolution of privacy rights from the Progressives to *Roe v. Wade*.[23] Instead, it was the deprivatization of corporate and business records that was central to the Progressive project of building the fact-intensive modern administrative state.[24] One can still agree that "the trusts" had to be brought under governmental control while admitting that the throughline from Louis Brandeis's famous law review article on privacy to the sexual autonomy cases is in fact *not* "assist[ing] the evolution of democracy in modern America and prevent[ing] democratic stagnation."[25]

There are similar examples. Despite the still-entrancing quality of FDR's court-packing plan and the Court's 1937 bending of the knee—the "breakthrough"—there is at least reason to question that this episode unfolded so dramatically and triumphally.[26] And to this day, constitutional scholars have not

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"The Political Effects of Policy Drift: Policy Stalemate and American Political Development," *Studies in American Political Development* 34(2020): 216-238.

[22] See, e.g., Nicholas Bagley, "The Procedural Fetish," *Michigan Law Review* 118 (2019): 345-401. For a representative view from the left, see Paul Glastris and Nate Weisberg, "The Meager Agenda of Abundance Liberals," *Washington Monthly*, March 23, 2025.

[23] But see James Fleming, *Constructing Basic Liberties: A Defense of Substantive Due Process* (University of Chicago Press, 2022).

[24] Kersch, *CCL*, 29-65.

[25] Ken Gormley, "One Hundred Years of Privacy," *Wisconsin Law Review* 1992 (1992): 1335-1441.

[26] See Mark Tushnet, *The Hughes Court: From Progressivism to Pluralism, 1930-1941* (Cambridge University Press, 2021). That said, the "legalist" or "internalist" scholars often overcorrect and place far more weight on doctrinal development than that causal factor can carry. See Laura Kalman, "The Constitution, the Supreme Court, and the New Deal, *American Historical Review* 110 (2005): 1052-1080.

provided a principled answer for why the Supreme Court should treat economic and social rights differently—even as, if this state of affairs were reversed, there would be by now thousands of law review articles criticizing such.[27] By that same token, even as there is much to admire in the Warren Court's body of work that helped quash old status hierarchies, there is vanishingly little (non-conservative) scholarship critical of the Warren Court. The only scholarly problem with the Warren Court is that it did not go far enough.[28] But rather than take the ahistorical view that the Warren Court was conservative in any meaningful sense, we might say that the Justices were, for example, short-sighted in their remaking of constitutional criminal procedure.[29] More broadly, it is difficult to deny that the Warren Court Justices often did not take legal doctrine and law seriously. As Felix Frankfurter presciently put it of the Warren Court vanguard shortly before he died in 1962: "They don't understand that there will come a time when there is a very different majority. They will be free to undo all of this. And even more."[30] But because it landed on politically pleasing results, the Warren Court gets a scholarly pass—a position that has left progressive legal scholars exposed as the Roberts Court works its own version of a "rights revolution."

In sum, given the deep political normativity baked into much (even most) constitutional scholarship, conservatism not only gets lost, but in an effort to prop up a set of political commitments, the resulting scholarly story gets narrowed. This results in a body of work that is often insensitive to political and constitutional development. Perspectives that do not reinforce the rise-and-fall story, or do not critique it from the left, are ironically dismissed as politically motivated scholarship. The following short case studies aim to suggest just how much is lost by continued attachment to the rise-and-fall story.

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[27] For the classic defense of this distinction, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980). For a critique of Ely and New Deal constitutionalism more generally from the right, see Michael Greve, *The Upside-Down Constitution* (Harvard University Press, 2012), esp. 175-98. From the left, see James Fleming, "A Critique of John Hart Ely's Quest for the Ultimate Constitutional Interpretivism of Representative Democracy," *Michigan Law Review* 80 (1982): 634-82.

[28] See, e.g., Justin Driver, "The Constitutional Conservatism of the Warren Court," *California Law Review* 100 (2012): 1101-167.

[29] William Stuntz, *The Collapse of Criminal Justice* (Belknap Press, 2011).

[30] Quoted in Brad Snyder, *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment* (W.W. Norton, 2023), 462.

II. THE LOCHNER ERA AND THE BARRIER THAT WASN'T

The first wing of the rise-and-fall triptych is this: a 1905 case, *Lochner v. New York*, epitomizes the "barrier" in the rise-and-fall story.[31] In short, the standard story holds that from the 1890s until the Constitutional Revolution of 1937, the Supreme Court repeatedly stood in the way of vital state and national social and economic legislation.[32] This 1905 case is such a talisman that one prominent legal historian argued that *Lochner* "brought Progressive Legal Thought into being."[33]

Several scholars have offered revisionist empirical accounts of Lochner constitutionalism—what emerges is that the Court was far more deferential to Congress than the rise-and-fall story asserts.[34] But one can press even further: the Lochner Era as such is a useful fiction, simply a tool for constitutional scholars and Supreme Court Justices to do battle over constitutional politics in the law reviews and judicial opinions.[35] Building on prior work, this case study argues that the Progressives and 1920s liberals would have found both the standard law school narrative and much of the revisionist scholarship puzzling.[36] The *Lochner* case was of some importance to the Progressives, but it hardly dominated their conception of constitutional politics and defined an era. Instead, a closer look reveals that they were responsive to the fluctuations of politics, judicial and otherwise. Focused so intently on the Supreme Court and judicial

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[31] See Kersch, *CCL*, 2.

[32] The literature on Lochner—the case and era—is too voluminous to set forth here. For useful collections of the relevant work, see Thomas Colby and Peter J. Smith, "The Return of Lochner," *Cornell Law Review* 100 (2015): 527-602; Laura Kalman, "In Defense of Progressive Legal Historiography," *Law and History Review* 36 (2018): 1021-1088.

[33] Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992), 33.

[34] See, e.g., Victoria Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review* 97(2009): 751-99; Keith Whittington, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (University Press of Kansas, 2019). Whittington, for example, shows that during the Lochner Era, the Supreme Court struck down congressional acts as unconstitutional only approximately 25 percent of the time thus seriously complicating the traditional law school narrative. Whittington, *Repugnant Laws*, 150-51.

[35] For a high-profile example of the Justices reinforcing the conventional wisdom regarding *Lochner*, see *Planned Parenthood v. Casey* (1992) (arguing that the Constitutional Revolution of 1937 "signaled the demise of *Lochner*.")

[36] Howard Gillman, "De-Lochnerizing *Lochner*," *Boston University Law Review* 85 (2005): 859-65.

review, rise-and-fall scholars miss that the Progressives' central complaint cut much deeper: the Constitution and the nature of public law itself.[37]

In the years after *Lochner*, Progressives repeatedly noted that the Supreme Court had liberalized in the face of repeated attacks and subsequent Court appointments.[38] In his influential 1907 broadside against *the Constitution*, Progressive scholar J. Allen Smith noted: "It must be admitted that, in the ordinary course, our highest federal judges have shown wisdom and patriotism, have sought to interfere little with national executive and legislature, and have been free from even the vaguest suspicion of venality."[39] In fact, Smith never even mentioned *Lochner*. A figure as central to Progressivism as Walter Weyl, one of the founding editors of their house organ, the *New Republic*, highlighted in 1912: "the Supreme Court of the United States, like other bodies, has come more or less under the ripening influence of a new democratic spirit"—it was the "State courts" that, along with the Constitution itself, were the problem. When he did discuss Supreme Court cases, Weyl identified other opinions rather than *Lochner* as the jurisprudential problems.[40]

The chief theorist of Progressivism, Herbert Croly, assessed the situation similarly in 1914 in *his* broadside against the Constitution and the received public law: "Plans of social legislation, which formerly would have been considered culpably 'paternal,' and, if passed at the solicitation of labor unions, would have been declared unconstitutional by the courts, are now considered to be normal and necessary exercise of the police power"—a police power that was now "emancipated."[41] That same year, Harvard Law School's Roscoe Pound, who wrote a famous 1905 essay on sociological jurisprudence, defended judges:

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[37] See Calvin TerBeek, *Enemy Establishment: The Constitution, the Modern State, and the Political Development of Polarization* (Princeton University Press, forthcoming).

[38] In addition to the examples that follow, see W.F. Dodd, "Social Legislation and the Courts," *Political Science Quarterly* 28 (1913): 1-17, 5-9; "Brandeis," *New Republic*, February 5, 1916; Horace A. Davis, *The Judicial Veto* (Houghton Mifflin, 1914), 4; Frank Goodnow, *Social Reform and the Constitution* (Macmillan, 1911), 329; William Lynn Ransom, *Majority Rule and the Judiciary* (Charles Scribner's Sons, 1912), 52-61.

[39] J. Allen Smith, *The Spirit of American Government: A Study of the Constitution, Its Origin, Influence, and Relation to Democracy* (Macmillan, 1907), 110-11. On Smith's influence, see Kalman, "In Defense of Progressive Legal Historiography," 1062-63.

[40] Walter Weyl, *The New Democracy* (Macmillan, 1912), 110-11, 114-15.

[41] Herbert Croly, *Progressive Democracy* (Macmillan, 1914), 4, 149.

"they know more of life than almost any other class of men."[42] In 1916, a Harvard law professor named Felix Frankfurter wrote in the *Harvard Law Review* that the doctrine outlined in *Lochner* "is surely no longer 'controlling.'"[43] The next year, the *New Republic* confidently declared the battle against Lochnerian "liberty of contract" over: "This method has now been generally discredited. A more realistic view appeared [on the Court]."[44]

If the very actors who were devising the meaning of Progressivism in its political and legal guises—and who had every reason to "see" a Lochner Era—could not do so in the decade-plus after the case, and in fact called the reasoning a relic, it is unclear what empirical leverage we are gaining on American constitutional history by insisting that there was a hegemonic Lochner Era in these years. It was not Supreme Court doctrine that was the problem. Rather, it was the Madisonian Constitution and the nature of public law itself, an importantly different and far deeper critique than debates about judicial review and deference to legislatures.

And contra another conceit of the Lochner Era story, the Progressives enjoyed no little success in remaking the Constitution of 1787 and the traditional toolkit of the lawyer. Thus, conservatives did not see themselves as hegemonic. In 1920, William Howard Taft warned them that "a new school of constitutional construction" had appeared in the law schools and on the Court; a conservative president needed to be elected to halt further inroads.[45] Taft would play just such a role after being appointed Chief Justice the following year. With the Taft Court's conservatism in the 1920s, liberals would bemoan the return of a "rigid" constitutional law they thought had been vanquished.[46] But sophisticated observers still did not see a "Lochner Era." Contemporaneous scholarship in high-profile law journals revealed the faulty empirical premise of the Lochner Era construct.[47] As Charles Beard told students in his 1930 textbook, all one had to do was compare the Constitution of today "with that of the closing years of the nineteenth century" to see how comparatively liberal

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[42] Roscoe Pound to Morris Cohen, March 16, 1914, box 10, folder 11, Morris Cohen Papers, University of Chicago.

[43] Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," *Harvard Law Review* 29 (1916): 353-73.

[44] "The Supreme Court's Power," *New Republic*, March 31, 1917, 250-52.

[45] William Howard Taft, "Mr. Wilson and the Campaign," *Yale Review* (October 1920), 1-25, 19-20.

[46] "The Same Mr. Taft," *The New Republic*, January 18, 1922, 191-94.

[47] Ray A. Brown, "Due Process of Law, Police Power, and the Supreme Court," *Harvard Law Review* 40 (1927): 943-68.

constitutional law had become.[48] If even into the 1920s, when the Taft Court was able to make conservative gains, figures as central to Progressive constitutional thinking as Beard could not see a Lochner Era, the burden is on constitutional scholars to point toward evidence that Beard was oblivious to the reality of constitutional politics.

The lack of contemporaneous recognition of a Lochner Era persists into the 1930s and '40s. In 1936—as FDR's battle with the Court was coming to a head—a scholarly book attacked the conservative Court: *Lochner* was simply one of many transgressive cases and not emblematic of an Era.[49] For Princeton's Edward Corwin in 1941, *Lochner* was "famous," if not an exemplar.[50] As FDR's New Deal Court took shape and then became the Warren Court, liberal Justices would wield *Lochner* as a rhetorical weapon in their opinions.[51] But there was still no concept of a Lochner Era. In a 1954 scholarly book, the author saw a 1908 Supreme Court case as marking the *end* of a conservative trend, followed by a period of relative liberalism on the Court, and *then* a revival from 1923 to 1937—he could see no linear Lochner Era, a concept he did not invoke.[52] And as late as a 1970 debate at the American Enterprise Institute with Senator Sam Ervin (D-NC), former Lyndon Johnson Attorney General Ramsey Clark pointed to *Hammer v. Dagenhart* (1918) as the emblematic case of the putative Lochner Era.[53]

In the 1970s, the Lochner Era concept was finally concretized. A year after Justice William Douglas used the term "Lochner Era" in a 1972 *Columbia Law Review* article, a Stanford law professor (Gerald Gunther) invoked the idea in an influential *Harvard Law Review* piece—it was again invoked by Harvard Law School's Laurence Tribe in the *Harvard Law Review* the following year.[54]

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[48] Charles Beard, *American Government and Politics,* 5th ed. (Macmillan, 1930), 101.

[49] John M. Henry, *Nine Above the Law: Our Supreme Court* (R.T. Lewis, 1936), 231, 252.

[50] Edward Corwin, *Constitutional Revolution, Ltd.* (Claremont Colleges, 1941), 29.

[51] See, e.g., Hughes's opinion in *West Coast Hotel v. Parrish* (1937); Frankfurter's opinion in *AFL v. American Sash & Door* (1949); Black's opinion in *Lincoln Federal Labor Union v. Northwestern Iron & Metal* (1949); and Douglas' opinion in *FHA v. Darlington* (1958).

[52] Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law* (University of California Press, 1954), 24, 92-96.

[53] Sam Ervin and Ramsey Clark, *Role of the Supreme Court: Policymaker or Adjudicator?* (AEI, 1970), 21.

[54] William O. Douglas, "A Tribute to Chief Judge Stanley H. Fuld," *Columbia Law Review* 71 (1971): 531-34; Gerald Gunther, "In Search of Evolving Doctrine on a Changing Court: A

Thereafter, for theorists of constitutional law, the meaning of the Lochner Era became a site of ideological shadow-boxing that continues to this day.

Empirically, the above at least suggests that the scholarly and Supreme Court enterprise of arguing about *Lochner*'s merit, the Court's ostensible use of "substantive due process," and its epitomization of an era of constitutional history is divorced from twentieth-century constitutional politics.[55] Constitutional politics waxed and waned unconfined by a Lochner Era. Insisting there was a Lochner Era runs up against the historical record in a larger sense: the significant accomplishments of the Progressives and 1920s liberals in remaking the Constitution to make space for the modern state.[56] Indeed, the notion of a Lochner Era makes little sense when we recognize that conservatives—when the Court was identifiably conservative—were spurred by Progressive success to try and rescue the traditional Constitution in the 1920s.[57]

The Lochner Era serves the politics of the legal academy, both past and present. Part of a pleasing story, it tees up the triumph of the New Deal and the Constitutional Revolution of 1937. More broadly, it provides an ostensible doctrinal glidepath to debate once and again libertarian versus progressive approaches to the Constitution. But what it has to tell us about American constitutional development in the first four decades of the twentieth century is unclear.

III. THE 1970S AS THE ZENITH OF LEGAL LIBERALISM

A critical implication of the rise-and-fall story is this: the Warren Court was the "apotheosis" of legal liberalism, and thus the 1970s are a time of declension, a conservative backlash both on and off the Court.[58] The Nixon administration

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Model for a Newer Protection," *Harvard Law Review* 86(1972): 1-48; Laurence Tribe, "Toward a Model of Roles in the Due Process of Life and Law," *Harvard Law Review* 87 (1973): 1-53.

[55] On the ahistoricity of *Lochner* as an example of substantive due process, see Gillman, "De-Lochnerizing *Lochner*."

[56] Stephen Skowronek and Stephen Engel, "Introduction," in Stephen Skowronek et al., eds., *The Progressives' Century: Political Reform, Constitutional Government, and the Modern American State* (Yale University Press, 2016), 1-15.

[57] Michael Lienesch, "Creating Constitutional Conservatism," *Polity* 48 (2016): 387-413; Joseph Postell and Jonathan O'Neill, "Introduction," in Postell and O'Neill, eds., *Toward an American Conservatism: Constitutional Conservatism During the Progressive Era* (Palgrave Macmillan, 2013), 1-15.

[58] See Kersch, *CCL*, 2.

and its Justices kicked off a "New Right regime" that presaged the Reagan revolution.[59] A longtime *New York Times* Supreme Court commentator and her legal academic co-author see the 1970s Burger Court as a conservative Court, shifting the law's movement significantly to the right.[60] Others see the Burger Court as, in the least, "revers[ing] the momentum of the Warren Court's movement toward greater equality."[61] This scholarship, in short, sets the Warren Court as the baseline of correct constitutional and public law and treats deviations from that as "conservative."

But one has to squint to see a conservative Supreme Court in the 1970s. Setting to the side two landmark rulings of liberal constitutionalism—the *Bakke* affirmative action case (1978) and *Roe v. Wade* (1973), the *sine qua non* of constitutional law for fifty years—the Burger Court liberalized individual free speech and private possession of obscene materials[62]; extended rights for those on welfare[63]; dismissed outdated ordinances that outlawed non-traditional family living situations[64]; struck down the death penalty as unconstitutional (though it backtracked four years later to let the states decide)[65]; recognized gender (sex) equality and struck down mandatory maternity leave policies even while the Equal Rights Amendment was going through the ratification process[66]; extended the right to counsel to all cases that carried the potential of imprisonment[67]; and, among much else, substantially expanded the opportunities for environmental and citizens groups to block via lawsuits governmental and private development they deemed harmful to the environment.[68]

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[59] See Cornell Clayton and J. Mitchell Pickerill, "The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence," *Georgetown Law Journal* 94 (2006): 1385-1426.

[60] Michael Graetz and Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right* (Simon & Schuster, 2016). For a more nuanced assessment, see Earl Maltz, *The Coming of the Nixon Court: The 1972 Term and the Transformation of Constitutional Law* (University Press of Kansas, 2016).

[61] David Strauss, "Why the Burger Court Mattered," *Michigan Law Review* 116 (2018): 1067-1080.

[62] *Cohen v. California*, 405 U.S. 15 (1971); *Stanley v. Georgia*, 394 US 557 (1969).

[63] *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[64] *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

[65] *Furman v. Georgia*, 408 U.S. 238 (1972)

[66] See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Cleveland Board of Education v. LaFluer*, 414 U.S. 632 (1974).

[67] *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

[68] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

Even where rise-and-fall devotees point to conservative Burger Court cases, they often fail to place those cases within their larger developmental context. Seeing *San Antonio v. Rodriguez* (1973)—where the Court refused to constitutionalize equalized funding of public schools—as the end of this public law story overlooks that several state supreme courts subsequently took that step.[69] In any case, when we look beyond US Supreme Court and state supreme court rulings and to subsequent public law, the impact of *Rodriguez* was ultimately obviated. Tallying up local, state, and federal funding, the overwhelming majority of school districts with poverty-stricken students receive *more* per-student funding than those with non-impoverished children.[70] Scholars devoted to the conventional story also point to a 1974 case as effectively killing off school busing and ending the promise of *Brown v. Board*. But careful scholarship that does not stop with Supreme Court rulings demonstrates that busing persisted in many school districts as federal district courts and the Office of Civil Rights continued the work of desegregating public schools (with ambiguous results).[71] At the same time, the rise-and-fall story rarely notes that federal (and state) judges ordered prisons, mental health hospitals, and police departments to reform in these years.[72]

Little of this can properly be deemed conservative. But perhaps most constricted is the focus on *Washington v. Davis* (1976), a case that upheld colorblindness as the standard for *constitutional* equal protection claims. Often portrayed as the state of public law, this perspective ignores that disparate impact race- and gender-conscious affirmative action was widespread in public, private, and higher education institutions prior to *Bakke*—indeed, race-conscious affirmative action was pioneered by Fortune 500 human relations departments.[73] And rarely do rise-and-fall scholars point to the Equal Employment Opportunity Commission's adoption and implementation of the "4/5ths

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[69] See, e.g., Donald Horowitz, *The Courts and Social Policy* (Brookings, 1977). In the 1980s and 1990s, Kentucky, Ohio, and New York state courts also ruled in favor of funding equality.

[70] "School Funding: Do Poor Kids Get Their Fair Share?," *Urban Institute*, May 2017.

[71] R. Shep Melnick, *The Crucible of Desegregation: The Uncertain Search for Educational Equality* (University of Chicago Press, 2023).

[72] Martha Derthick, "Crossing Thresholds: Federalism in the 1960s," *Journal of Policy History* 8 (1996): 64-80.

[73] See John D. Skretny, *The Minority Rights Revolution* (Harvard University Press, 2002); Frank Dobbin, *Inventing Equal Opportunity* (Princeton University Press, 2011); Jennifer Delton, *Racial Integration in Corporate America, 1940-1990* (Cambridge University Press, 2009); Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972* (Oxford University Press, 1990); John D. Skretny, *After Civil Rights: Racial Realism in the New American Workplace* (Princeton University Press, 2014).

rule of thumb" in hiring, firing, and promotion.[74] This was not a mere suggestion—business firms and their human relations directors took the EEOC seriously.[75]

Beyond the liberalism of the Supreme Court, lower federal courts, and the EEOC, rise-and-fall scholars gloss over the greatly expanded 1970s administrative state as a whole and its public law. Much "thicker," "broader," and more "intrusive" than the New Deal iteration, new public law now touched on all manner of social and economic life.[76] In particular, the Environmental Protection Agency and the field of environmental law came into being in the 1970s as new positive rights burgeoned, such as the right to clean air, with identifiable ramifications for public policy.[77] In a reinforcing loop, federal agencies and courts took on vast swaths of public policy—a partnership liberal federal judges and law professors praised in their opinions and law review articles as the "inevitable" state of affairs in our "increasingly regulated society."[78] By that same measure, painting President Jimmy Carter as a crypto neoliberal is hard to square with his creation of the Department of Education and the Department of Energy, both cabinet-level posts.

Legal liberalism predominated as well across other civil society institutions. Public interest law firms and "cause" lawyers "proliferated" in the late 1970s

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[74] This rule implemented a standard that when any "racial, sexual, or ethnic group" that was hired, fired, or promoted at a rate less than 80 percent of white men there was a presumption of discrimination. EEOC, "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures," See, e.g., March 2, 1979, available at: https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines.

[75] Theodore Purcell, "Management and Affirmative Action in the Late Seventies," in Leonard Hausman, Orley Ashenfelter, Bayard Rustin, Richard Schubert, and Donald Slaiman, eds., *Equal Rights and Industrial Relations* (Industrial Relations Research Association, 1977), 71-104.

[76] Bryan D. Jones, Sean Theriault, and Michelle Whyman, *The Great Broadening: How the Vast Expansion of the Policymaking Agenda Transformed American Politics* (University of Chicago Press, 2019), 1-15.

[77] Marc Landy, "The Politics of Environmental Policy," in Marc Landy and Martin Levin, eds., *The New Politics of Public Policy* (Johns Hopkins University Press, 1995), 207-27; Marc Landy et al., *The Environmental Protection Agency: Asking the Wrong Questions from Nixon to Clinton* (Oxford University Press, 1994). See also Robert Rabin, "Lawyers for Social Change: Perspectives on Public Interest," *Stanford Law Review* 28 (1976): 207-262, 236-55.

[78] Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (1976): 1281-1316. For a pertinent example of the administrative and judicial partnership, see Judge David Bazelon's opinion in *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 589, 597 (D.C. Cir. 1971).

with the support of progressive charitable foundations as they collectively defined the "public interest" to be ideologically left-of-center, ranging from liberal to radical.[79] Many of these cause lawyers were recent graduates of a more progressive legal academy. In the law schools, especially elite institutions, many law students had left-liberal to radical politics—these students from affluent families "were rejecting middle class values" (as one Yale student put it).[80] Law students were also now far more likely to come from social science undergraduate programs rather than, as just ten years earlier, the humanities.[81] Not only were their politics more progressive, but they were thus predisposed to see the law as a tool for social change, policy by a different name, as manifested by the introduction of the *Yale Review of Law and Social Action*.[82] In 1973, nearly a quarter of law students "foresaw legal careers in public defender, legal aid, civil rights, or civil liberties work, and in radical legal activities such as the Lawyers' Commune."[83] Thus, when a high-profile liberal federal appeals court judge (J. Skelly Wright) warned Alexander Bickel and other legal process scholars that "times are changing"—that their way of understanding the law was "headed for obsolescence"—he was on the nose in the near term and in ways he could not quite imagine over the horizon.[84]

Even this brief synthesis strongly suggests that, whether taken on its own terms—a conservative 1970s Supreme Court—or looked at with a wider public law and policy lens, the "fall" story is difficult to sustain. Rather, legal liberalism predominated as the conservative legal movement was only starting to get its act together. Focused intently on a handful of Supreme Court cases and reading

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[79] Luca Falciola, *Up Against the Law: Radical Lawyers and Social Movements, 1960s-1970s* (University of North Carolina Press, 2022); Steven Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, 2008), 22-57. See also Jerold S. Auerbach, *Unequal Justice: The Lawyers and Social Change in Modern America* (Oxford University Press, 1976), 282-83.

[80] Robert Stevens, "Law Schools and Law Students," *Virginia Law Review* 59 (1973): 551-707, 553, 585-86, 598, 602, 607. Stevens reported that his data showed that women and Black law students were "much more likely" to enter law schools with an aim toward "restructuring society." Stevens, "Law Students," 613.

[81] Stevens, "Law Students," 574-75.

[82] Stevens, "Law Students," 552 n. 2, 598, 602.

[83] Stevens, "Law Students," 634.

[84] J. Skelly Wright, "Professor Bickel, the Scholarly Tradition, and the Supreme Court," *Harvard Law Review* 84 (1971): 769-805, 772. Of course, Wright failed to see that conservatives' constitutional originalism, a political mirror-image of his preferred Constitution, was building momentum for future impact. See Jonathan Gienapp, *Against Constitutional Originalism* (Yale University Press, 2024).

history backwards—this time with a teleology attributed to conservatism—the standard story overlooks how ideologically sure of itself legal liberalism was in the 1970s and how its accomplishments may have opened the door still wider for the conservative legal movement in the 1980s.

IV. IMPLICATIONS AND CONCLUSIONS

This essay has argued that Ken Kersch's early work pointed political scientists and legal academics to the weakness of the standard story's rendition of modern American constitutional development: the "barrier" of the Lochner Era, the "breakthrough" of the Constitutional Revolution of 1937, and the "apotheosis" of liberal constitutionalism via the Warren Court. As the case studies extending this point show, Kersch's scholarly instincts were correct. Reading history backward, by *not* treating it developmentally, the standard story rests on rickety foundations.

We should abandon the received rise-and-fall story, whether one we tell ourselves or our students. Hanging on to the Lochner Era prevents us from seeing what the Progressives accomplished both institutionally and ideologically before the New Deal—and how they understood these political developments and the scope of their constitutional project. And if, during the most conservative decade of the twentieth century prior to Ronald Reagan's 1980 election (the 1920s), conservatives contemporaneously did not see this as a triumphant time, the story has lost the thread. By that same token, if, for the sake of a narrative, we continue to paint the 1970s as "conservative" because the Warren Court left the scene, it is unclear what meaningful analysis legal scholars can add beyond saying the following decades were "more" conservative.

This leads to a final point. By not taking conservatism seriously and by implicitly treating the Warren Court as the baseline, it is difficult to tell a compelling developmental story about how and why constitutional conservatism succeeded. Kersch's later work counseled to take conservatism on its own terms, not as a prop or a "reaction." Again, one need not agree with all his interpretations of conservatism to see that here too his instincts were keen. Freed from a politically pleasing but seriously incomplete understanding of modern Supreme Court and public law politics, we can write a more subtle developmental one.