DE-LOCHNERIZING LOCHNER

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If one was unaware of the peculiar reputation of *Lochner v. New York* within American constitutional theory it would be hard to know what all the fuss is about. On its own terms the case does not appear to be especially dramatic, controversial, or important. New York’s Attorney General was halfhearted in his defense of the state’s maximum hours statute for bakery workers. At the time the decision was handed down it did not appear to cause much of a stir in the political system. Unlike the Court’s earlier decisions regarding the income tax or the labor injunction, there is no evidence that the case had especially important consequences for American politics, although there is some evidence that the decision helped spawn the development of sociological jurisprudence within the legal academy. In the short term, some reformers in the states were undoubtedly discouraged from advocating

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1 198 U.S. 45 (1905).
3 Barry Friedman points out that, around the time of *Lochner*, some legal scholars stepped up their complaints about the conservatism of the federal judiciary, and he properly cautions against revisionist efforts to minimize the reactionary nature of these judicial decisions. See Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner, 76 N.Y.U. L. Rev. 1383, 1441-47 (2001). Still, these complaints had started well before *Lochner* and continued throughout the era, and there is no reason to think that the *Lochner* case itself was cause for any special outrage.
4 On the link to sociological jurisprudence, see Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence 132-46 (1993). As Keith Whittington points out, there is some evidence that within a decade of the decision, members of the legal academy were focusing on *Lochner* as the touchstone for criticisms about conservative decision making. See Keith E. Whittington, Congress Before the Lochner Court, 85 B.U. L. Rev. 821 (2005). Charles Warren wrote in 1913 that critics “who claim that the Court stands as an obstacle to ‘social justice’ legislation, if asked to specify where they find the evil of which they complain and for which they propose radical remedies, always take refuge in the single case of *Lochner v. New York*.” Charles Warren, The Progressiveness of the United States Supreme Court, 13 Colum. L. Rev. 294, 294 (1913).
expanded protections against excessive working hours, but no one gave up.\(^5\) Within a few years, the Court upheld similar legislation covering women and children,\(^6\) and during World War I the justices essentially reversed themselves by deciding that states had the authority to regulate working hours in most workplaces.\(^7\)

The justices on the Supreme Court were slow to treat the case as if it was especially noteworthy. Citations to *Lochner* were few and far between for many decades after the decision.\(^8\) Unlike *Adkins v. Children’s Hospital*\(^9\) the *Lochner* decision was not even considered important enough formally to overrule.\(^10\) It was not until the late 1940s that the justices began citing the opinion with any regularity.\(^11\) Notably, those newly invigorated citation practices were initiated by Felix Frankfurter, who thirty years earlier helped write the brief in the case that tacitly overruled *Lochner*, and who had subsequently decided to advance his political-jurisprudential reform agenda by lionizing Justice Holmes.\(^12\) Not surprisingly, the point of (now) Justice Frankfurter’s citation to *Lochner* was to call special attention to Holmes’ “famous protest” in his *Lochner* dissent against illegitimate judicial policy

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\(^5\) William E. Forbath, *Law and the Shaping of the American Labor Movement* 17 (1991) (arguing that conservative constitutionalism in general during this period forced the American labor movement to switch from an agenda of broad social reform to one that focused on trade unionism). Still, *Lochner* itself does not seem to be an especially important aspect of this phenomenon.

\(^6\) Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding a statute limiting working hours of women in laundries and basing this judgment on “the inherent differences between the two sexes”).

\(^7\) Bunting v. Oregon, 243 U.S. 426, 439 (1917) (finding that the law in question “regulates wages, not hours of service” and affirming lower court decision upholding law regulating overtime pay when employees in certain industries worked over ten-hour days).


\(^10\) The Supreme Court did not find it necessary to formally declare *Lochner* overruled until 1992. *See* Planned Parenthood v. Casey, 505 U.S. 833, 861 (1992) (indicating that the decision in *West Coast Hotel* “signaled the demise of *Lochner* by overruling *Adkins*” and formally acknowledging *Lochner* as overruled).

\(^11\) See Rosenberg & Rohrbacher, *supra* note 8. They report that, in the 20 years following *Lochner*, the case was cited in only 10 opinions. Over the next decade it was cited in only 2 cases. At the time of their study they reported that 82% of the cases citing *Lochner* occur after 1947.

\(^12\) Frankfurter helped write the brief for the state of Oregon in *Bunting*. *See* Bunting v. Oregon, 243 U.S. 426 (1917). *See also* Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of his Twenty-five Years on the Supreme Court*, 41 Harv. L. Rev. 121 (1927) (lionizing Justice Holmes).
making. By the end of the 1950s, the justices were issuing warnings about the “ghost of Lochner v. New York.”

Thus, it was only after the triumph of New Deal constitutionalism that the historical Lochner was transformed into the normative Lochner – that is, into the symbol of judges usurping legislative authority by basing decisions on policy preferences rather than law. Lochner became that symbol, not because the case itself was an especially good example of that vice, but because Holmes’ aphoristic dissent proved politically convenient for later generations of lawyers and judges. New Dealers, intent on delegitimizing the constitutional vision of early twentieth century judicial conservatives, found cover under Holmes’ dissent. Conservatives later resurrected the ghost of Lochner as a way of assaulting the civil liberties opinions of the Warren and Burger Courts. Lochner had finally become Lochnerized.

Given the political origins of the lore of Lochner it is no surprise that Lochner scholarship focuses primarily on the issues arising out of Holmes’ accusation. With rare exception, Lochner scholars in the legal academy are supposed to be worked up about the problem of judicial activism and are supposed to have a point of view about whether Lochner era judges were basing their decisions on the law or on their personal policy preferences. One’s position in these evolving debates apparently is mostly driven by conventional and contemporaneous political considerations, as part of the ongoing political-ideological process by which constitutional law professors promote preferred decisional trends or seek to undermine constitutional policies with which they disagree.

For a long time the usefulness of Lochner as an epithet in contemporary debates was an article of faith within the post-New Deal constitutional

13 For Frankfurter’s judicial opinions referring to Holmes’ “famous dissent,” see Winters v. New York, 333 U.S. 507, 527 (1948) and Am. Fed’n of Labor v. Am. Sash & Door Co., 335 U.S. 538, 543 (1949) (citing to “Holmes’ famous protest . . . against measuring the Fourteenth Amendment by Mr. Herbert Spencer’s Social Statics”). As Rosenberg and Rohrbacher report, a few years later Justice Douglas began to feature Lochner more prominent in his opinions. See, e.g., Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (announcing that “we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare”).


15 At the Lochner Centennial Conference, Randy Barnett asserted that Gerald Gunther intentionally paired Lochner with Griswold and Roe in his casebook in the hope of undermining the legitimacy of the latter two cases.

16 See William M. Wiecek, Liberty under Law: The Supreme Court in American Life 123-25 (1988) (“Lochner has become in modern times a sort of negative touchstone. Along with Dred Scott, it is our foremost reference case for describing the Court’s malfunctioning . . . . We speak of ‘lochnerizing’ when we wish to imply that judges substitute their policy preferences for those of the legislature.”).
universe. Over the years, however, so-called revisionist historical scholarship has problematized certain assumptions within that faith. We now know that it is misleading (at best) to say that those conservative jurists were motivated by conventional *laissez-faire* policy preferences rather than the law, and that *Lochner* era jurisprudence was an unprecedented departure from previous constitutional understandings. Moreover, since the rise of the New Right in American politics and the legal academy, there is cause to reconsider the question of whether *Lochner* was really all that bad. As a result, some conservative scholars have worked to re-legitimize *Lochner*-style decision making, while liberals try to construct new reasons for why we should still consider the decision illegitimate.

I know my book, *The Constitution Besieged*, provided grist for this argumentative mill, especially given its focus on the precedents for *Lochner* era jurisprudence and the argument about how the justices seemed to be operating within prevailing legal categories. See generally Gillman, supra note 4. However, it may be worth reiterating that I was not motivated to write the book by a desire to contribute to these debates. Rather than make normative points about the meaning of *Lochner* for constitutional theory I wanted to make empirical points about the relevance of *Lochner* era jurisprudence for political science theories of judicial decision making. The literatures that formed the backdrop for my study were judicial behavioralism and the emergent research agendas of the new institutionalism and American political development (APD). See Rogers Smith, *Political Jurisprudence, the ‘New Institutionalism,’ and the Future of Public Law*, 82 Am. Pol. Sci. Rev. 89, 98-107 (1988). In his terrific paper for the conference Barry Cushman expands on this debate. Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. Rev. 881, 881-883 (2005). It is true that I thought I had an obligation to be clear about why I thought my revisionist account of *Lochner* era jurisprudence undermined conservative critiques of *Roe*; in a nutshell, I wanted to say that modern “fundamental rights” jurisprudence was just a completely different sort of thing than *Lochner* era “public purpose” jurisprudence. But my more general point (in that same paragraph) was that, in light of American political development, “the proper role of the judiciary in American politics” could no longer be determined by comparing our practices to unrecoverable nineteenth century practices. Beyond this straightforward APD point the book took no position at all on normative debates within contemporary constitutional theory. See Gillman, supra note 4, at 205.


See, e.g., David A. Strauss, *Why Was Lochner Wrong?*, 70 U. Chi. L. Rev. 373, 374-75 (2003) (explaining that *Lochner* was not wrong for attempting to enforce a limited freedom of contract right, but for making it “a preeminent constitutional value that repeatedly prevail[ed] over legislation that, in the eyes of elected representatives, serve[d] important
Thus, revisionist histories of \textit{Lochner} have already transformed the ways in which the case is used by contemporary theorists, mostly by calling into question the Holmesian assumption that \textit{Lochner} era conservatives were indulging personal preferences rather than the law.\footnote{Arguments continue about how best to characterize the nature of this jurisprudential regime. Most recently, David Bernstein has entered the fray in a series of thoughtful, comprehensive, and exhaustive overviews of police power opinions during the \textit{Lochner} era. See David E. Bernstein, \textit{Lochner Era Revisionism, Revised}: \textit{Lochner and the Origins of Fundamental Rights Constitutionalism}, 92 Geo. L.J. 1, 58-60 (2003). Bernstein believes that my emphasis on judicial concerns about “class legislation” or “public purpose” do not explain much of what the Court was doing in the early twentieth century, and that I underestimate the extent to which those justices focused on protections for “fundamental rights.” \textit{Id.}} In his essay, \textit{Congress Before the \textit{Lochner} Court},\footnote{In his essay for this conference Barry Cushman offers an elaborate (partial) defense of my original argument against Bernstein’s critique. Cushman, \textit{supra} note 17, at 883-943. I appreciate his effort, since I am not sure I have the same Talmudic fascination with these opinions that I had back in the mid-1980s. But there is one piece of Bernstein’s argument that is not addressed by Cushman. Bernstein reads cases like \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923), and \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925), as \textit{Lochner} era permutations of modern \textit{Griswold}-style “preferred freedoms” jurisprudence, and he argues that I have essentially ignored these cases. See Bernstein, \textit{supra}, at 53-59 (referring to \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965)). As he puts it: The Supreme Court \textit{Lochnerian} civil liberties decisions of the 1920s and early 1930s exemplify the problems with the class legislation hypothesis. As discussed previously, these were clearly \textit{Lochner} era decisions, yet class legislation analysis played no role in the Courts’ opinions. The class legislation thesis simply cannot account for these cases, and Gillman ignores them completely in \textit{The Constitution Besieged}. \textit{Id.} Bernstein, however, knows that I have addressed how these cases fit into the larger argument in my book. See Howard Gillman, \textit{Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence}, 47 Pol. Res. Q. 623 (1994). Bernstein drops a footnote in which he (very) briefly refers to this article, but unfortunately he makes no effort to review or address my argument about the differences between \textit{Lochner} era “public purpose” jurisprudence and modern “preferred freedoms/rights as trumps” jurisprudence. See Bernstein, \textit{supra}, at 59 n.325. Bernstein knows that I tie modern civil liberties jurisprudence to “the progressive expansion of state power,” and that I trace its lineage through Brandeis and Stone (among others), and later through the short-lived “preferred freedoms” debates of the 1940s. Given the importance that he places on \textit{Meyer} and \textit{Pierce} in his critique of my thesis it would have been useful if Bernstein offered some explanation for why he disagrees with my account of these cases, and more generally for my account of the lineage of contemporary fundamental rights jurisprudence.\textit{Id.}} Keith Whittington calls into question the other assumption that made \textit{Lochner} a useful epithet, namely that \textit{Lochner} era decision making is a good exemplar of illegitimate judicial activism. Following the lead of Robert Dahl and (more recently) Mark Graber, Scot
Powe, and Michael Klarman, among others, Whittington demonstrates how the Supreme Court – like all national high courts – should be viewed as a cooperative partner within a national governing coalition. The general belief underlying this “political regimes” approach is that the justices typically act in a way that is broadly consistent with the preferences of a dominant political coalition and, conversely, that they rarely adopt a course of action that is opposed by that coalition. Whittington shows in this paper how this general political-science assumption is consistent with the *Lochner* Court’s overall pattern of decision making.

Scholars who operate within this new research tradition generally assume that if a court is liberal or conservative, activist or restrained, it is probably because it was made that way by other power holders. To invoke the prevailing jargon, judicial power is better understood as “politically constructed” rather than the by-product of completely exogenous judicial attitudes or agendas. Judges are not merely constrained by a political context; they are extensions of that context, in the sense that they are expected to play their part in an overall effort to promote the agendas of the national governing coalition. This is in sharp contrast to the implicit assumption in most conventional *Lochner* scholarship that judges are policy making competitors whose actions impose meaningful constraints on a regime.

I should rush to add that this argument does not assume that judges are mere party hacks. Many of us in political science have done research that has attempted to show that judges seem to take seriously jurisprudential considerations. But jurisprudence operates most effectively on a willing mind, and a judge’s willingness to take seriously the imperatives of precedent depends largely on whether she or he is ideologically inclined to agree with the policy implications inherent in the doctrine. I have no doubt that most of the conservative justices of the *Lochner* era believed that they were obligated to enforce the contours of traditional police powers jurisprudence, but I also have no doubt that they felt that obligation because they had conservative preferences and, happily, the jurisprudence had conservative implications. When more reform-oriented judges ended up on the Court they found ways to be more accommodating of social legislation. When enough judges concluded that the jurisprudence was not worth preserving they abandoned it. Similar patterns of constraining or accommodating reform efforts at the level

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22 See id. at 821-24.
23 Id. at 824-29.
24 See id. at 824-835.
of state high courts can undoubtedly be uncovered if we had better political histories of state judiciaries.

Whittington does not spend much time on how the Court’s approach to state regulation fits into this Dahlian scheme, but it is not difficult to see how his analysis would extend to the more familiar cases of the period. Republican Party leaders in the late nineteenth century expected federal courts to supervise the actions of state legislatures and state courts, to act as a bulwark of conservatism and as a promoter of economic nationalism. On matters that party leaders cared about, such as the scope of reasonable economic regulation, the justices acted with increasing vigor in response to intensifying pressures for reform legislation. In areas where party leaders wanted no federal protection, such as the fate of blacks, the justices did almost nothing (or worse). On matters that divided the national party coalition the justices often reproduced those divisions. Undoubtedly the overworked justices also addressed many issues about which national party leaders had no preferences, and in these cases the Court, like any bureaucratic agency, was able to chart a relatively independent course. In these respects there are no reasons to think that the justices of the Lochner era were fundamentally different than any other justices in the history of the Court.

Revisionist intellectual histories of Lochner era police powers jurisprudence have called into question the charge that Lochner judges were ignoring the law, and now revisionist political histories of Supreme Court politics are calling into question the charge that Lochner judges were exemplars of activism. If these empirical accounts are persuasive, then the question to normative constitutional theorists has to be: Is there anything remaining of Lochner that raises especially interesting questions for American constitutional theory? If not, then a century after the decision, perhaps it is time to de-Lochnerize Lochner.

27 See Whittington, supra note 4, at 825-827 (citing Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy Maker, 6 J. PUBL. L. 279 (1957)).
28 See Howard Gillman, How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891, 96 AM. POL. SCI. REV. 511, 512-13, 515-19 (2002) (explaining how the late-nineteenth-century Republicans used federal judges to enforce their political agendas, and how Supreme Court justices were willing to expand federal court control over commercial litigation).
29 Id. at 519.
30 Id. at 515 n.20 (discussing how national enthusiasm for vigorous civil rights protection diminished in the 1870s, and noting two Supreme Court cases that invalidated civil rights legislation).
31 See id. at 518 (emphasizing that nineteenth-century justices were selected by the President and senators for their devotion to party principles).
32 See id. at 519.