

ACTIVISM IS NOT A FOUR-LETTER WORD

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INTRODUCTION

Activism is one of those “-isms” hurled in anger, in frustration, in condemnation. Like any such slur, it is intended to sting, to discredit. In truth, however, it has more of the ring of “your mother wears combat boots” than of a genuine critique. As criticisms of courts go, it is not much more instructive (though much more powerful) than saying that the Court writes long opinions or often reverses lower courts. But it is more insidious. Sounding the tone of a substantive critique, it tends to distract the discourse from a much more fruitful inquiry—how well the Court is conceiving and playing out its role in the constitutional democracy. That, and not a particular Court’s “activism,” should be the question for debate.

Yet “activism” has been a popular cry. Its popularity is related, surely, to the unyielding grip of Bickel’s counter-majoritarian difficulty on the legal academy. Indeed, the choice of the term “activist” as a critique in the Warren Court era may well have been intended to stand in stark semantic counterpoint to the Bickelian “passive” virtues.¹ To be active is a vice, to be passive a virtue.

The first time the word “activism” appeared in a Supreme Court opinion was in 1967 in an impassioned dissent by Justice Black over the Court’s decision to invalidate an in-court identification of a criminal defendant.² Needless to say, Justice Black did not use the word as a compliment.³ Since then, the

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1. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* ch. 4 (2d ed. 1986) (advocating courts’ use of various techniques to maintain passive role in the interest of prudence).

2. *United States v. Wade*, 388 U.S. 218, 250 (1967) (Black, J., dissenting in part). The in-court identification was based on a prior lineup that did not satisfy due process criteria for accuracy.

3. See *id.* (“[w]e are deciding what the Constitution is, not from what it says,

epithet has appeared in surprisingly few opinions, always dissents (or functionally dissents), and, overall, referring to a surprising range of judicial peccadilloes. It has been voiced by an intriguing variety of justices who have launched the accusation of activism at their comrades. For example, the next Justices to use the term were Justice Douglas and Chief Justice Burger, in a dissent chastising the majority for allegedly reading the Copyright Act out of existence for cable TV. This, they charged, was "rampant judicial activism."⁴ Other "activism" charges leveled at Court majorities have included a disregard of statutory precedent and willingness to fashion new rules,⁵ disregard of constitutional precedent,⁶ insufficient deference to Congress,⁷ and, the largest category, reaching out to resolve issues not raised by the parties in order to make new law.⁸ It may be ironic that the most frequent sounders of the charge of activism on the Supreme Court have been the justices generally thought to be liberal, accusing their conservative fellows of being insufficiently attentive to the properly restrained judicial role.

Perhaps it is ironic, or perhaps it simply underscores the point about activism. Activism is not a coherent attack on the merits, as the array of uses just described would attest. It is a rhetorical ploy, often a desperate one, used to undermine the persuasiveness of those who are accused of reading the law incorrectly, when more substantive efforts at persuasion have failed. My argument is that this accusation of judicial activism is not merely harmless rhetorical indulgence. Rather, by ask-

but from what we think it would have been wise for the Framers to put in it.").

4. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 419 (1974) (Douglas, J., with Burger, C.J., dissenting).

5. See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 105 (1993) (Scalia, J., concurring); *McCleskey v. Zant*, 499 U.S. 467, 522 (1991) (Marshall, with Blackmun and Stevens, JJ., dissenting); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 663 (1989) (Stevens, with Brennan, Marshall and Blackmun, JJ., dissenting); *Engle v. Isaac*, 456 U.S. 107, 137 (1982) (Brennan, with Marshall, JJ., dissenting).

6. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 98 (2000) (Stevens, with Souter, Ginsburg and Breyer, JJ., dissenting).

7. *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J., dissenting).

8. See *Florida v. Wells*, 495 U.S. 1, 11-12 (1990) (Stevens, J., concurring in judgment); *Patterson v. McLean Credit Union*, 485 U.S. 617, 623 (1988) (Stevens, with Brennan, Marshall and Blackmun, JJ., dissenting); *Batson v. Kentucky*, 476 U.S. 79, 115-116 (1986) (Burger, C.J., with Rehnquist, J., dissenting); *New Jersey v. T.L.O.*, 469 U.S. 325, 371-375 (1985) (Stevens, with Marshall and Brennan, JJ., dissenting).

ing the wrong question and highlighting the wrong values, the charge of activism actually distorts constitutional debate and harms important efforts such as the selection of good judges, the development of good theory, and the writing of good opinions. It also impedes the public assessment of a court's work by riveting attention on characteristics that are not germane to thoughtful analysis. Of course, most of the debate about activism took place not on the pages of the U.S. Reports, but outside those tomes. Starting as early as the 1940's, progressives began to voice a growing concern about the tension between democratic rule, a strong liberal commitment, and the protection of certain important rights, like freedom of political association and conscience,⁹ as brought to the fore by the Communist cases.¹⁰ The memories of the liberal academics at this time still vividly pictured the "Nine Old Men"¹¹ of the *Lochner* era who, they thought, had nearly derailed the progressive legislation of the New Deal by striking down statute after statute on contestable readings of the Constitution.¹²

While the term "activist" was not then the rhetorical weapon that it later became, the notion of a court inappropriately interfering in matters outside its proper sphere was certainly at the heart of an intense debate. Learned Hand, in his influential Holmes lectures, expressed his deep distrust of courts in the democratic system.¹³ To him, if courts—unelected and unaccountable as they are—were going to be tolerable within the sphere of democracy, they must choose between

9. See, e.g., HENRY STEELE COMMAGER, *MAJORITY RULE, MINORITY RIGHTS* (1943) (criticizing judicial review as undemocratic); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952) (defending the Court's protection of liberty against charge of being undemocratic); Barry Friedman, *The Birth of an Obsession*, 24-26 (providing a thorough account of this period of academic discourse) (unpublished manuscript, on file with the author).

10. See, e.g., *Watkins v. United States*, 354 U.S. 178 (1957) (limiting the authority of the House Un-American Activities Committee to attain disclosures); *Yates v. United States*, 354 U.S. 298 (1957) (reversing communist convictions); *Jencks v. United States*, 353 U.S. 657 (1957) (reversing the criminal conviction of a union official who falsely denied communist membership in NLRB affidavit); *Cole v. Young*, 351 U.S. 536 (1956) (reversing the discharge of a federal employee affiliated with a seditious organization).

11. DREW PEARSON, *THE NINE OLD MEN* (1936).

12. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 978 (2000) (discussing the critique of the New Deal Court as out of touch with modern times).

13. GERALD GUNTHER, *LEARNED HAND, THE MAN AND THE JUDGE* 658 (1994).

their independence and their activism: "Judicial self-restraint and popular control of the judiciary were the only two possibilities consistent with democracy."¹⁴ Felix Frankfurter,¹⁵ Henry Steele Commager,¹⁶ and many others also weighed in on the side of democracy, with judicial review generally regarded as, at best, unnecessary, and at worst, an impediment to democratic progress.¹⁷ From today's vantage point, it is particularly surprising to note one 1957 statement that "if there was one principle that nineteenth-century liberals agreed upon, it was that of the primacy of legislative power."¹⁸

This liberal belief was forced into something of a box with *Brown v. Board of Education*¹⁹ and subsequent rights-protecting decisions from the Warren Court. During this period liberal academics struggled mightily to reconcile their prior view of democratic primacy with the increasingly obvious need for civil rights protection.²⁰ It was primarily these liberals who agonized over the Court's perhaps zealous protection of rights and the perceived absence of principled decision making in *Brown* and other cases.²¹

14. *Id.* at 249.

15. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 652 (1943) (Frankfurter, J., dissenting) ("[i]f the function of this Court is to be essentially no different from that of a legislature . . . then indeed judges should not have life tenure and they should be made directly responsible to the electorate.").

16. COMMAGER, *supra* note 9, at 59-62 (arguing that judicial review should be abandoned because political majorities can be trusted to respect minority rights).

17. *Id.* at 56.

18. BERNARD SCHWARTZ, *THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT* 371 (1957). See Friedman, *The Birth of an Obsession*, *supra* note 9, at pt. II-B (discussing the already dated view espoused by Schwartz). Of course, as the Warren era extended into the 1960's and 1970's, liberals became associated with a belief in broad judicial power to strike down legislative acts that encroach on individual rights.

19. 347 U.S. 483 (1954).

20. For a comprehensive examination of these forces and the dilemma that shaped constitutional theory, see Friedman, *The Birth of an Obsession*, *supra* note 9, at pt. II.

21. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 33 (1996) (describing Learned Hand's belief that the *Brown* Court inappropriately engaged in its own reappraisal of legislative judgments). There was one notable exception: see CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 156 (1960) (noting his surprise "to find that a number of scholars of the law, friends, in the main, neither of the suppression of political eccentricity nor of racism, have in effect joined hands" with "friends and proponents . . . of quite radically novel inroads on personal liberties.").

Then, Alexander Bickel, himself of the liberal academic tradition, entered the fray in 1962 with *The Least Dangerous Branch*, arguing that the Court should be guided by the *passive* virtues in recognition of its deviant status in the democracy.²² In order to reconcile judicial review with democracy, Bickel envisaged an extremely modest court—a court not prone to any behavior remotely resembling “activism,” under any of its many definitions. This aspiration for the Court, fueled by the deep resonance in the academic community with his notion of a “counter-majoritarian difficulty,”²³ took hold and shaped scholarly debate for decades to come.²⁴

Thus, while it is tempting to think that it was conservatives who tried to make the issue of activism the basis for criticism of the Warren Court, they may have simply seized an opportunity presented to them on a silver platter by the angst-ridden liberals who struggled to reconcile their principled commitment to democratic rule with the activism of the Warren Court, whose results they largely agreed with. And, seize this opportunity conservatives did indeed. In the ensuing years, conservatives devoted little argument to the question of whether the Court was interpreting the Constitution correctly and a great deal to the accusation that it was acting illegitimately.²⁵

It was no accident that the cries of activism, the calls for modesty and passivity, were greeted hospitably by people of all political stripes. These arguments capitalized on one point of agreement that seems to have united progressives and conservatives alike—the chagrin over *Lochner*.²⁶ Thus the damning

22. BICKEL, *supra* note 1, at 18.

23. As Bickel explained it, “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.” *Id.* at 16-17.

24. See Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 550-52 (1998) (discussing Bickel’s influence).

25. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9-11 (1971) (arguing that *Griswold v. Connecticut* is constitutionally unprincipled, and drawing analogy to *Lochner*); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 936-39 (1973) (arguing that *Roe v. Wade* is constitutionally unprincipled, and drawing analogy to *Lochner*).

26. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state law setting maximum working hours for bakery workers, on the ground that it exceeded state police power and thus infringed individual right to liberty). See BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 23 (1980) (describing *Lochner* as

syllogism: *Lochner* was activist; *Lochner* was wrong; therefore, activism is wrong. Q.E.D.

This syllogism forms the heart of my claim in this paper. I suggest that it is both flawed and misleading. Yes, *Lochner* may have been activist, and yes, *Lochner* may have been wrong. But, in my view, the error of *Lochner* had nothing to do with its activism. Indeed, to the extent that *Lochner* did something right, the right thing that it did was intertwined with the activism it employed. I suggest, therefore, that, although the *Lochner* syllogism described above seems to have contributed significantly to the more modern apologia for Warren Court activism, it need not have given rise to such defensiveness at all. A more thoughtful approach to activism itself would have made for a healthier discussion of the constitutional issues all around.

Common critiques of *Lochner* are twofold—the Court imposed an economic theory of government not contained in the Constitution and it recognized rights—economic rights—that should not have been protected so vigorously.²⁷ Together, these critiques suggest that striking down a state labor law was both activist and wrong: activist in the sense that the Court did not heed the limits of its own appropriate sphere of power and wrong, in that the decision was not based on constitutional imperative.²⁸ Historical commentary has suggested that the Court was primarily concerned with what was known as “class legislation”—laws favoring a particular subset of the community due to some form of illegitimate preference or influence at the legislative level.²⁹ Some have also voiced the criticism that both the case and the Court were anti-progressive.³⁰

However, there is another way to think about *Lochner*—one that I believe is instructive in helping us think about the Rehnquist Court of today, and of activism in general. Like many of the Rehnquist Court’s more controversial opinions,

“one of the most condemned cases in United States history . . . used to symbolize judicial dereliction and abuse.”).

27. See GEOFFREY R. STONE & LOUIS M. SEIDMAN, CONSTITUTIONAL LAW 822-29 (3d ed. 1996) (describing several different critiques of *Lochner*).

28. These two errors often go together, but need not.

29. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 438-39 (1978) (explaining *laissez-faire* philosophy).

30. See PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 156-57 (1998) (describing two differing views of the government’s role: business interests, negative state, and status quo, versus labor interests, positive state, and reform).

Lochner should perhaps be considered a case about structural concerns, or state power, as contrasted with cases primarily focused on individual rights. I do not wish to diminish the importance of liberty protection under the Due Process Clause, on which *Lochner* certainly had something to say.³¹ For those who have not read the *Lochner* opinion lately, however, I offer a reminder of how the opinion was written, which is quite different from the way it is often characterized, especially when it is thrust into an argument as a weapon to undermine the legitimacy of the modern liberty cases.³²

With regard to the rights analysis, *Lochner* simply accepted at the outset what at that time was not a controversial proposition, one continuously recognized as a constitutional principle in American courts since before the time the Fourteenth Amendment was ratified.³³ That principle was simply that "liberty [was] held on such reasonable conditions as may be imposed by the governing power of the State."³⁴ At that time, a claim to liberty did not have to be established, classified as either fundamental or ordinary, or defended in its importance. Liberties were not placed in a hierarchy of importance; liberty embraced a continuum of activities that together make up a human life. The claim of liberty had merely to be stated, and the question immediately shifted to whether the conditions that a state was imposing on its exercise were reasonable. Accordingly, the *Lochner* Court devoted no more than three sentences to the task of identifying a right before it turned to the real question presented—the state's power to limit that liberty.

Thus, *Lochner* really is about power. More than that, it is a case about *enumerated* power. This may sound strange in the context of a state law, but this is an artifact of the times. To the *Lochner* Court, state power was valid insofar as it was used to protect the safety, health, morals, and general welfare of the community.³⁵ While today we tend to think of this recitation of

31. See Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 WM. & MARY L. REV. 65 (1999) (discussing the liberty aspects of *Lochner*).

32. See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315 (1999) (comparing *Roe v. Wade* to *Lochner*).

33. See *id.* (detailing the state courts' use of substantive due process as a bound of legitimate government in antebellum America). Cf. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (carrying forward that tradition under the Fourteenth Amendment).

34. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

35. This reading of the *Lochner* analysis, as a statement of the limits of the

state power as another way of describing a general plenary power, this was not the case in 1905. The *Lochner* Court viewed the police power as a specific grant of power, defined and sharply delineated by the purposes for which legislation was enacted. It understood its job as the task of scrutinizing whether the state had transgressed the bounds of that specific power. The controlling inquiry in this determination was whether the regulation was indeed a measure designed to protect the general welfare or common good.³⁶ If so, then any liberty would be held subject to that reasonable exercise of state power. If not, then the liberty would take precedence, not as the result of balancing two competing values, but because the state simply would lack the power to act outside of its enumerated spheres of regulation.

The *Lochner* Court embarked, then, on the task of determining whether a state government's exercise of power exceeded the constitutional bounds of its authority. It answered the question by looking at the state's professed reasons for passing the law. The state offered evidence to suggest that the law was motivated by a desire to protect health. The Court, however, was unimpressed. It explicitly admitted to harboring "a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare."³⁷

What we are left with, then, is a scenario more familiar than we may have realized: a Court that viewed its role as the policing of the bounds of power of a political body, suspicious that the motives actually underlying the passage of the law were other than those articulated by the legislature and that the true motives, if disclosed, would place the law outside the legislative authority. A couple of points are noteworthy here. First, the prominence of motive in the analysis of constitutional power presages much of the analysis that would come to dominate Supreme Court jurisprudence in the ensuing century. In addition, there is some common ground, at least superficially, between the *Lochner* Court's approach and the jurisprudence of

police power, has been given compelling historical support and contextual richness by Howard Gillman in his enlightening book, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

36. See *Munn v. Illinois*, 94 U.S. 113 (1877) (suggesting that it is the "very essence of government" to regulate individual behavior "when such regulation becomes necessary for the general good.").

37. *Lochner*, 198 U.S. at 62-63.

both the Rehnquist and Warren Courts. The Warren Court self-consciously set about to fashion doctrine effective at flushing out illegitimate motives of legislators.³⁸ In at least this regard, it appears that both the Warren Court and the *Lochner* Court responded with activism, if you will, to their suspicion of legislative motives. But the particular motives the two Courts worried about seem altogether different.

While the Warren Court worried about invidious discrimination and governmental infringement of individual liberties, the *Lochner* Court had in mind something else altogether. That Court and its predecessors had repeatedly expressed concerns about "what is called class legislation,"³⁹ or laws passed for "the benefit of some to the disparagement of others."⁴⁰ In their view, the most serious threat to the principles of equality and liberty lay in the corrupt use of public power by competing social groups.⁴¹ Their mission, accordingly, was to protect personal autonomy and social independence by enforcing the requirement of generality in state legislation through limits on the police power.⁴² Both Courts shared the experience of acting to protect individuals from what the justices perceived to be the threat of corrupt political overreaching.

It seems to me that if the *Lochner* Court went wrong, it was not in asking the state to justify, with reasons relating to the common good, its interference with individual liberty. Nor was it in scrutinizing that justification, even vigorously, for evidence of pretext. Indeed, those two exercises, even if activist, contribute to the cultivation of a system of "ordered liberty," later defined by Justice Harlan as "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."⁴³

But the *Lochner* Court did make one very important mistake. It considered those questions through the lens of an outdated and inflexible notion of what the common good entailed. The *Lochner* Court subscribed to the contested nineteenth-century view that the common good categorically could not be

38. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 135-79 (1980) (suggesting that much of Warren Court doctrine was handmaiden of motivation analysis).

39. The Civil Rights Cases, 109 U.S. 3, 24 (1883).

40. *Butchers' Union v. Crescent City*, 111 U.S. 746, 758 (1883).

41. GILLMAN, *supra* note 34, at 114.

42. *Id.* at 125.

43. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

served by government intervention into the consensual economic transactions of the atomistic individual.⁴⁴ Because this view tied the very definition of general welfare to state neutrality, any law that appeared to operate to the benefit of a subset of the community was thought to be necessarily antagonistic to the general welfare. Thus, a law benefiting the health of bakers, such as that at issue in *Lochner*, could not, by definition, qualify as a benefit to society as a whole. Such a law suggested to the justices a breakdown in the egalitarian process that they considered to be essential to the making of law. The law in question could not represent the common interest and, therefore, was beyond the constitutional power of the state.

The *Lochner* Court did demonstrate that it could take a somewhat broader view of the common good in exceptional circumstances. For example, *Muller v. Oregon*,⁴⁵ decided just three years after *Lochner*, involved a very similar labor regulation that limited the working hours of women rather than bakers. This time, however, the Court upheld the statute. It appears that, in this case, the Court was able to construct a plausible general purpose that it had found to be missing in *Lochner*. The opinion stated as much: "As healthy mothers are essential to vigorous offspring, the physical well-being of [a] woman becomes *an object of public interest and care* in order to preserve the strength and vigor of the race."⁴⁶ Factually, the rationale is a stretch. But theoretically, it supplies precisely what was missing in the bakers'-hours law—a bridge between mere preferential treatment of a particular group and a benefit to the public at large. For the state to help women as a group was to contribute to the good of all, because of the unique characteristics that the Court perceived in that group. What the Court missed is that, increasingly, the latter analysis was becoming applicable to more segments of society, and should not have been regarded as the exception.

44. See HERBERT SPENCER, SOCIAL STATICS: OR THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED (1866). Spencer defended a "first principle" that "[e]very man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man," and argued that no further qualification of the liberty of action could be accomplished by community regulation; any such limitation on the equal freedom must come from private and individual action. *Id.* at 121.

45. 208 U.S. 412, 421 (1908).

46. *Id.* at 421.

This reading of *Lochner's* mistake provides a profitable way to consider Justice Holmes's famous dissenting protestation that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."⁴⁷ This statement is usually understood as a condemnation of the majority's adoption of a particular contemporary economic theory, with its laissez-faire assumptions, under the guise of constitutional interpretation. The quip takes on a slightly different implication, however, if one supposes that Justice Holmes may have understood the majority to be adopting the categorical view that regulation of economic relations such as workers' hours can *never* be in the interest of the public at large, which was Herbert Spencer's claim.⁴⁸ Thus understood, the Court's error was not in reaching or perverting a constitutional result in order to promote its own laissez-faire ideology, as so many have suggested.⁴⁹ Rather, the error arose when the Court, while enforcing the established constitutional principle that liberty-impairing regulation must be supported by state reasons that serve the common good, resorted to a rigid extrinsic tenet decreeing, as a matter of economic truth, that a certain type of regulation can *never* serve the common good. Wooden reliance on this tenet in applying constitutional requirements inappropriately led the Court to decline to use its judgment in determining whether, in the individual case, the state had indeed succeeded in demonstrating that its regulation was a valid effort to regulate for the benefit of the general welfare.⁵⁰ Even if the Court had reached the same conclusion that the maximum-hour law exceeded the police power, it would not have committed the same error had it done so without employing a presumption that it had imported from a controversial political theory.

Thus, the Court erred in failing to recognize the possibility of a dynamic meaning of common good. By 1934, even the Supreme Court itself had recognized this as its prior error. Writing for the Court in *Home Building & Loan Association v.*

47. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

48. See SPENCER, *supra* note 44, at 95.

49. See Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987) (describing the substantive objections to the *Lochner* opinion based on its view of the appropriate role of government).

50. Recall that this was exactly Justice Harlan's basis for dissenting: not succumbing to the mistake of the majority, he had determined that the state had demonstrated valid health reasons for the passage of the legislation. See *Lochner*, 198 U.S. at 69-70 (Harlan, joined by White and Day, JJ., dissenting).

Blaisdell, Chief Justice Hughes addressed the error of *Lochner* on precisely these terms, when he wrote as follows:

Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State itself are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.⁵¹

This, I argue, is the critical bridge explaining how the odious class legislation of the *Lochner* era became the valid economic legislation for the common good of the post-*Lochner* era. The bridge is the recognition of the interdependence of individuals and groups in an industrialized, integrated economy. Herbert Spencer's impenetrable conceptual wall between the realm of the community and the realm of the private had tumbled.

The error of *Lochner* was not its activism any more than it was the Court's protection of rights or its suspicion of legislative motives. Its error was an impoverished and inflexible understanding of what the common good might entail during a period of ongoing radical social and economic change. The Court did not respond quickly enough to the changing nature of the relationship between the government and the individual occasioned by the Industrial Revolution. By the time of *West Coast Hotel Co. v. Parrish* in 1937,⁵² the Court had recognized that the huge transformation in the economic and social order in this country necessitated regulation of the type at issue in *Lochner*, and that it truly was in the *common* good to protect *classes* of vulnerable workers.⁵³ What had changed was not the constitutional definition of either rights or power, nor the standard by which state regulation impairing liberty would be assessed. What had changed was the understanding of what it meant for a state to act for the common good.⁵⁴

51. *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 442 (1934).

52. 300 U.S. 379 (1937).

53. *See id.* at 399 ("[t]he exploitation of a class of workers . . . casts a direct burden for their support upon the community.").

54. *Cf. GILLMAN, supra* note 35, at 192-93 (concluding that "new social facts had finally brought down a century-old police powers jurisprudence.").

Turning to the Rehnquist Court, many parallels present themselves. The Rehnquist Court also sees its role as the policing of structural limits that separate the departments of government in this country, including the states. Like the *Lochner* Court, it has taken seriously the notion of enumerated powers and has acted aggressively to enforce their limits. In further keeping with the *Lochner* Court, it has made clear that it distrusts legislative motives and will act aggressively when it senses dishonesty or pretext in assertions of legislative authority.⁵⁵

Consider, with the Rehnquist Court in mind, this quote from *Lochner*:

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. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law.⁵⁶

This may sound somewhat familiar, in its emphasis on the “character” of a law, a notion that the Rehnquist Court has revived.⁵⁷ Removing “police power” and “public health or welfare” as the definitive criteria, and replacing them with the term “commerce,” the concern bears a resemblance to that expressed by the Court in *United States v. Lopez*.⁵⁸ Similarly, replacing the same “police power” concern with Congress’s “power to enforce the Fourteenth Amendment,” one can see that the *Lochner* Court’s concern looks very similar to the Rehnquist Court’s underlying skepticism about legislative motive in substitution of “enforcement of the Fourteenth Amendment,” pro-

55. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (contrasting a federal statute at issue in a prior case, where “[o]ne of the primary purposes of the Act in question was to increase the market price of wheat,” with federal gun possession law, which “has nothing to do with ‘commerce,’” thereby suggesting the return of some motive analysis in commerce clause jurisprudence); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating federal law on ground that statute is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”).

56. *Lochner*, 198 U.S. at 64.

57. See *Lopez*, 514 U.S. at 567-68 (expressing a commitment to preserve the distinction between “what is truly national and what is truly local.”).

58. 514 U.S. 549 (1995).

vides a good sense of the Court's concern in *City of Boerne v. Flores*.⁵⁹

But this semantic similarity does not address the more important question of what it is that the Rehnquist Court is worried about when it expresses its suspicions. What *are* the types of "other motives" that it suggests would undermine the validity of legislation and justify the Court's intervention, providing the counterpart to the *Lochner* Court's worry about corrupt legislation benefiting particular classes?⁶⁰ The Rehnquist Court has given us indications that it, too, harbors some vision or belief about the kinds of processes that lead to good and acceptable government.⁶¹ It may well be that the Court has adopted a role that suggests a twenty-first century analogue to the kind of role that the *Lochner* Court embraced at the turn of the last century. This strategy is not without significant risk for the Court. The success of the Rehnquist Court in vindicating its activist approach will depend entirely on whether it has chosen to be mistrustful of the right things, or whether it, too, has succumbed to an impoverished, outdated, or categorical notion of the proper functions of the representative branches of government in a still-changing world.

If the Rehnquist Court wants to avoid the ignominy that befell the *Lochner* Court, it will have to justify its distrust of legislative motives with a vision of government that animates its activist decisions. The jury is still out on whether it will be able to do this in an intellectually defensible manner.

This—the ability of a Court to defend its understanding of good government and its own role in constitutionalism—is the true measure of a successful Court, and not whether it follows precedent, not whether it reaches out to answer questions not raised by the parties, not whether it fails to give deference to coordinate branches of government; in short, not whether it is activist. Rather, we must judge a court by how well it has justified its particular brand of activism.

59. 521 U.S. 507 (1997).

60. Unlike many, I do not believe that all of the Court's decisions can be explained by a simple ideological agenda. That agenda certainly contributes to the Court's selection of cases in which its suspicions of motive will be aroused, just as the *Lochner* Court's laissez-faire beliefs cannot be totally discounted in the explanation of its decisions. But it does not explain all of the activist results.

61. This is an inquiry I am exploring elsewhere with a colleague. See Lisa Schultz Bressman & Rebecca L. Brown, *The Deep Structure of the Rehnquist Court* (work in progress, on file with author).

I may be alone in my willingness to say outright that I like activism. I understand activism to be a court's willingness to apply its best understanding of the Constitution's requirements even if that means invalidating the acts of more accountable governmental bodies and even if it means alienating large sectors of the public. In my view, that is the purpose of an independent judiciary in the constitutional system that we have. Alexander Hamilton referred to the judiciary as "the citadel of the public justice;"⁶² I am inspired by any Court that seeks to live up to that description.

The reason that I like *Lochner* more than most people do is that it took that role seriously. Did that Court make a mistake? Yes, I think it did. But what kind of mistake did it make? It upheld a claim of individual liberty on the erroneous belief that the state had not met its burden to justify limiting that liberty in the interest of the common good. This is the type of error that we, as a constitutional democracy, can afford to risk. I would much rather impose on the government the obligation to justify its incursions into the lives of its citizens—knowing that sometimes it will be erroneously prevented from governing exactly as it wishes—than take what is today known as the "judicial minimalist" approach, leaving any matter that is in doubt to the democratic process and leaving individuals to blow in the wind of majority will with no protection from courts.

Activism must be justified by a substantive sense of the judicial mission in a democracy. I believe the Warren Court justified its activism. It had a vision of what constituted legitimate and illegitimate legislative motives, and it acted on that vision. Because it was so successful in that effort, today the kinds of motives that Court searched out and destroyed are no longer even a major focus of constitutional inquiry. Those particular invidious manifestations of improper motive have been largely eradicated, at least in the areas targeted by that Court. Instead of talking about whether the enforcement of individual rights through activist constitutional interpretation is legitimate, we should talk instead about the extent of the rights, how best to enforce them, and what kinds of state interests should be permitted to overcome them. These are the discus-

62. THE FEDERALIST No. 78, at 403 (Alexander Hamilton) (George W. Carey, James McClellan eds., 2001).

sions we should be having, not arguments about the legitimacy of activism itself.

Similarly, with regard to the Rehnquist Court, I would prefer to argue about that Court's reading of the Constitution, the vision that it holds of what government should and should not do. There is much to debate in the unenumerated restrictions the Court reads into the constitutional structure with very thin textual or historical support. There is much to debate in its reluctance to ask states for meaningful justifications for their restraints on personal liberty.⁶³ There is much to debate in its aggressive hostility toward legislative expansions of civil rights at both the state and federal levels.⁶⁴ Has the Rehnquist Court lived up to its role of "citadel of the public justice"?

Indeed, the best thing I have to say about the Rehnquist Court so far is that it *is* activist. The Supreme Court must always set the standard for an acceptable balance that we know as ordered liberty, and activism is a way to accomplish this goal. Earlier Courts have found that constraining governmental power can be one way of protecting individual rights and liberties, and at times the pursuit of this goal requires activist intervention into the affairs of the political branches. It does not appear, however, that this particular objective is the motivating force behind the activism we have seen from the Rehnquist Court. What remains to be seen is whether the Rehnquist Court can supply some other objective that can be said to serve the values that the Constitution holds dear as justification for its particular brand of activism.

Accordingly, what we should be talking about is not superficial resemblances between the Warren and Rehnquist Courts, or the hypocrisy of their respective critics and supporters, but rather the defensibility of the current Court's constitutional

63. See, e.g., *Cruzan v. Dir., Missouri Dep't. of Health*, 497 U.S. 261 (1990) (even assuming the existence of an individual right to refuse medical treatment in a competent person, a state may erect high barriers to the assertion of that right by close family members on behalf of an incompetent person); *Washington v. Glucksberg*, 521 U.S. 707 (1997) (interest of terminal patients in ending their lives is no more fundamental than any person's interest in committing suicide).

64. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (imposing the highest possible burden on the federal government to justify efforts to allocate certain benefits disproportionately to "economically disadvantaged individuals" when classifications involve presumptions based on race); *Boy Scouts v. Dale*, 530 U.S. 640 (2000) (striking down the application of state anti-discrimination provision to private organization that discriminates on basis of sexual orientation).

values. And, we should talk about these constitutional values during the appointment of judges and in the scholarly debates appearing in the pages of academic journals. By masking the real, substantive questions behind claims of judicial legitimacy or illegitimacy, activism or restraint, we encourage public rhetoric that illuminates nothing meaningful about the visions propounded by judicial nominees or Court opinions. Presidents have been permitted to advertise Supreme Court nominees as those who would not *make* law, but would only *apply* it.⁶⁵ The only reason such a vacuous and misleading dichotomy is tolerated in the sphere of political debate is that scholars have allowed their own academic debate to focus on issues like legitimacy and activism, rather than on the defensibility of the particular substantive visions that drive specific justices. The cost of this diversion goes beyond hypocrisy, extending to the very quality of the Supreme Court, and, inevitably, to the meaning of ordered liberty itself.

So, I say that activism is not a four-letter word to be slung in criticism of a judiciary doing its best to follow the Constitution. It is a way for a Court to live up to its obligation to serve as citadel of the public justice. But the test of the Court will be whether it uses this tool in pursuit of just ends.

65. See President's Remarks Announcing the Nomination of Clarence Thomas to Be an Associate Justice of the Supreme Court of the United States and a News Conference in Kennebunkport, Maine, 27 WEEKLY COMP. PRES. DOC. 868, 871 (July 1, 1991) (suggesting that the nominee would "faithfully interpret the Constitution and avoid the tendency to legislate from the Bench").

