

# THE HISTORY OF THE COUNTERMAJORITARIAN DIFFICULTY, PART THREE: THE LESSON OF *LOCHNER*

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*For nearly a century, the conventional wisdom has been that during the Lochner era, Supreme Court Justices failed to adhere to constitutional norms requiring deference to majoritarian decisions and inappropriately struck down laws by substituting their own views for those of legislative bodies. Recently, however, revisionist scholars have endeavored to rehabilitate Lochner-era judicial decisionmaking by demonstrating that those decisions were based soundly on established legal principles. In this Article—the third in a five-part series—Professor Barry Friedman calls into question both revisionist and conventional accounts of the Lochner era. After outlining the revisionist agenda and its effort to bestow “legal legitimacy” upon Lochner-era decisions, Friedman presents extensive historical evidence showing that popular opinion throughout the era saw judges as deciding controversial cases in illegitimate ways, creating novel constitutional rights, and acting on class biases. Revisionists also claim that Justice Holmes’s famous Lochner dissent was novel, and that his arguments regarding deference to majority will were adopted only after the fact by Progressive critics of the courts. But Friedman establishes that there was nothing novel to Holmes’s dissent; Justice Harlan said much the same in his, and both were part of a wide movement that criticized courts for interfering with the popular will. By juxtaposing the hue and cry over Lochner-era decisions with revisionist claims of doctrinal fidelity, Friedman concludes that the true test of whether controversial decisions such as Lochner will be accepted as legitimate is not simply whether such decisions are legally precedential, but whether the wider public perceives them to be “socially legitimate,” i.e., appropriate as a matter of policy given the necessities of the time.*

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Introduction .....	1384
I. The Revisionist Endeavor .....	1389
A. History .....	1391
B. Revisionism .....	1397
II. Convention Meets Revision: Public Opinion .....	1402
A. Doctrinal (In)Consistency .....	1404
B. Creation of “New” Rights .....	1413
C. Judicial Class Bias and Laissez-Faire Economics ....	1420
III. The “Countermajoritarian” Critique .....	1428
A. <i>Lochner</i> Dissents .....	1430
B. The Roots of the Dissenters’ Democratic Theory ...	1432
C. Judicial Deference to Legislatures .....	1436
D. Countermajoritarian Rhetoric .....	1438
IV. The Lesson of <i>Lochner</i> .....	1447
A. Revisionism Fails .....	1448
B. Problems With the Conventional Lesson of Restraint .....	1452
C. The Relationship Between Legal and Social Legitimacy .....	1453
Conclusion .....	1455

## INTRODUCTION

What determines the legitimacy of judicial review by a constitutional court? Is it whether the court adhered to existing legal norms? Or is it public acceptance of the court’s decision, whether or not that decision had a sound jurisprudential basis?

Many legal scholars tend to think that consistent application of legal principles, rather than popular support, determines the legitimacy of constitutional law. This is manifest in the legal academy’s reaction to the Supreme Court’s controversial decision in *Bush v. Gore*.<sup>1</sup> Legal academics became preoccupied with the question of whether the Court’s decision resolving the 2000 presidential election was consistent with existing legal precedent,<sup>2</sup> despite an apparently

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School in January of 2000, and New York University’s Legal History Colloquium in February of 2000.

<sup>1</sup> 531 U.S. 98 (2000) (reversing Florida Supreme Court decision allowing recount of presidential ballots).

<sup>2</sup> See, e.g., Richard A. Epstein, “In such Manner as the Legislature Thereof May Direct”: The Outcome in *Bush v. Gore* Defended, 68 U. Chi. L. Rev. 613, 634 (2001) (asserting that “weighty matters of constitutional interpretation do have right, and hence wrong, answers that can be gathered from a close examination of text, structure, and function” and concluding that *Bush v. Gore* was correctly decided); Richard D. Friedman, Trying to Make Peace with *Bush v. Gore*, 29 Fla. St. U. L. Rev. (forthcoming 2001) (manuscript at 1, on file with the *New York University Law Review*) (arguing that decision was wrong as

widespread popular belief that politics motivated the decision.<sup>3</sup> Rule-of-law concerns undoubtedly explain this elevation of doctrinal coherence over popular opinion, as popular opinion is thought to be the antithesis of law.

Concern about separating law from politics similarly must explain the extraordinary revisionist effort underway in the academy to legitimate the work of courts during the so-called *Lochner* era. Remember *Lochner*?<sup>4</sup> Until recently, scholars painted *Lochner* as the primary example of judicial activism, symbolic of an era during which courts inappropriately substituted their views as to proper social policy for those of representative assemblies.<sup>5</sup> "When contemporary commentators decry the abuse of judicial power or the evils of 'judicial activism' the historical examples that most readily come to mind are drawn from Supreme Court decisionmaking around the turn of the century, a period often referred to as the '*Lochner* era.'"<sup>6</sup> Courts that appear to be substituting their own view of desirable social policy for that of elected officials often are said to *Lochnerize*.<sup>7</sup> Michael Les Benedict,

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matter of law and stressing that "[d]ecisions of the Supreme Court should be more than mere reflections of ideological or partisan preference thinly camouflaged behind legalistic language"; Michael W. McConnell, Two-and-a-Half Cheers for *Bush v. Gore*, 68 U. Chi. L. Rev. 657, 660 (2001) (claiming that "the Fourteenth Amendment holding . . . was both sensible and persuasive" though "the decision to halt the recount was incorrect as a matter of law"); Richard A. Posner, Florida 2000: A Legal and Statistical Analysis of the Election Deadline and the Ensuing Litigation, 2000 Sup. Ct. Rev. 1, 2 (arguing that plurality's basis for decision in *Bush v. Gore* was correct as matter of law). But see generally Michael J. Klarman, *Bush v. Gore* Through the Lens of Constitutional History, 89 Cal. L. Rev. (forthcoming 2001) (manuscript on file with the *New York University Law Review*) (assessing question of whether *Bush v. Gore* will stand test of public opinion).

<sup>3</sup> See Klarman, *supra* note 2 (manuscript at 70 & nn.216-18) (noting public opinion polls showing that roughly half of country thought *Bush v. Gore* incorrectly decided).

<sup>4</sup> *Lochner v. New York*, 198 U.S. 45 (1905) (striking down, on due process grounds, New York statute setting maximum working hours for bakers).

<sup>5</sup> See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 1 (1993) (describing "long-standing common wisdom" about era which charged that Supreme Court "began to aggressively disregard the proper boundaries of their authority in order to search out and destroy 'social legislation' that was inconsistent with their personal belief in laissez-faire economics and social Darwinism").

<sup>6</sup> *Id.* Owen Fiss recently concluded that the Fuller Court, which ran throughout much of this period, "ranks among the worst." Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, at 3 (1993); see also Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 Yale L.J. 2309, 2310 (1995) (reviewing Fiss, *Troubled Beginnings*, *supra*, and claiming that Fuller Court joined its prejudices and suspicions of regulation "with an expansive and ill-considered conception of judicial power that enabled the Justices to strike down all manner of legislation by employing highly creative interpretations of the Constitution"). But see James W. Ely Jr., *The Chief Justiceship of Melville W. Fuller, 1888-1910*, at 1 (1995) ("Historians have been all too prone to mimic the image, fixed by the Progressives, of a bench single-mindedly devoted to safeguarding corporate interests.").

<sup>7</sup> See Gillman, *supra* note 5, at 4 (discussing concept of "lochnerizing"); see also 2 Bruce Ackerman, *We the People: Transformations* 269 (1998) ("[M]odern judges are more

a prominent revisionist, sums up the conventional understanding of the era succinctly: "Nothing can so damn a decision as to compare it to *Lochner* and its ilk."<sup>8</sup>

No more. Today, many scholars are engaged in an effort to legitimize judicial review during the *Lochner* era on the ground that decisions during that era reflected established jurisprudence, and thus were "law," and not "politics."<sup>9</sup> Rather than seeing the *Lochner*-era judges as imposing their own views and biases when invalidating popularly enacted legislation on constitutional grounds, scholars on both sides of the ideological divide seem to coalesce around a far more sympathetic vision of *Lochner*-era judicial conduct. Revisionist scholars now assert that a firm jurisprudential basis for the *Lochner*-era decisions existed in nineteenth-century legal thought.<sup>10</sup>

This Article examines the question whether, if there is a lesson regarding the legitimacy of judicial review to be learned from the *Lochner* era, that lesson best derives from the revisionists' claim of doctrinal fidelity, or from the angry reaction that the judges' decisions evoked, regardless of whether judges grounded those decisions soundly in existing jurisprudence. Revisionists suggest that, in order to assess the legitimacy of judicial review, we should look to see if judicial decisions have an established jurisprudential basis. But that

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disturbed by the charge of *Lochnering* than the charge of ignoring the intentions of the Federalists and Republicans who wrote the formal text.").

<sup>8</sup> Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & Hist. Rev. 293, 295 (1985); see also 1 Bruce Ackerman, *We the People: Foundations* 40 (1991) ("For a modern judge, one of the worst insults is that she is reenacting the sin originally committed by the pre-New Deal Court in cases like *Lochner v. New York*.").

<sup>9</sup> James A. Thomson documents the vast and expanding body of revisionist literature in *Swimming in the Air: Melville W. Fuller and the Supreme Court 1888-1910*, 27 Cumb. L. Rev. 139, 140-41 & n.6 (1996-1997) (reviewing Ely, *supra* note 6). Most of the recent revisionist effort focuses on dispelling the notion that the Supreme Court represented a mere appendage of corporate America. See, e.g., Paul Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York* 4 (1990) [hereinafter Kens, *Judicial Power*] ("Historians have pointed out that more regulatory statutes and labor laws were upheld than were overruled during the first thirty years of this century."); Paul Kens, *Lochner v. New York: Rehabilitated and Revised, but Still Reviled*, 1995 J. Sup. Ct. Hist. 31, 32 [hereinafter Kens, *Rehabilitated and Revised*] (noting how some revisionists contend that Supreme Court's decisions during this period were "about as progressive as reformers could have hoped," how another group argues that Court's "emphasis on economic liberty is consistent with our constitutional tradition," and how third group theorizes that Court's decisions were "consistent with long-standing American traditions inspired by Jacksonian democracy and free labor ideals"); Stephen A. Siegel, *Let Us Now Praise Infamous Men*, 73 Tex. L. Rev. 661, 686 (1995) (reviewing Fiss, *supra* note 6, and stating that "old historiography" presents Fuller Court "as advocates of business enterprise" while "the new presents them all as protectors of liberty").

<sup>10</sup> See *infra* Part I.B (describing revisionist views).

position takes insufficient account of the outcry that followed constitutional judging throughout the period.

The central point of this Article is that the work of constitutional judges must have both “legal” and “social” legitimacy.<sup>11</sup> Social legitimacy, as distinguished from legal legitimacy, looks beyond jurisprudential antecedents of constitutional decisions and asks whether those decisions are widely understood to be the correct ones given the social and economic milieu in which they are rendered. The public rarely knows, and undoubtedly little cares, if there is a preexisting doctrinal basis for judicial decisions. Opinion regarding judicial review is as likely to be formed solely upon whether the decisions of courts are seen as socially right, or just, or appropriate. This is not to say that public passion alone should determine the outcome of judicial cases. Law is not pure politics, and precedents do matter. But those concerned with the legitimacy of judicial review cannot ignore the reality, and impact, of public reaction to the courts.

The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court’s decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate. There will be attacks on judges and, ultimately, on the institution of judicial review. Even in the face of established precedent, law itself will come to be seen as nothing but politics. People will say, as they did throughout the *Lochner* era, that “the judiciary [is] . . . ‘step by step destroying government by law and substituting therefore a government by Judges.’”<sup>12</sup>

Part I of this Article explains the revisionist attack on the conventional understanding of *Lochner*. This Part briefly recounts the historical background of the *Lochner* era and then focuses primarily on explaining revisionist efforts to present a more sympathetic view of *Lochner*-era judging. Such efforts, while originally purely historical endeavors to recover turn-of-the-century legal thought,<sup>13</sup> have be-

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<sup>11</sup> Daryl Levinson deserves thanks for helping to clarify this distinction and for suggesting the terminology “social” legitimacy and “legal” legitimacy.

<sup>12</sup> Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960*, at 66 (1985) (quoting Am. Fed’n of Labor Executive Council, Election Circular (Oct. 12, 1908), microformed on American Federation of Labor Records: The Samuel Gompers Era, reel 69 (Microfilming Corp. of Am.)); see also Child Labor and the Constitution, 114 *Nation* 638, 639 (1922) (explaining that problems arise when courts are given power of judicial review because “reconciliation of progress with the rigidity of a written constitution is a matter of politics and not of law”).

<sup>13</sup> A number of revisionist scholars approached their task in terms of unearthing the previously hidden doctrinal bases of *Lochner*-era decisionmaking. See, e.g., Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 *Y.B.* 53, 55 (arguing that “results of these new investigations require a

come, for some revisionists, a normative agenda that calls for more aggressive judicial review.<sup>14</sup>

Part II carefully measures the revisionists' claims against historical evidence of public opinion regarding judicial review during the *Lochner* era. The focus here is not on doctrine but on what people at the time were saying about the way in which judges decided controversial cases. This Part reveals that whether or not the revisionists are correct that judges were simply following the law's commands, commentators saw those judges as manipulating law, largely for reasons involving class bias. Part III demonstrates that, despite revisionist claims that countermajoritarian concerns arose only after the *Lochner* decision, contemporary critics criticized the judiciary for failing to defer to the majority legislative will, as embodied in legislative judgments. Thus, Justice Holmes's famous dissent in *Lochner* was not, as revisionists characterize it,<sup>15</sup> an idiosyncratic judicial opinion but an accurate barometer of public opinion and academic thought. In this regard, convention has it right.

It is precisely because the *Lochner*-era judges engaged in formalist legal reasoning, without attention to the felt necessities of the time, that they earned the contempt of their contemporaries and of generations to come. The important lesson of this era is that the legitimacy of law and the independence of judges require a certain basic acceptance of judicial decisions. Indeed, the more correct revisionists are in their claim of doctrinal fidelity, the more significant the public outcry that accompanied it. Despite the "legal legitimacy" that revisionists claim for *Lochner*-era judging, the Court's many critical commentators simply could not, and did not, see matters that way.

Part IV explains how the revisionist and conventional stories are in a sense quite independent, and how—in a more important way—they might be integrated. Both stories might be correct. *Lochner* revisionism is only concerned with legal legitimacy. Revisionists may well be accurate in their jurisprudential claim and still take nothing from the conventional story about *Lochner*-era attacks on judges. Convention, however, is surely accurate in observing that, despite legal legitimacy, *Lochner*-era judges were attacked as acting lawlessly.

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wholesale rethinking of the problems of judicial response to social reform"); G. Edward White, Revisiting Substantive Due Process and Holmes's *Lochner* Dissent, 63 Brook. L. Rev. 87, 88 (1997) (stating that "[w]hen I turned to the relevant sources, I found that neither of the [jurisprudential] mythologies bore much resemblance to the actual relationship" between *Lochner* Court's decisions and their repudiation).

<sup>14</sup> See *infra* notes 74-84 and accompanying text (discussing revisionists' normative agenda).

<sup>15</sup> See *infra* notes 215-16 and accompanying text (discussing revisionist depiction of Holmes's *Lochner* dissent).

Thus, as Part IV ultimately explains, the lesson of *Lochner* is that social disagreement with legal decisions can lead to a belief that those decisions are themselves unlawful.

Contemporary critics decry the Court's perceived abandonment of precedent not only in *Bush v. Gore*, but in the many recent federalism decisions that unsettle New Deal understandings and, in theory, limit the power of Congress to correct social ills and hold states accountable for constitutional violations.<sup>16</sup> In response to this activity, commentators (and dissenting Justices) are quick to invoke *Lochner* and raise the supposed lessons of that era and the New Deal.<sup>17</sup> Unpacking the legal and popular debate around *Lochner* suggests that ultimately what may matter most is not whether the Court is adhering to settled principles in the decisions, but whether the public is prepared to accept those decisions as legitimate in some broader sense.

## I

### THE REVISIONIST ENDEAVOR

At stake in the debate between convention and revisionism is the legal legitimacy of the *Lochner* Court. What is said to follow from that debate is the proper scope of judicial review. Until recently, the consensus was clear. As Owen Fiss, author of the Holmes Devise volume on the Fuller Court explained, "[b]y all accounts, the Court over which Melville Weston Fuller presided, from 1888 to 1910, ranks among the worst."<sup>18</sup> It probably says enough to note that *Lochner*

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<sup>16</sup> Invalidation of individual damage remedies against states under the Americans with Disabilities Act is but the latest example. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). Particularly noteworthy are the number of times the Court has struck down recently passed congressional enactments, even economic regulations deemed sacrosanct after the New Deal. See, e.g., *Eastern Enters. v. Apfel*, 524 U.S. 499 (1998) (holding that Coal Industry Retiree Health Benefit Act amounts to unconstitutional taking); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating Gun-Free School Zones Act on Commerce Clause grounds); cf. *Alden v. Maine*, 517 U.S. 706 (1999) (allowing states to assert sovereign immunity to avoid complying with federal statutes).

<sup>17</sup> For example, in dissent in *Alden*, Justice Souter compared the majority's opinion to *Lochner*, suggesting that the majority's conception of state sovereign immunity was as historically and constitutionally inaccurate as the *Lochner* Court's reliance on laissez-faire economics. See *Alden*, 527 U.S. at 814 (Souter, J., dissenting). The claim is a familiar one to make. See Mary Cornelia Porter, *Lochner and Company: Revisionism Revisited*, in *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal* 11, 14 (Ellen Frankel Paul & Howard Dickman eds., 1989) (describing similar trades of taunts of *Lochnerism* during Burger Court); Gary D. Rowe, *Lochner Revisionism Revisited*, 24 L. & Soc. Inquiry 221, 223 (1999) ("[A]voiding '*Lochner's* error' remains the central obsession, the (oftentimes articulate) major premise, of contemporary constitutional law.").

<sup>18</sup> Fiss, *supra* note 6, at 3.

often is paired with *Dred Scott v. Sandford*<sup>19</sup> as an example of judicial overreaching and as an argument for judicial restraint.<sup>20</sup> In fact, in the minds of those who tell the conventional story, the *Lochner* era gave rise to the modern-day countermajoritarian difficulty (the problem of reconciling judicial review with democracy).<sup>21</sup> Convention's lesson from this is one of judicial restraint. By tracing the jurisprudential antecedents of *Lochner*-era decisions, revisionists would redeem the legal legitimacy of the *Lochner* Court and many of them would thus encourage a more aggressive exercise of judicial review.

This Part describes the revisionist effort. Revisionists label long-accepted understandings of the period as "mythology"<sup>22</sup> and consider decisions once seen as the height of judicial impropriety to be "legitimate interpretation[s] of original meaning."<sup>23</sup> In what surely will be news to most of the broader legal world, one scholar recently claimed that revisionists have "render[ed] the traditional view of *Lochner* a relic."<sup>24</sup> Section A briefly canvasses the largely familiar events of the *Lochner* era. Section B then explains the revisionist response to those

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<sup>19</sup> 60 U.S. (19 How.) 393 (1857) (holding that African Americans could not qualify as citizens).

<sup>20</sup> See Kens, *Judicial Power*, supra note 9, at 2 (pairing *Lochner* with *Dred Scott* and *Brown v. Board of Education*, 347 U.S. 483 (1954), as one of most controversial Supreme Court decisions in American history); see also Bernard H. Siegan, *Economic Liberties and the Constitution* 23 (1980) (stating that *Lochner* "is one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse"). *Lochner* achieved another infamous pairing in the joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*, 505 U.S. 833, 862-63 (1992), which presented *Lochner* alongside *Plessy v. Ferguson*, 163 U.S. 537 (1896), as an example of a case in which overruling of precedent was justified despite *stare decisis*.

<sup>21</sup> This paper is part three of a five-part broader project examining the genesis of the academy's obsession with reconciling judicial review and democracy—the problem of the "countermajoritarian difficulty." See Barry Friedman, *The History of the Countermajoritarian Difficulty*, Part Five: *The Birth of an Academic Obsession* (2000) (unpublished manuscript, on file with the *New York University Law Review*), which historicizes the countermajoritarian problem. The *Lochner* era is the paradigmatic example of widespread public attacks on the courts framed in terms of judges interfering with popular democracy. For other works in the series, see Barry Friedman, *The History of the Countermajoritarian Difficulty*, Part One: *The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333 (1998) [hereinafter Friedman, *Judicial Supremacy*]; Barry Friedman, *The History of the Countermajoritarian Difficulty*, Part Two: *Reconstruction's Political Court* (2001) (unpublished manuscript, on file with the *New York University Law Review*) [hereinafter Friedman, *Political Court*]; Barry Friedman, *The History of the Countermajoritarian Difficulty*, Part Four: *Law's Politics*, 148 U. Pa. L. Rev. 971 (2000) [hereinafter Friedman, *Law's Politics*].

<sup>22</sup> See White, supra note 13, at 88 (discussing "mythology" that *Lochner* decision represented Court's "willful substitution of its own view on political economy—typically designated as an outmoded gospel of *laissez faire*—for the views of the New York legislature").

<sup>23</sup> Bernard H. Siegan, *Rehabilitating Lochner*, 22 San Diego L. Rev. 453, 454 (1985) (arguing that "[f]ull rehabilitation [of *Lochner*] may be in order").

<sup>24</sup> Rowe, supra note 17, at 241 (claiming that revisionists' "assault" on conventional view has been "devastating").



events and discusses some of the normative implications of the revisionist endeavor. In doing so, this Part sets the stage for an extended examination of whether the revisionist challenge to the conventional wisdom about *Lochner*-era judging can succeed.

### A. History

*Lochner* was decided in 1905, yet the real furor over the courts began in the 1890s<sup>25</sup> and lasted until at least the middle of the 1920s.<sup>26</sup> Criticism throughout was fueled by the fact that the courts constantly ran afoul of the two great political movements of the time: Populism and Progressivism.<sup>27</sup> These two movements spelled out an agenda

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<sup>25</sup> See *infra* notes 32-36 and accompanying text (discussing controversial judicial decisions of 1890s).

<sup>26</sup> Many would say it continued through 1937. See, e.g., Gillman, *supra* note 5, at 201 (noting that constitutional principles underlying *Lochner* era were usurped by “‘constitutional revolution of 1937’”). But see Friedman, *Law’s Politics*, *supra* note 21, at 984-88 (arguing that Populist-Progressive and New Deal periods were distinct in character).

<sup>27</sup> Populism and Progressivism were very different movements, but it is their similarities that play the greatest role in this story. See J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 *Yale L.J.* 1935, 1945 (1995) (book review) (“Although populism and progressivism share a desire for reform, they diverge most significantly in their attitudes towards the beliefs, attitudes, and actions of the mass of ordinary citizens.”).

Populism grew out of agrarian and labor reform movements responding to industrialization and to corporate control of vital aspects of trade such as the railroads. The Populists, disenchanted with “the consequences of economic development . . . hoped to preserve an agrarian social order in the face of an industrializing economy.” Ely, *supra* note 6, at 66; see also Lawrence Goodwyn, *Democratic Promise: The Populist Movement in America*, at xvii (1976) (viewing purpose of Populism as substantial “structural reform of the American economic system”); Richard Hofstadter, *The Progressive Movement, 1900-1915*, at 6-7 (1963) [hereinafter Hofstadter, *Progressive Movement*] (noting that Populism had roots in farmers’ grievances “against railroads, monopolies, bankers, and political bossism”). The Populist Movement probably reached its zenith in 1892, the year Colonel James B. Weaver won over a million votes running as a third-party candidate. See Lewis L. Gould, *Grover Cleveland*, in *The Reader’s Companion to the American Presidency* 257, 262 (Alan Brinkley & Davis Deyer eds., 2000) (summarizing 1892 election results). Many scholars argue that the Movement collapsed after the Populists chose the Democratic candidate William Jennings Bryan as their standard-bearer in the 1896 election. The election of McKinley in 1896 with the largest margin of any winning presidential candidate since 1872 devastated the Populists, leaving them stunned and disheartened. See Goodwyn, *supra*, at 514 (claiming that spirit of Populism “expired in the autumn of 1896”); Robert H. Wiebe, *The Search for Order, 1877-1920*, at 105 (1967) (noting that after 1896 election, “[p]opulism was dead”).

Whereas Populism largely was a rural movement, Progressivism generally found its root in urban centers. See Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 133 (1955) [hereinafter Hofstadter, *Age of Reform*] (comparing Populism and Progressivism and noting that latter “was characterized by a fresh, more intimate and sympathetic concern with urban problems”); Arthur S. Link & Richard L. McCormick, *Progressivism* 28 (1983) (pointing out that “[p]olitical progressivism originated in the cities”). Nonetheless, there were agrarian allies of Progressivism. See Wiebe, *supra*, at 166 (mentioning that “[t]he two initial centers of progressive reform were the large cities of the East and Midwest and the predominantly agrarian states of the Midwest and portions of

that attracted enough adherents to permit them to call themselves—whether rightly or wrongly—a “majority” of the people.<sup>28</sup> Several issues topped the Populist and Progressive agendas: the desire to control monopolistic trade practices,<sup>29</sup> to improve the working conditions and wages of common laborers,<sup>30</sup> and to enact “social legislation,” including the reform of child labor rules and health and safety laws.<sup>31</sup> Judicial response to such “social legislation” fueled the attacks on courts and gave rise to the conventional story.

It is important to recall that courts already were under siege well before the turn of the century. Criticism of the Supreme Court began in earnest early in the 1890s in response to the “anti-Granger” decisions, particularly *Chicago, Milwaukee, & St. Paul Railway Co. v. Minnesota*,<sup>32</sup> which upheld the right of states to regulate rates charged by private businesses. In 1895, three other Supreme Court decisions—

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the South”). By the time Progressivism reached its height, it is fair to say that much of American politics could be said to be “progressive.” See *id.* at 217. In fact, commentators frequently observe that in the 1912 election, the platforms of all three major political parties could be said to be “progressive.” See *id.*

<sup>28</sup> It is not necessary that those attacking the judiciary actually constitute a majority on every relevant issue, but simply that they are numerous enough as to advance the claim with some plausibility. See Friedman, *Judicial Supremacy*, *supra* note 21, at 350 (concluding that courts may engender countermajoritarian criticism merely by offending “some group ‘substantial’ enough that it does not see itself as a distinct minority”).

<sup>29</sup> See *infra* note 38 and accompanying text (discussing controversy over antitrust decisions of Supreme Court).

<sup>30</sup> See William E. Forbath, *Law and the Shaping of the American Labor Movement* 37 (1991) (stating that “[t]he labor movement of the 1880s and early 1890s embraced what was, by contemporary standards, a bold program for government regulation of the wage contract and working conditions”); Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 *J. Am. Hist.* 63, 72 (1985) (“The struggle to reduce the number of working hours constituted one of the major reforms of the period and was part of a larger campaign for shorter hours dating back to the early nineteenth century.”).

<sup>31</sup> See Morton J. Horowitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 221 (1992) (suggesting that “Theodore Roosevelt’s 1912 campaign proposal for recall of judges was offered in reaction to judicial hostility towards workers’ compensation statutes”); Link & McCormick, *supra* note 27, at 47 (characterizing federal child labor legislation as “the single most popular social reform of the time”).

<sup>32</sup> 134 U.S. 418 (1890) (subjecting reasonableness of rate regulations set by state commissions to judicial due process scrutiny). Edward S. Corwin wrote that the decision marked “a complete volte-face on the part of the Court that fourteen years before pronounced the decision in *Munn v. Illinois*[,]” in which the Court upheld state authority to regulate rates charged by private businesses so long as that private property was dedicated to “public use.” Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 *Mich. L. Rev.* 643, 660 (1909).

the income tax,<sup>33</sup> lottery,<sup>34</sup> and labor injunction<sup>35</sup> decisions—led to sharp attacks on judicial authority.<sup>36</sup>

*Lochner* itself, decided in 1905, marks the beginning of the second great period of turmoil, which stretches forward until the onset of World War I. The period from 1906 to 1912 likely was history's most vocal regarding the inconsistency of judicial review with respect to democratic principles. During this period, state and federal courts regularly struck down "social" legislation or continued to interfere with direct action in labor unions to obtain remedies for workers.<sup>37</sup> In addition, after sustaining the constitutionality of the antitrust laws, the Supreme Court decided two cases involving the oil and tobacco trusts that promised to give far greater rein to monopolizing combinations.<sup>38</sup>

As a result of these decisions, the role of the judiciary generally, and the Supreme Court in particular, became an important campaign issue in the election of 1912. Theodore Roosevelt, who after his two

<sup>33</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (striking down federal tax on income from real estate and municipal bonds).

*Pollock* aroused the greatest fury of this early period. While many defended the Supreme Court's holdings, arguing that the Court was simply enforcing the will of the people, subsequent analysis of press and review coverage reveals that critics of the Court's holdings outweighed its defenders. See Sidney Ratner, *American Taxation: Its History as a Social Force in Democracy* 214 (1942) (collecting criticism of income tax decisions and noting that critics outnumbered defenders).

<sup>34</sup> *Champion v. Ames*, 188 U.S. 321 (1903) (upholding regulation of federal lottery sales on Commerce Clause grounds).

<sup>35</sup> *In re Debs*, 158 U.S. 564 (1895) (upholding power of courts to enjoin strikes and boycotts).

<sup>36</sup> For a detailed history of the labor injunction doctrine, see Charles Noble Gregory, *Government By Injunction*, 11 *Harv. L. Rev.* 487 (1898). Much of the legal commentary was on the merits, whether defending or attacking the courts. For a defense of labor injunctions, see, for example, William G. Peterkin, *Government By Injunction*, *Paper Read Before the West Virginia Bar Association* (Nov. 3, 1897), in 3 *Va. L. Reg.* 549, 549 (1897), which attributes the public fervor against injunction cases to "[j]ealousy of the enlargement of the Federal power . . . older than the Constitution itself[;]" W.A. Woods, *Injunction in the Federal Courts*, 6 *Yale L.J.* 245, 245 (1897), which rejects the notion that any "decision of the Supreme Court . . . touching the subject of injunction, can be said to be founded on or to involve any new doctrine, or any application of established principle which was new[.]" For attacks, see, for example, S.S.P. Patteson, *Government by Injunction*, 3 *Va. L. Reg.* 625, 625 (1898), which criticizes the injunction decisions as "a departure from the teachings of textbooks, . . . in conflict with all of the recognized ancient precedents, and . . . not warranted by any new State or Federal statute."

<sup>37</sup> One part of the revisionist effort challenges the claims of frequency made above. But frequency is a relative term. Compared to what the courts had done in preceding years, the period of 1890 to 1925 indeed was busy. See *infra* Part IV.A for a discussion both of the relative frequency with which courts struck down legislation and of the types of legislation invalidated.

<sup>38</sup> *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (finding that Standard Oil violated antitrust laws but holding that similar acts, if performed by separate corporations acting in concert, would not); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (finding that American Tobacco violated antitrust laws but refusing to enjoin its conduct).

terms as a Republican president and a sabbatical on safari in Africa returned to the United States and served as the Progressive Party's standard-bearer, led the movement against courts during much of this period.<sup>39</sup> Critics voiced serious proposals to reform or discipline the courts. William Jennings Bryan called for the election of federal judges,<sup>40</sup> and Senator Owen introduced his proposal to elect and recall federal judges, insisting that to allow popular decisions "to be set aside by any tribunal not responsible to the people, not elected by the people, not subject to the recall of the people, or of the people's representatives, is to establish a judicial oligarchy and to overthrow the Republic."<sup>41</sup> *The Saturday Evening Post* strongly favored the recall, repeatedly mentioning the people's will and the right of the people to govern.<sup>42</sup> That same year, numerous books were published either for or against the recall, discussing the problem in terms of judicial interference with popular will.<sup>43</sup>

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<sup>39</sup> For an account of how Roosevelt recaptured his role as the leader of the Progressive movement, see I.E. Cadenhead Jr., *Theodore Roosevelt: The Paradox of Progressivism* 187-203 (1974).

<sup>40</sup> William Jennings Bryan, *The People's Law, Address Delivered at the Ohio Constitutional Convention* (Mar. 12, 1912), in S. Doc. No. 63-523, at 14 (1914). Bryan pointed out that the states used a variety of mechanisms for selecting judges, including popular vote for a definite term, and appointment by the Legislature for a definite term. *Id.* He saw no reason for judges to be independent of the people: "[T]he people are much more apt to deal justly with judges than they are to receive justice at the hands of judges who distrust the intelligence and the good intent of the masses." *Id.* (emphasis omitted).

<sup>41</sup> 47 Cong. Rec. 3368 (1911) (statement of Sen. Owen).

<sup>42</sup> Melville Davisson Post, *Recall of Judicial Decisions*, *Sat. Evening Post*, Aug. 31, 1912, at 3 ("A democracy is constructed upon the idea that all power is lodged in the electorate . . .").

<sup>43</sup> The following book offers arguments in favor of the recall of judges. See, e.g., William L. Ransom, *Majority Rule and the Judiciary* 36 (1912) (questioning how it could be just for "a few men [to] obstruct the will and the needs of the many," especially where there seems to be "no question of substantial right[s]"); Theodore Roosevelt, *Introduction to Ransom*, *supra*, at 1, 4 (arguing that it is people's duty to determine principles of constitutional interpretation, using, as example, Abraham Lincoln's refusal to accept Supreme Court's decision in *Dred Scott* case).

The following books offer arguments opposed to changing the judicial system. See, e.g., Nicholas Murray Butler, *Why Should We Change Our Form of Government?* 5 (1912) (claiming that it undermines representative government "to appeal over the heads of the people's chosen representatives to the people themselves"); *id.* at 11 (implying that representative form of government reflects public opinion); *id.* at 25 (calling initiative "the most preposterous and the most vicious" proposal yet); J. Hampden Dougherty, *Power of Federal Judiciary over Legislation* 6-7 (1912) (commenting that judicial recall would be "so direct a blow at judicial independence that it can be no cure for any evils in the judicial system"); *id.* at 111 ("The demand for recall springs . . . not so much from doubt of the integrity of the courts as from dislike of their decisions").

Although commentators generally agree that criticism of the courts enjoyed a lull during the war years,<sup>44</sup> the early 1920s saw a revival of criticism of the courts—a revival that actually commenced at the end of the previous decade with the Supreme Court's invalidation of the national child labor law as beyond Congress's power to regulate interstate commerce.<sup>45</sup> "[A] series of 5-4 decisions in which the Supreme Court offended nearly every stripe of liberal opinion"<sup>46</sup> added fuel to the fire. From 1921 to 1926, the Court struck down a number of state and federal laws, accepting fifteen out of fifty-three due process arguments.<sup>47</sup> Of particular significance was the 1923 decision in *Adkins v. Children's Hospital*,<sup>48</sup> which invalidated the District of Columbia's minimum wage law for women and children. *Adkins* raised such a storm of commentary that the *New Republic* put out a book, *The Supreme Court and Minimum Wage Legislation*, collecting the largely critical commentary by the legal profession on *Adkins*.<sup>49</sup> During this period, Charles Warren published his monumental historical defense of the Court, *The Supreme Court in United States History*.<sup>50</sup> The intense attacks on the Court during this period drew even Chief Justice William Howard Taft out to respond.<sup>51</sup>

Senator Robert LaFollette, the most vehement Court critic of the period and a presidential candidate in 1924, suggested barring lower

<sup>44</sup> William G. Ross theorizes that several factors muted criticism of the Court during this time, including "profound public respect for the judiciary" and "institutional obstacles that impeded the viability of legislation to curtail judicial power." William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937*, at 2 (1994). Robert C. Post argues persuasively that the surge in Court activity (and concomitant popular contempt for the Court) was driven by the Court's desire for a return to normalcy after the administrative buildup of World War I and the threat to laissez-faire it engendered. Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. Rev. 1489, 1491-93 (1998).

<sup>45</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Equally controversial was invalidation of a taxing measure aimed at the same evil. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (striking down, on Tenth Amendment grounds, federal law taxing products of child labor).

<sup>46</sup> Ross, *supra* note 44, at 174.

<sup>47</sup> *Id.* at 180 (citing Roy A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv. L. Rev. 943, 944 & n.10 (1927) (collecting cases in which Court struck down legislation on due process grounds)).

<sup>48</sup> 261 U.S. 525 (1923).

<sup>49</sup> Nat'l Consumers' League, *The Supreme Court and Minimum Wage Legislation* (1925) (compiling commentary on Court's minimum wage decision).

<sup>50</sup> Charles Warren, *The Supreme Court in United States History* (1922) (explaining, and ultimately defending, decisions of Supreme Court by placing them in their respective historical contexts); see also *id.* at 29 ("[I]t may truly be said that . . . the Court today fulfills its function in our National system better than any instrumentality which has ever been advocated as a substitute.").

<sup>51</sup> *The Supreme Court and Partisan Passion*, N.Y. Times, May 31, 1923, at 14 (noting Chief Justice Taft's defense of Court).

federal judges from striking down laws and permitting congressional override of Supreme Court decisions by the usual legislative process.<sup>52</sup> LaFollette never formally introduced his proposal as legislation, but a general declaration in favor of limiting the power of the federal judiciary was part of the Progressive party platform and court curbing was an issue in the 1924 campaign.<sup>53</sup> Although LaFollette failed to gain the presidency, his campaign demonstrated significant popular support for his ideas.<sup>54</sup> His attack on the Court sparked a huge publicity campaign on behalf of the Court,<sup>55</sup> with Calvin Coolidge repeatedly coming to its defense.<sup>56</sup>

Coolidge ultimately won the election, and thereafter criticism of the Supreme Court abated. But it would begin again soon enough. In the face of continued judicial interference with popular legislation during the New Deal, the debate over judicial review raged throughout the mid-1930s, culminating in Franklin Roosevelt's 1937 attempt to pack the Supreme Court.<sup>57</sup>

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<sup>52</sup> See 62 Cong. Rec. 9076 (1922) (statement of Sen. LaFollette); see also William E. Sweet, *Curb the Court!*, 50 *Survey* 217, 217 (1923) (recording hearty support of Governor of Colorado to restrict power of courts to declare laws unconstitutional).

<sup>53</sup> See *The Supreme Court Under Fire*, 77 *Current Opinion* 556, 556 (1924) (observing that LaFollette's attack on Supreme Court "has drawn more fire from his opponents than any other issue in the Presidential campaign"); see also *Our Despotist Courts*, 119 *Nation* 300, 300 (1924) (discussing LaFollette proposal); *Our Supreme Court—Tyrant or Protector?*, *Literary Digest*, Sept. 20, 1924, at 12, 12-13 (discussing LaFollette proposal and summarizing commentary on issue).

<sup>54</sup> Ross, *supra* note 44, at 283 (noting that LaFollette's "impressive vote tally" demonstrated that "one-sixth of the voters were willing to support a candidate who favored a major limitation of the Court's power of judicial review").

<sup>55</sup> Conservative propaganda supporting the courts and their role in judicial review included "Constitution Day" celebrations promoting public awareness of the role of the courts in protecting the people from "unrestrained democracy that could threaten personal and economic liberties." *Id.* at 233.

<sup>56</sup> See *Coolidge Sees Constitution or Despotism*, *N.Y. Tribune*, Sept. 26, 1924, at 1 (advocating "maintenance of the integrity of the judicial system that the individual may be secure in his rights"); *Coolidge States Views on Issues in Last Big Speech*, *N.Y. Times*, Oct. 24, 1924, at 1 (warning that to give Congress power over courts would be equal to giving them "the power to destroy the States, abolish the Presidential office, close the courts and make the will of the Congress absolute"). Coolidge felt this would make the people "subject to all the influences which might be exerted on the Congress by the power and wealth of vested interests on one day, and the passing whim of popular passion on another day." *Id.* "The poor and weak would be trampled underfoot." *Id.* "[L]ife and property, and the freedom of religion, speech and the press, would have very little security." *Id.*

<sup>57</sup> For a detailed discussion of the legal and historical events leading up to and surrounding the 1937 Court-packing plan, see generally Friedman, *Law's Politics*, *supra* note 21.

### B. Revisionism

Revisionists seek to establish the “legal” legitimacy of these controversial *Lochner*-era decisions. According to most revisionists,<sup>58</sup> the judges of this era have received unduly harsh criticism because scholars have not paid sufficient attention to the fact that these judges engaged in a principled exercise to apply existing doctrines, albeit in a world that was changing around them.<sup>59</sup>

The conventional story errs, revisionists explain, in “claiming that Gilded Age and Progressive-era judges read into the Constitution their own probusiness, anti-labor biases when, in fact, they were faithful, heroically so, to the reigning constitutional ideology of limited government and state neutrality.”<sup>60</sup> As Professor Bruce Ackerman has argued:

It is anachronistic for the modern myth of rediscovery to portray the *Lochner* Court as if it were abusing the idea of constitutional interpretation by imposing its idiosyncratic and reactionary views on a polity yearning for the New Deal. Like the courts of the early republic, the *Lochner* Court was exercising a preservationist function, trying to develop a comprehensive synthesis of the meaning of the Founding and Reconstruction out of the available legal materials.<sup>61</sup>

Revisionists tell essentially two stories of doctrinal fidelity.<sup>62</sup> First, some revisionist scholars maintain that the *Lochner* Court’s defense of property rights had a firm basis in existing jurisprudence, both as to the nature of the specific rights protected and as to the broader tradition of invoking the Constitution to limit the powers of

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<sup>58</sup> The revisionists are not a monolithic lot. For a review of revisionist perspectives, see Porter, *supra* note 17, at 17.

<sup>59</sup> Indeed, many revisionists go a step further, and claim that everything we are taught to believe about this era is “winner’s history.” See James W. Ely Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 *Vand. L. Rev.* 953, 967 (1998) (suggesting “that every aspect of . . . [the substantive due process] tale is suspect” and that “[t]he dire legend of substantive due process was invented by scholars associated with the Progressive movement in order to further their regulatory agenda”); see also White, *supra* note 13, at 123, 124 (describing “now conventional” account as “launched in the late 1930s” in order to “strip the ‘liberty of contract’ doctrine from its foundationalist moorings” and characterize its proponents “as reactionaries resisting modern social legislation designed to relieve inequalities in the industrial marketplace”).

<sup>60</sup> Rowe, *supra* note 17, at 239.

<sup>61</sup> Ackerman, *supra* note 8, at 101.

<sup>62</sup> Somewhat at the nexus is a more general statement of the legacy of Populist-Progressive Era judges as devoted to “liberty.” This is Owen Fiss’s thesis in his *Holmes Devise* volume on the Fuller Court. In a discussion that touches on aspects of the rights and police power thesis, Fiss concludes: “My claim is that this is a misunderstanding and that the Fuller Court should be understood as an institution devoted to liberty and determined to protect that particular constitutional ideal from the social movements of the day.” Fiss, *supra* note 6, at 12.

political bodies.<sup>63</sup> Scholars who advance this thesis (some scholars draw from both strains) may be called "rights revisionists."

The second strain of revisionism, which attracts far more attention, defends *Lochner*-era jurisprudence as consistent with a long-standing tradition of invalidating "class" or special interest legislation (as opposed to legislation adopted to promote the "public" or "general" welfare).<sup>64</sup> Drawing from themes present at the Founding, as well as from antebellum and late-nineteenth-century jurisprudence, these revisionists argue that by the turn of the century, it was well established that government only could legislate for public purposes or the public good. Legislation that benefited just one "class" thus was invalid.<sup>65</sup> Labor legislation, such revisionists argue, was particularly suspect in light of the "free labor" principles that evolved from antislavery arguments of the nineteenth century.<sup>66</sup> These latter scholars may be called "police power" revisionists, because the heart of

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<sup>63</sup> See Siegan, *supra* note 20, at 111 (suggesting that in expanding due process concept, "the Justices stated they were not intruding on the legislative function" but were enforcing constitutional limits on "the power of government to diminish the right of contract"); Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 *Wm. & Mary Bill Rts. J.* 1, 9 (1997) (observing that Supreme Court Justice George Sutherland "reflected a conservative judicial tradition in which judges invoked constitutional limitations to restrain political factions and preserve individual economic liberty"); Siegel, *supra* note 9, at 686 ("If the old historiography [of the Fuller Court] presented them all as advocates of business enterprise, the new presents them all as protectors of liberty.").

<sup>64</sup> See Gillman, *supra* note 5, at 7 (suggesting that courts were adverse, not to all economic regulation, but only to particular kind of government interference in market relations that "promoted only the narrow interests of particular groups or classes rather than the general welfare"); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689, 1701 (1984) ("If a measure enacted by the government was not a proper exercise of the police power under common law standards, it was impermissible under the due process clause as a naked preference for one group at the expense of another."). Melissa L. Saunders corroborates the "class legislation" revisionist effort but with the goal of revising equal protection law in the context of racial gerrymandering cases. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 *Mich. L. Rev.* 245, 247-48 (1997) (arguing that Equal Protection Clause meant to nationalize doctrine against "partial" or "special" laws).

<sup>65</sup> See Gillman, *supra* note 5, at 4-10 (describing revisionist theories regarding class legislation).

<sup>66</sup> For an excellent account of the conflict between the formalistic jurisprudence that was used to uphold slavery and the alternative antislavery jurisprudential views, see William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *Harv. L. Rev.* 513 (1974). In the postbellum era, antislavery ideas appeared in many court opinions. See *id.* at 557. For example, William Howard Taft wrote that the worker had an "inalienable right to bestow his labor where he will." *Id.* (quoting *Toledo, A.A. & N.M. Ry. v. Penn. Co.*, 54 F. 730, 737 (C.C.N.D. Ohio 1893)); see also William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 *Wis. L. Rev.* 767, 783 ("[T]he abolitionist talked about the freedom of the Northern worker in terms of self-ownership, that is, simply not being a slave, being free to sell his own labor.").



their argument holds that, despite the conventional story's focus on *Lochner*-era decisions as improperly creating constitutional economic rights that did not exist, in fact those decisions primarily dealt with the limits on the police power, and particularly with class legislation prohibition.

Much of the early revisionist work,<sup>67</sup> such as that by Loren Beth, Alan Jones, Charles McCurdy, William Nelson, or Mary Cornelia Porter,<sup>68</sup> claimed no end but that of history. As McCurdy said in his impressive piece on the roots of the "liberty of contract" doctrine, the task of these revisionists is largely "descriptive rather than explanatory," and devoted to recording "the habits and thought of action that gave 'Lochnerism' a particular configuration" so that we might understand those "habits were deeply imbedded in the American consciousness well before the liberty of contract entered American constitutional law in 1886."<sup>69</sup> Regardless of whether the claims of these early authors prove on examination to be correct or themselves in need of revision, the endeavor was what it claimed to be: historical in flavor and approach.<sup>70</sup>

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<sup>67</sup> Although "the revisionist bandwagon," see G. Edward White, *The Constitution and the New Deal*, at ix (2000), has been picking up momentum in recent years, early revisionism can be found in the late 1960s and early 1970s. See, e.g., Loren Beth, *The Development of the American Constitution 1877-1917* (1971) (tracing historical development and evolution of American constitutional practices); Alan Jones, Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration, 53 *J. Am. Hist.* 751 (1967) (examining assumption that American constitutional law has been preoccupied with judicial protection of property rights).

<sup>68</sup> See *supra* note 67 and *infra* note 69.

<sup>69</sup> Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 *Y.B.* 20, 24 (1984); see also Mary Cornelia Porter, *That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court*, 1976 *Sup. Ct. Rev.* 135, 145 ("[W]ithout judgment as to what the Court should, or should not, have done, it is from this unique Commerce Clause perspective that substantive due process should be understood."). Nelson's important work on the free-labor ideology is devoid of any normative claims. Nelson, *supra* note 66 (discussing shift in nineteenth-century judicial reasoning from instrumentalism to formalism).

<sup>70</sup> Two of the earliest authors cited for being at the forefront of the revisionist effort do not really deserve to be lumped with subsequent revisionism: Loren P. Beth's magisterial review of constitutional developments at the turn of the century, see Beth, *supra* note 67, is a wonderfully written piece of intellectual history; Alan Jones's work, see Jones *supra* note 67, provides a thorough history of Cooley's thought. Jones, although claiming to "examine the assumption of Progressive historiography that American constitutional law has been anxiously preoccupied with the judicial protection of property rights[.]" Jones, *supra* note 67, at 752, really focuses only on Cooley's thought, and in doing so may persuade most readers that Cooley does not deserve to have been adopted as the banner figure of laissez-faire constitutionalism. See, e.g., *id.* at 762-63 (discussing misunderstanding of Cooley's thought and providing more finely grained analysis). Similarly, Beth can hardly be called a revisionist historian at all. Although he unquestionably presents the events of constitutional history in a more balanced way than the conventional story might, his book is—from start to finish—consistent with that story's major premises. See Beth, *supra* note 67, at 143

The goal of the revisionist effort in some quarters is still relatively modest: simply to take the sting out of an apparently widespread belief that constitutional judging is (or was) all judicial will and no law. Scholars such as Howard Gillman turned to revisionism to respond to the “attitudinal”<sup>71</sup> movement in political science, which claims that judicial votes reflect essentially nothing more than judicial ideology. Thus, Gillman hoped

to encourage a renewed appreciation of the extent to which judicial behavior—that is, writing opinions and making decisions—may be motivated by a set of interests and concerns that are relatively distinct from the preferences of particular social groups, the policies prescribed by particular economic theories, or the personal social and political loyalties and sympathies of individual judges.<sup>72</sup>

Similarly, scholars such as Barry Cushman (whose primary project has been the New Deal era) sought to discount external explanations, i.e., those that claim external events and pressure on judges explain jurisprudential transformation.<sup>73</sup> These revisionists sought to demonstrate that the doctrine in fact played a role during political times and that fidelity to law could and did decide cases.

Of late, however, the revisionist project has moved into more normative hands, with scholars offering revisionism as an argument for more aggressive judicial review. For example, in a recent article, Rebecca Brown relies on revisionism to suggest “a strong offensive charge on behalf of vigorous liberty protection under the Fourteenth Amendment.”<sup>74</sup> Similarly, Owen Fiss says: “*Lochner* stands for both a distinctive body of constitutional doctrine and a distinctive conception of judicial role: One could reject one facet of *Lochner* and accept the other. . . . [W]e may wish to criticize its substantive values and yet leave unimpeached its conception of role.”<sup>75</sup> And Gary Rowe sums

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(discussing discretion in judges’ hands); *id.* at 147 (denying any coherent vision to Supreme Court commerce decisions); *id.* at 185 (describing results in cases as Supreme Court’s “familiar pattern of favoring employers at the expense of employees”).

<sup>71</sup> See generally Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993) (examining Supreme Court decisions to determine whether decisions are product of “law” or of justices’ political attitudes and ideology).

<sup>72</sup> Gillman, *supra* note 5, at 11.

<sup>73</sup> Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 4-5 (1998) (seeking to provide internal, intellectual explanation for New Deal jurisprudence). G. Edward White follows in Cushman’s shoes in attacking the “behavioralist” model of judging, but ultimately White comes to a more normative claim for what should replace it. See White, *supra* note 67, at 309 (decrying inability “to imagine world in which legal actors could approach their experience without holding to behavioralist theories of law, judging, and constitutional interpretation”).

<sup>74</sup> Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 *Wm. & Mary L. Rev.* 65, 65 (1999).

<sup>75</sup> Fiss, *supra* note 6, at 19.

up the entire revisionist project: "By freeing us from excessive worries about the legitimacy of judicial review, revisionism promises to direct our attention to more fruitful and creative jurisprudential endeavors. It makes possible, at long last, constitutional thinking that need not [perform] strenuous backflips to distance itself from '*Lochner*'s error.'"<sup>76</sup>

Of course, the appropriate end of vigorous judicial review turns out to depend largely upon each revisionist's own ideology.<sup>77</sup> Scholars on the right seek nothing less than to "rehabilitate" *Lochner*, emphasizing the essential correctness of the *Lochner* Court's recognition of property rights.<sup>78</sup> The world they envision would be a significant shift from post-New Deal understandings. Other scholars argue that while the specific *Lochner*-era holdings themselves were wrong because the Court failed to decide the cases in the context of radically changed economic conditions, the tradition of upholding rights against popular legislation was an established one.<sup>79</sup> These "legal liberals have . . .

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<sup>76</sup> Rowe, *supra* note 17, at 242.

<sup>77</sup> See Porter, *supra* note 17, at 17 (summarizing some of these revisionist positions). Porter's piece nicely captures the fact that both charges of *Lochner*izing and use of revisionist understandings vary case-to-case depending on ideology. *Id.* at 12-17 (discussing traded charges of *Lochner*izing as Court's decisions shift ideologically).

<sup>78</sup> See, e.g., Ely, *supra* note 59, at 973 ("[T]he intellectual quandary over substantive due process review would be eliminated by again extending meaningful judicial scrutiny to property rights"); Richard A. Epstein, *The Mistakes of 1937*, 11 *Geo. Mason U. L. Rev.* 5, 7 (1988) ("A robust constitution therefore must also seek to entrench individual rights against all levels of the state . . . because we know that if usable property rights are not made permanent and definite, then political actors will have far greater power over the fortunes of their citizens. . . ."); Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 *Wm. & Mary L. Rev.* 3, 11 (1999) ("If the Due Process Clause contains a substantive component, the dominant account does not provide a valid explanation for the differential treatment of economic rights and so-called personal rights, such as the right of privacy."); Siegan, *supra* note 23, at 454 (approving of *Lochner* inquiry as "an appropriate function for the Court under the due process clause"); cf. White, *supra* note 67, at 312 (seeking to cabin New Deal commitments in time so as not "to perpetuate a disabling nostalgia for an idealized model of constitutional governance"). But see Gillman, *supra* note 5, at 11 (agreeing with "conservative polemicists" that "the judiciary during the *Lochner* era was being faithful to a well-established constitutional tradition," but contending that "the judiciary's stubborn attachment to what historical participants perceived to be an increasingly anachronistic jurisprudence" eventually led to crisis in American constitutionalism).

<sup>79</sup> Professor Olken makes this point when he states that "for *Lochner* era judges, the appropriate limits of local economic regulation emanated from longstanding concerns about the vulnerability of individual rights in a democratic republic. . . . [P]assionate commitment to equal operation of the law informed judicial decision making[.]" but Justice Sutherland and others "mistakenly construed industrial conditions of the . . . past." Olken, *supra* note 63, at 88. Edward White follows up on this view of Justice Sutherland as applying a consistent police power jurisprudence and contrasts it with Justice Hughes's opinion in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), where Hughes suggested "that when economic conditions changed, the calculus of police power due process cases could

sought to undermine the commonly asserted skepticism toward a strong judicial role;"<sup>80</sup> they support a more activist liberal jurisprudence.<sup>81</sup> Owen Fiss explains that "one may, with perfect consistency (though not without a touch of bravado), remain attached to *Brown* [*v. Board of Education*] and its robust use of the judicial power to further the ideal of equality, yet be happy that *Lochner* lies dead and buried."<sup>82</sup> Scholarship embedded in modern public choice theory<sup>83</sup> argues that the "class legislation" thesis also serves as a basis for more intrusive judicial review of special interest legislation.<sup>84</sup>

What we have, then, is a fight about legal legitimacy and its supposed consequences for judicial review. The question is whether *Lochner*-era judges were faithful to existing precedent and jurisprudential understandings. Conventional wisdom says that they were not and draws from the events of that era a strong argument for judicial restraint. Revisionists (or at least the more normatively minded of them), having "recovered" the jurisprudential strains of *Lochner*-era judging, suggest convention errs in restraining judges, that so long as judges are faithful to the law, they have fulfilled the requirements of legitimacy and should go about the business of protecting constitutional liberty and limiting class legislation.

## II

### CONVENTION MEETS REVISION: PUBLIC OPINION

All revisionism rests in the belief that *Lochner*-era judges were legally faithful, but many revisionists go further and argue that those

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change as well." White, *supra* note 13, at 122; see also Fiss, *supra* note 6, at 20 (arguing that *Lochner* Court sought to protect constitutional ideal of liberty but Court saw new forms of political and social organization as threat).

<sup>80</sup> Rowe, *supra* note 17, at 224.

<sup>81</sup> E.g., Gillman, *supra* note 5, at 205 ("Conservatives have used the lore of *Lochner* as a weapon in their struggle against the modern Court's use of fundamental rights as a trump on government power. If nothing else I hope this study helps remove that weapon from their hands."); Brown, *supra* note 74, at 90 (urging increased protection for liberties under Fourteenth Amendment and claiming that Court's current approach has added "only one right, abortion" since *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing right to privacy)).

<sup>82</sup> Fiss, *supra* note 6, at 21.

<sup>83</sup> For a general discussion of how interest groups influence the political process, see Daniel A. Farber & Philip P. Frickey, *Law and Public Choice* (1991); see also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *Yale L.J.* 31, 33 (1991).

<sup>84</sup> See Sunstein, *supra* note 64, at 1731 (arguing that "vigorous [judicial] theory must also develop devices . . . to filter out naked preferences"); see also Cass R. Sunstein, *Lochner's Legacy*, 87 *Colum. L. Rev.* 873, 878 (1987) (explaining that statute at issue in *Lochner* "was invalidated as an interest-group deal, reflecting nothing other than political power").

who claim otherwise have misconstrued events for political ends. To hear some revisionists tell it, the conventional story was developed long after *Lochner* by Progressives anxious to undermine a conservative Supreme Court and—ultimately—to legitimate the dramatic shift in constitutional doctrine that occurred following the defeat of the 1937 Court-packing plan. For these revisionists, Holmes's famous dissent in *Lochner* decrying the inappropriate substitution of judicial views for popular will was idiosyncratic for its time but later became the rallying cry of progressively minded legal scholars.<sup>85</sup>

Whether this revisionist claim is correct is critical to the thesis advanced here. If convention later distorted the record for political reasons, then the normative (as opposed to historical) claims of revisionism might hold some weight. If, however, convention's attack on judges as unfaithful actually was leveled at the time, in response to supposedly faithful judicial decisions, then it is worth considering whether the lesson we ought to draw about judicial review should find roots only in legal legitimacy or should look more broadly to social legitimacy, i.e., society's views of the propriety of constitutional decisions.

This Part establishes that commentators at the time criticized the work of Populist-Progressive Era judges precisely in the terms of the conventional story. For nearly a century, the sins of judges during the *Lochner* era were clear, as was the perception of the pervasiveness of judicial misconduct. First, “[t]he received wisdom is that *Lochner* was wrong because it involved ‘judicial activism’: an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.”<sup>86</sup> Second, the tool for judicial usurpation was the (mis)reading into the Constitution of rights not clearly set out there, such as the liberty of contract, the basis of the *Lochner* decision it-

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<sup>85</sup> See *infra* notes 215-19 and accompanying text (discussing revisionist portrayal of Holmes's *Lochner* dissent).

<sup>86</sup> Sunstein, *supra* note 84, at 874. Similarly, Howard Gillman writes:

[C]ritics charge that in expressing the view that the legislation was not substantially related to legitimate concerns about public health and safety, the majority was assailing the doctrine of separation of powers by substituting its conception of good, effective policymaking for that of the legislature, which had determined that maximum hours laws would in fact contribute to the physical well-being of workers.

Gillman, *supra* note 5, at 3; see also Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483, 493 (1997) (referring to *Lochner* as “the case that gave its name not only to an era but subsequently to a term connoting illegitimate judicial activism”).

self.<sup>87</sup> Third, the basis for the misreading was explained as a judicial preference for laissez-faire constitutionalism and a desire to protect monied interests against aggressive legislative use of the police power to correct societal ills.<sup>88</sup> Finally, laissez-faire constitutionalism resulted in an interpretation of the Constitution that was just plain wrong. *Lochner*-era judges, so the conventional story goes, found economic rights in the Constitution that simply are not there, and in doing so inappropriately blocked socially progressive legislation enacted by popular assemblies.

The three sections of this Part correspond to three central revisionist claims. Section A makes clear that, contrary to revisionist claims of doctrinal consistency, critics at the time felt that Populist-Progressive Era courts were applying the doctrine in wildly indeterminate ways. Given the nature of how law works, it may be possible to make arguments that the cases lined up consistently with doctrinal principles, but observers at the time did not see it that way. This should come as no surprise: Legal Realism was born of the perceived indeterminacy of *Lochner*-era decisionmaking.<sup>89</sup> Section B establishes that, despite revisionist claims that *Lochner*-era decisions were not about rights but about the proper scope of the police power, contemporary critics believed judges were finding rights in the Constitution that were not there. This does not mean judges actually were doing so, but it does make clear that observers at the time so perceived judicial decisions. Section C then demonstrates that, despite the revisionists' claim that *Lochner*-era judges did not decide cases on the basis of laissez-faire ideology or class bias, there was a wide perception among the general public of such judicial bias.

### A. *Doctrinal (In)Consistency*

The revisionists have rendered valuable service in recovering elements of Progressive Era jurisprudence. The "free labor" and "class legislation" antecedents of *Lochner*-era cases indeed were lost to

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<sup>87</sup> *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.").

<sup>88</sup> See Gillman, *supra* note 5, at 3 (recognizing that many scholars argue "that in ruling that the statute was defective," Supreme Court read "into the Constitution a prohibition on legislative power that could not be found in the text of the Constitution and was not supported by any previous interpretation of either the words of the text or the intent of the framers"); Sunstein, *supra* note 84, at 877 ("Efforts to redistribute resources and paternalistic measures were both constitutionally out of bounds. They did not fall within the 'police power'; the employer had committed no common law wrong, and regulatory power was largely limited to the redress of harms recognized at common law.").

<sup>89</sup> See *infra* note 126 and accompanying text.

many of us.<sup>90</sup> Knowing of these doctrinal antecedents can only enhance our understanding of the period, and of constitutional law more generally.

It is important to understand, however, that—unlike us—critics of the Progressive Era judges were fully aware of these jurisprudential antecedents. Criticism occurred with full knowledge of, and despite familiarity with, the ideas revisionists have “uncovered.” Contemporary critics of the courts conceded the importance of vested rights under the Constitution and the importance of judicial review in protecting those rights.<sup>91</sup> There were debates about how intrusive judicial review should be, but its exercise was relatively uncontested. Similarly, many contemporary commentators, including those critical of *Lochner*, were willing to concede that turn-of-the-century doctrine in fact prohibited class or special legislation.<sup>92</sup>

The problem for revisionism is that even though contemporary commentators understood the doctrinal roots of decisions, they nonetheless perceived vast and incomprehensible indeterminacy in the doctrine, thereby undermining a central revisionist claim.<sup>93</sup> Revisionists

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<sup>90</sup> To provide but one example, the “special legislation” idea actually survives in state constitutional law, although it finds no place in the more familiar federal constitutional canon. Several state constitutions still contain a “special legislation” prohibition. See, e.g., Colo. Const. art. V, § 25 (“Special legislation prohibited.”); Tenn. Const. art. XI, § 8 (“General laws only to be passed.”); Wash. Const. art. III, § 28 (“Special Legislation: The Legislature is prohibited from enacting any private or special laws in the following cases . . .”).

<sup>91</sup> See, e.g., Ernst Freund, *Constitutional Limitations and Labor Legislation*, 4 Ill. L. Rev. 609, 620-21 (1910) [hereinafter Freund, *Constitutional Limitations*] (arguing that judicial protection of rights may require questioning of legislative judgments); Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 Green Bag 411, 414 (1905) [hereinafter Freund, *Limitation of Hours*] (recognizing that Fourteenth Amendment protects “vested rights of property”); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495, 495-96 (1908) (claiming that liberty to contract finds no protection under Fourteenth Amendment, but acknowledging that “liberty” to make contracts” has become part of that liberty through “successful assertion”).

<sup>92</sup> There was some discussion of the conflation of the otherwise separate “class” prohibitions in equal protection and due process cases. On the “conflation” of due process and equal protection limitations on class legislation into a “single doctrine forbidding legislation designed to advance the interests of a certain class, rather than the public as a whole,” see Saunders, *supra* note 64, at 263, which notes that “doctrines overlapped a good deal in application”; see also William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 182 (1988), in which the author discusses the way in which interpretation of the Fourteenth Amendment as a guarantee of equal rights and as a protection of fundamental rights were conflated by the Supreme Court into a “single doctrine prohibiting unequal and unreasonable regulations.” For an example of a *Lochner*-era commentator struggling to keep the two concepts straight, see Andrew Alexander Bruce, *The Illinois Ten-Hour Labor Law for Women*, 8 Mich. L. Rev. 1, 6-9 (1909), which notes the contradictory applications of due process of law and equal protection of the law.

<sup>93</sup> Just as indeterminacy is present in law, so too is it present in history. Some revisionists tell a story that not only captures the judiciary’s struggle, but also seeks to tie the

argue that certain distinctions, like the anticlass principle, actually were and could be deciding the cases.<sup>94</sup> As Howard Gillman tells us, “the *Lochner* era [decisions] represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law.”<sup>95</sup> But *Lochner*-era critics did not deny the role of courts in protecting liberty, or the anticlass legislation principle for that matter. Rather, as this Section makes clear, the critics saw the principles applied in extremely arbitrary ways.

At the very outset of the Populist-Progressive Era, some observers already voiced skepticism about the determinacy of constitutional decisionmaking.<sup>96</sup> James Bradley Thayer, the patron saint of judicial restraint, preached before the turn of the century and criticized the “pedantic and academic treatment of the texts of the constitution and the laws” that resulted from treating interpretation as though it “is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict.”<sup>97</sup> In this same time frame, an author in *The American Law Review* explained, “[i]t is, no doubt, convenient for the practical lawyer to accept the fiction that the judge does not make law[,]” though “the critical student of political science repudiates it.”<sup>98</sup> The increasing use of due process principles to strike state legislation and the contrary decisions of different courts—“[t]he

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themes of the Progressive Era judges to constitutional themes going all the way back to the beginning of the Republic. See Gillman, *supra* note 5, at 4-11 (discussing revisionist theories and suggesting that *Lochner* era’s jurisprudence had doctrinal roots that dated to framing of Constitution). Gillman’s story has some resonance, although it is equally possible to tell the story as one of novel beginnings in law following Reconstruction. See, e.g., Corwin, *supra* note 32 (describing beginnings of Court’s Progressive Era jurisprudence).

<sup>94</sup> See Fiss, *supra* note 6, at 19 (“[F]or the most part the work of the Fuller Court had a coherence and an inner logic.”).

<sup>95</sup> Gillman, *supra* note 5, at 10. Similarly, James W. Ely Jr. and Bernard H. Siegan both trace the originalist and historical background of the *Lochner*-era principles. James W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 103 (1992) (noting that *Lochner* symbolized Court’s “commitment to property rights”); Siegan, *supra* note 20, at 23 (noting that *Lochner* “has as solid a constitutional basis as numerous contemporary decisions that have elicited . . . lavish praise”).

<sup>96</sup> See, e.g., Gillman, *supra* note 5, at 46 (arguing that doctrinal categories had content, but conceding “it is understandable how people might conclude that the key words in the formulation [of police power jurisprudence]—‘reasonable’ and ‘legitimate’—essentially allowed judges to decide cases any way they wanted”).

<sup>97</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, Speech Before the Congress on Jurisprudence and Law Reform (Aug. 9, 1893), in 7 *Harv. L. Rev.* 129, 138 (1893).

<sup>98</sup> Boyd Winchester, *The Judiciary—Its Growing Power and Influence*, 32 *Am. L. Rev.* 801, 806 (1898) (claiming that judicial interpretation particularly was attacked “in the presence of the undoubted formulation by the [C]ourt of principles never before enunciated, and which in many cases conflict hopelessly with the fundamental principles of the past”).



courts do not agree with each other; they do not agree with themselves"<sup>99</sup>—led to doubts about the inevitability of the judicial process. As early as 1885, William Meigs came to the conclusion that a judge's decision in a case "depends as a matter of fact upon his pre-conceived views of the political history and tendency of his country; and these, again, have been enormously influenced by what may be his theory and belief as to the best and most advisable form of government."<sup>100</sup> In 1890, Eaton Drone commented that "[t]ime has shown that the operation of the amendment is capable of restriction to a very narrow sphere, or extension to a scope well-nigh illimitable. The Supreme Court has headed toward each extreme."<sup>101</sup>

By the close of the era this early drumbeat of skepticism had grown to a staccato theme,<sup>102</sup> undermining public faith that judicial decisions represented the neutral application of "law," as opposed to

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<sup>99</sup> T. W. Brown, *Due Process of Law*, 32 Am. L. Rev. 14, 20 (1898) (critiquing judicial invalidation of popularly enacted legislation). Brown questioned the use of generic terms like "general rules of jurisprudence," "the fundamental principles of liberty and justice," and "the principles of the common law" to justify judicial decisions. *Id.*

<sup>100</sup> William M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 Am. L. Rev. 175, 191 (1885).

<sup>101</sup> Eaton S. Drone, *The Power of the Supreme Court*, 8 Forum 653, 663 (1890) (discussing Supreme Court's "varying interpretation of the Fourteenth Amendment").

<sup>102</sup> Many people insisted that judges were pawing off their own views, inevitably conservative ones, as the meaning of the Constitution. See, e.g., Frank J. Goodnow, *Social Reform and the Constitution* 247 (1911) ("What the courts actually do in cases in which they declare a law of this sort unconstitutional, is to substitute their ideas of wisdom for those of the legislature, although they continually say that this is not the case."); Gilbert E. Roe, *Our Judicial Oligarchy* 56 (1912) (recognizing that it is accepted policy "that the courts do invalidate statutes merely because they disapprove the policy embodied in such statutes"); L.B. Boudin, *Government By Judiciary*, 26 Pol. Sci. Q. 238, 267 (1911) ("Each case is supposed to stand 'on its own merits,' which, . . . simply means that each law is declared 'constitutional' or 'unconstitutional' according to the opinion the judges entertain as to its wisdom."); W.F. Dodd, *The Growth of Judicial Power*, 24 Pol. Sci. Q. 193, 195 (1909) (

The courts seem now to have reached the point of treating as unconstitutional practically all legislation which they deem unwise. . . . [B]road guaranties of the federal and state constitutions have been so extended by judicial interpretation as to give the courts in practically every case the final determination as to whether or not laws shall be enforced . . . .);

Hand, *supra* note 91, at 501 ("A vote of the court necessarily depends not upon any fixed rules of law, but upon the individual opinions upon political or economic questions of the persons who compose it . . . ."); Judges as Statesmen, 36 *New Republic* 62, 63 (1923) (asserting that Supreme Court "will have earned its own downfall by attempting to read the personal and professional sympathies and antipathies of its members into the law of the land"); Theodore Roosevelt, *Nationalism and the Judiciary*, 97 *Outlook* 532, 534 (1911) ("But in the concrete there has often been much ingenious twisting of the Constitution, doubtless entirely unconscious, in order to justify judges to their own conscience in deciding against a given law.").

judicial political beliefs.<sup>103</sup> There was no need for a constitutional law expert to point this out: Newspapers and periodicals were quick to identify conflicting cases, ridiculing the indeterminacy.<sup>104</sup>

Indeed, the justices themselves candidly admitted the doctrine's lack of clarity. In *Lochner*, Justice Peckham referred to "[t]hose powers, [which] broadly stated, and *without, at present, any attempt at a more specific limitation*, relate to the safety, health, morals and general welfare of the public."<sup>105</sup> His inability to provide a better definition was singled out for criticism in periodical accounts of the case.<sup>106</sup> Even at the end of the era the problem persisted. In *Tyson & Brother v. Banton*,<sup>107</sup> as Robert Post explains, Justice Sutherland "conceded at the outset that the distinction between private property and property 'affected with a public interest' was 'at best an indefinite standard, and attempts to define it have resulted, generally, in producing little more than paraphrases, which themselves require elucidation.'"<sup>108</sup>

Many scholars similarly found fault with perceived judicial arbitrariness. Roscoe Pound condemned the "narrow view of what constitutes special or class legislation that greatly limits effective law-making."<sup>109</sup> Judge Bruce criticized the "logic of these decisions [which] practically is that all legislation except that which is 'omnibus'

<sup>103</sup> Incidentally, accusations of indeterminacy and judges imposing their own particular views were not confined to the critics on the left. After *Lochner*, *The Nation* found itself wondering how the decision could have been as close as five-to-four: "[H]ow is the attitude of the individual judges to be explained?" A Check to Union Tyranny, 80 *Nation* 346, 347 (1905). *The Nation* concluded that one of the dissenters, Justice White, was a Democrat who doubtless "was perhaps influenced by the States Rights contention" and the "rest of the dissenting justices were doubtless swayed by their general inclination towards paternalism." *Id.*

<sup>104</sup> See, e.g., *The Child-Labor Law Squashed*, *Literary Digest*, May 27, 1922, at 11, 11 ("If the Supreme Court decision is sound, then the decision of the same court sustaining the tax of 10 per cent. on State bank notes was unsound. Then the decisions upholding the Federal taxes on oleomargarine and on matches made from poisonous ingredients were wrong."); Thomas Reed Powell, *The Child-Labor Decision*, 106 *Nation* 730, 730-31 (1918) (commenting on striking down of child labor law as outside Congress's commerce powers).

<sup>105</sup> *Lochner v. New York*, 198 U.S. 45, 53 (1905) (emphasis added).

<sup>106</sup> *The Ten-Hour Labor Decision*, 79 *Outlook* 1017, 1017 (1905) (describing case as involving "a somewhat arbitrary ruling as to the limits of the police powers of the State"); *An Unconstitutional Ten-Hour Law*, 58 *Independent* 917, 917 (1905) ("The police powers of a State had not been exactly described or limited by the courts."); see also George W. Alger, *The Courts and Legislative Freedom*, 111 *Atlantic Monthly* 345, 347 (1913) (describing dilemma of legislator who, "searching among court decisions for a definition of this police power, so-called, . . . finds there is no concrete definition of it" as it "is incapable of definition").

<sup>107</sup> 273 U.S. 418 (1927) (invalidating, on Fourteenth Amendment grounds, New York law regulating resale price of theater tickets).

<sup>108</sup> Post, *supra* note 44, at 1523 (quoting *Tyson & Brother*, 273 U.S. at 430).

<sup>109</sup> Roscoe Pound, *Liberty of Contract*, 18 *Yale L.J.* 454, 462 (1909) (recounting historical development of idea of liberty of contract).

in its character is unconstitutional,” insisting that “in arriving at them the courts seem to have been guilty of a lack of discrimination which is somewhat remarkable.”<sup>110</sup> Justice Walter Clark of the North Carolina Supreme Court explained that:

A power without limit, except in the shifting views of the court, lies in the construction placed upon the Fourteenth Amendment, which was passed solely to prevent discrimination against the colored race, but *has been construed by the court to confer upon it jurisdiction to hold any provision of any statute whatever “not due process of law.”*<sup>111</sup>

George Alger mocked the Court for using due process to strike laws without giving the phrase any definition.<sup>112</sup>

The *bête noire* of the time was the “reasonableness” test at the heart of many *Lochner*-era decisions.<sup>113</sup> Howard Gillman explains that “*reasonableness* was the concept that embodied the system’s tolerance of class-neutral policies that advanced a public purpose.”<sup>114</sup> Yet critics had a field day with the idea of reasonableness, especially in light of the large number of closely split decisions.<sup>115</sup> That is, how

<sup>110</sup> Bruce, *supra* note 92, at 8.

<sup>111</sup> Walter Clark, *Is the Supreme Court Constitutional?*, 63 *Independent* 723, 724 (1907) (emphasis added); accord Jesse F. Orton, *An Amendment by the Supreme Court*, 73 *Independent* 1284, 1284-86 (1912).

<sup>112</sup> Alger, *supra* note 106, at 347 (“The courts say, in substance, to the law-maker, ‘We can give you no rule or definition for this things which shall enable you to know what due process of law is before you legislate . . . .’”); see also Albert M. Kales, “Due Process,” *The Inarticulate Major Premise and the Adamson Act*, 26 *Yale L.J.* 519, 538 (1917) (“[I]n the definition of what is ‘due process’ the court leaves the major premise always inarticulate. . . . To leave the major premise inarticulate and to reach results on ‘judgment’ or ‘intuition’ is just a scheme for not having any rule of law or legal generalization which is susceptible of application.”).

<sup>113</sup> See Corwin, *supra* note 32, at 667-68 (condemning reasonableness test in application because law’s reasonableness is not absolute); Freund, *Constitutional Limitations*, *supra* note 91, at 622 (explaining need for “some intelligible and uniform principle”).

<sup>114</sup> Gillman, *supra* note 5, at 73.

<sup>115</sup> See, e.g., 64 *Cong. Rec.* 3959 (1923) (statement of Sen. Owen) (introducing into Congressional Record letter authored by Senator William E. Borah stating that “the will of the people should [not] be thwarted upon a decision rendered by a bare majority of the court”); Drone, *supra* note 101, at 663 (commenting on “extraordinary instance of the power of five men to sacrifice or save one of the chief results gained by the greatest war known to history”); Editorial Notes, 15 *New Republic* 157, 159 (1918) (commenting on Child Labor Decision that “[i]n the long run American opinion will not consent to have social legislation invalidated and its social progress retarded by the necessarily accidental and arbitrary preferences of one judge in a court of nine”); The Minimum Wage Law Unconstitutional, 133 *Outlook* 694, 694 (1923) (commenting on *Adkins v. Children’s Hospital*, 261 U.S. 525 (1922), that “aware of the protests that have been made against the power of the Supreme Court by a majority of one to nullify the will of Congress, the Court makes a very clear and conclusive statement as to the right of the Court to declare laws unconstitutional”); Powell, *supra* note 104, at 730 (noting that “[b]y the most tenuous margin possible, the statute of Congress is destroyed” by Child Labor Decision); Henry R. Seager,

could one say something was “unreasonable” when not only the legislative majority, but a close number of votes on the same court, felt quite the contrary.<sup>116</sup> Were all those other voices unreasonable? Beulah Ratliff, writing in *The Nation*, put the point sharply:

The rule that the Supreme Court has always professed to follow in passing upon the constitutionality of laws is that where reasonable doubt exists the statute shall stand. The five-to-four decision is, on its face, an infringement of this rule, for, where four of the learned judges disagree with the other five, everybody except possibly lawyers and judges can see only ground for scoffing at the conflict between the court’s profession and practice.<sup>117</sup>

Critics of the judiciary identified the problem as doctrinal malleability and claimed the doctrine was so indeterminate as to permit judges to reach virtually any result they wished. As Learned Hand observed: “[T]he necessary result has been great divergence of constitutional decision[s] and an apparent absence of actual principle upon

Foreword to *The Minimum Wage—What Next?*, 50 *Survey* 215, 215 (1923) (commenting on “enormous power and influence which our system vests in one or two Justices of the Supreme Court” to overrule three of their colleagues, “the conviction registered by both houses of Congress when they enacted the statute and by the President when he approved it”). Even proponents of the Court’s decisions were unhappy with the close decisions. See *Fussy Legislation*, *N.Y. Times*, Apr. 19, 1905, at 10 (“It is true that it would be more useful if it were more apt to be unanimous.”).

Thomas Reed Powell was fairly apoplectic on the subject:

Suffice it to say that minimum-wage legislation is now unconstitutional, not because the Constitution makes it so, not because its economic results or its economic propensities would move a majority of judges to think it so, but because it chanced not to come before a particular Supreme Court bench which could not muster a majority against it and chanced to be presented at the succeeding term when the requisite, but no more than requisite, majority was sitting. In the words of the poet, it was not the Constitution, but “a measureless malfeasance which obscurely willed it thus”—thus the malfeasance of chance and of the calendar.

Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 *Harv. L. Rev.* 545, 552 (1924). Or, as Corwin said, “why was the statute in this particular litigation overturned by the Supreme Court of the United States by a vote of five to four after having been sustained by the New York Court of Appeals by a vote of four to three?” Corwin, *supra* note 32, at 668.

<sup>116</sup> See *The Minimum Wage Decision*, *Survey*, May 1, 1923, at 150, 150 (asking in light of split decision in *Adkins*, “how can it be said in honest fact that there can be no rational doubt of its unconstitutionality”). Concerns about reasonableness also applied to the rule of reason employed in the Court’s antitrust decisions. As *The Nation* explained, defending the Court, “‘Determining in the light of reason’ and ‘resort to reason’ have been widely described as an innovation in Supreme Court procedure, or as ‘writing something into the law.’” *The Tobacco Decision*, 92 *Nation* 570, 570 (1911) (discussing Court’s decision in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911)). *The Nation* went on to explain that “the so-called ‘rule of reason’ . . . is merely the application of the rule of common sense.” *Id.*

<sup>117</sup> Beulah Amidon Ratliff, *May Congress Limit the Supreme Court?*, 118 *Nation* 579, 580 (1924).

which such cases can be determined.”<sup>118</sup> One example was judicial approval of laws that banned the sale of oleomargarine.<sup>119</sup> Although legislatures justified the prohibition on oleomargarine as a “health” measure, Geoffrey Miller’s study of the oleomargarine laws makes clear that there was not the faintest doubt in anyone’s mind—including the judges and the legislators’ themselves—that such prohibitions were “class legislation” designed to protect the dairy industry.<sup>120</sup> Courts upheld the prohibition nonetheless, on the grounds that it was a “good-faith effort ‘to protect the public health and to prevent the adulteration of dairy products.’”<sup>121</sup> Yet, critics wondered, if deference to the legislature’s good faith was warranted with regard to oleomargarine, why not when the legislatures passed labor laws?<sup>122</sup>

The apparent indeterminacy of the doctrine was the precise problem commentators had with *Lochner* itself. After all, “[o]f the twenty-two judges who participated in the four [*Lochner*] decisions, twelve thought it constitutional, but because five of the ten who disagreed sat on the United States Supreme Court, the law went down.”<sup>123</sup> It was this very arbitrariness that led authors such as Learned Hand to insist that judges were doing nothing other than imposing their own views.<sup>124</sup> *The Outlook* clearly explained that the

<sup>118</sup> Hand, *supra* note 91, at 499.

<sup>119</sup> *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (recognizing Pennsylvania law banning sale of oleomargarine as legitimate exercise of police power).

<sup>120</sup> On the fight over oleomargarine, see Geoffrey P. Miller’s excellent article, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 Cal. L. Rev. 83, 125-26 (1989), in which the author explains that the passage of a bill to tax and regulate the margarine industry in fact benefited farming interests at the expense of oleomargarine producers.

<sup>121</sup> Gillman, *supra* note 5, at 74 (quoting *Powell*, 127 U.S. at 684). Gillman also examines Justice Field’s lone dissent in *Powell* where “Field argued that courts needed to exercise greater care to ensure that acts ostensibly related to the health, safety, or morality of the community in fact advanced these goals.” *Id.* at 75. On this point Field’s concern was shared by *The Albany Law Journal*, which called the legislation an “emolument of a class of producers.” *Current Topics*, 37 Alb. L.J. 325, 325 (1888). In *Powell*, the Court stated that the constitutionality of the statute could not be challenged unless the Court was willing to hold that while the statute was “enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects.” *Powell*, 127 U.S. at 684. The Court assumed that the legislature acted “upon the fullest investigation” and “upon reasonable grounds.” *Id.* at 686.

<sup>122</sup> See Corwin, *supra* note 32, at 666 (suggesting that based on standard set in *Powell*, questions about actual motives behind legislation are irrelevant).

<sup>123</sup> Urofsky, *supra* note 30, at 79.

<sup>124</sup> Hand, *supra* note 91, at 501 (“A vote of the court necessarily depends not upon any fixed rules of law, but upon the individual opinions upon political or economic questions of the persons who compose it . . . .”); see also George Gorham Groat, *The Eight Hour and Prevailing Rate Movement in New York State*, 21 Pol. Sci. Q. 415, 426-27 (1906) (pointing out that no baker had challenged law as interfering with liberty). Professor Greeley point-

“nature of the case, . . . which involves a somewhat arbitrary ruling as to the limits of the police powers of the State, brings into greater prominence than usual the individual inclinations of the judges.”<sup>125</sup>

The revisionist case for doctrinal consistency seems all the more remarkable given that Legal Realism was born during this period out of deep skepticism that doctrine being relied upon by courts actually was deciding cases. As Morton Horwitz has suggested, and as this account makes clear, Realist roots appear as early as the turn of the century, and the impetus for Realist skepticism is found in the constitutional and public law decisions of the court.<sup>126</sup> By the 1890s, a deep suspicion grew among academics and the broader public that judges’ political views often were the determining factor in constitutional litigation and that their isolation from the messy facts of the real world often led them to invalidate legislation.<sup>127</sup>

Contrary to revisionist claims, *Lochner*-era decisions simply defy attempts to divide the cases into doctrinal categories. As Charles McCurdy acknowledges, “no amount of thoughtful revisionism can erase the fact that the ‘principle of neutrality’ did not have a uniform operation.”<sup>128</sup> Or, as Lawrence Friedman has said, “[t]he worst thing about this power was that it was randomly and irresponsibly exercised. It could be neither predicted nor controlled.”<sup>129</sup>

Thus, in a sense it matters not that one can argue that *Lochner*-era decisions were founded on established jurisprudence. Observers simply did not see it that way. Indeed, the more substantial the revisionist claim, the more important the conventional story. That is, if

edly applied this theory by noting that in 1910 the three Justices who concurred in *Lochner* had retired and the four dissenting Justices remained, so “it is not at all improbable that [the Court] might, if the case came before it, overrule the *Lochner* case and sustain a ten-hour law.” Louis M. Greeley, *The Changing Attitude of the Courts Toward Social Legislation*, 5 Ill. L. Rev. 222, 227 (1911).

<sup>125</sup> The Ten-Hour Labor Decision, *supra* note 106.

<sup>126</sup> Horwitz, *supra* note 31, at 169-92 (providing detailed account of Realism’s emergence in legal academy).

<sup>127</sup> See, e.g., *infra* notes 131, 134, 136, 177 and accompanying text.

<sup>128</sup> Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law*, in *The State and Freedom of Contract* 161, 165 (Harry N. Scheiber ed., 1998). Melvin Urofsky set out to demonstrate that state courts were not as reactionary as believed. What he succeeded in accomplishing was proving that the varying decisions rendered highly arbitrary results in similar cases. Urofsky, *supra* note 30, at 88. “[N]early identical laws dealing with hours, wage regulation, employer liability, and workmen’s compensation met with completely different judicial responses even in neighboring states. . . .” *Id.* Similarly, Guyora Binder and Robert Weisberg explain one such attempt: “The priority of public over private explains any decision against regulation but cannot distinguish *Lochner* from such decisions favoring regulation as *Munn v. Illinois*, *Holden v. Hardy*, and *Muller v. Oregon*.” Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* 439 (2000).

<sup>129</sup> Lawrence M. Friedman, *A History of American Law* 317 (1973) (noting small number of overrulings).

one supposes that *Lochner*-era decisions were fully precedented, it is then all the more remarkable that Legal Realism finds its roots here, demonstrating that disagreement on the merits inevitably places enormous pressure on perceptions of doctrinal determinacy.

### B. Creation of "New" Rights

According to many revisionists, *Lochner*-era decisions were not about rights; they were about distinguishing what properly was within the police power from what was not. As Owen Fiss argues, in *Lochner* Justice Peckham did not "'find' liberty of contract in the interstices of the Fourteenth Amendment. He instead was trying to preserve the then fairly well recognized limits on the police power as a form of constitutive authority."<sup>130</sup> But both before and after *Lochner*, contemporary critics did not see it that way.

In an important article in the *Harvard Law Review* published in 1891, Charles Shattuck criticized the Supreme Court's stretching of the right to "liberty" in the Fourteenth Amendment to reach economic rights in ways without historical precedent.<sup>131</sup> Shattuck specifically criticized the dissenters in the *Slaughterhouse Cases*<sup>132</sup> for treating the case as though it were about the police power rather than the absence of any "right" in the Fourteenth Amendment. He explained:

[T]he decision does not rest, so far as this clause is concerned, upon the ground that the act was a fair exercise of the police power, and so was due process of law. It proceeds on the ground that the fourteenth amendment has no application whatever to such a right as that contended for, namely, the right of every man to pursue a lawful occupation. So that the actual decision in the case is against, rather than in favor of, the broad construction of the term "liberty."<sup>133</sup>

Similarly, in the 1890s, Seymour Thompson criticized courts for talking about the liberty of contract.<sup>134</sup> According to Thompson, "[i]t is not even truthful or sincere. No such freedom of contract exists.

<sup>130</sup> Fiss, *supra* note 6, at 163.

<sup>131</sup> Charles E. Shattuck, Essay, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 *Harv. L. Rev.* 365, 391-92 (1891) ("As regards the tendency to give the clause a broad interpretation, and at least to include within the term 'liberty' the right to follow any lawful calling . . . it seems, upon examination, to have little real foundation either in history or principle.").

<sup>132</sup> 83 U.S. (16 Wall.) 36 (1873) (upholding against constitutional challenges Louisiana statute granting single business exclusive right to operate slaughterhouse business in New Orleans).

<sup>133</sup> Shattuck, *supra* note 131, at 386.

<sup>134</sup> McCurdy, *supra* note 69, at 32 (quoting Seymour Thompson)

Every judge knows it; every other man knows it; and it is the duty of judges in framing their decisions to take judicial notice of what everybody knows."<sup>135</sup> And, in 1893, Richard McMurtrie exclaimed that "[t]he spectacle of a government that cannot prohibit a contract merely because two grown persons desire to make it, is so utterly absurd as to be quite beyond the region of discussion if government of any kind is to continue."<sup>136</sup>

Commentators regularly referred to the supposed liberty of contract as "new" or "novel."<sup>137</sup> As Learned Hand said, "[t]here can be little doubt that so to construe the term 'liberty' is entirely to disregard the whole juristic history of the word."<sup>138</sup> Pound insisted it had impermissible origins in natural law.<sup>139</sup> The right was not to be found in "the standard treatises on constitutional law."<sup>140</sup> Rather, the right used to strike down wage and hour laws was "supposed"<sup>141</sup> or "theoretic . . . [with] no existence in fact."<sup>142</sup> Corwin said that "the truth of the matter is that the modern concept of due process of law is not a legal concept at all" and complained that it gave judges a "roving commission" to "sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency."<sup>143</sup> Francis Bowes Sayre, writing about the *Adkins* decision, complained of "a theoretical freedom of contract which [Justice Sutherland] con-

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<sup>135</sup> *Id.* (quoting Seymour Thompson).

<sup>136</sup> Richard C. McMurtrie, *A New Canon of Constitutional Interpretation*, 32 *Am. L. Reg. & Rev.* 1, 4 (1893) (asserting that it is "ridiculous" to claim that State has no right to interfere with individual's right to contract).

<sup>137</sup> See Freund, *Constitutional Limitations*, *supra* note 91, at 615 (no such "new limitations permitted"); Freund, *Limitation of Hours*, *supra* note 91, at 414 ("novel"); Pound, *supra* note 109, at 455 ("new"); see also Corwin, *supra* note 32, at 657 (explaining that series of opinions has enabled "the terms 'liberty' and 'property' [in the Fourteenth Amendment to] take on the meaning of liberty of pursuit and freedom of contract").

<sup>138</sup> Hand, *supra* note 91, at 495. Hand agreed nonetheless that the construction of liberty to include "such contracts as one wishes has become too well settled to admit of question." *Id.* at 496.

<sup>139</sup> Pound, *supra* note 109, at 464-68. Pound argued that many lawyers were trained in natural law tradition and accustomed to applying natural law principles, which were the theory of the Bill of Rights. "But the fact that the framers held that theory by no means demonstrates that they intended to impose the theory upon us for all time." *Id.* at 467. He complained of the use of natural law such that "new incapacities of fact, arising out of present industrial situations, may not be recognized by legislation. This is, in truth, but another illustration of the purely personal character of all natural law theories." *Id.* at 468 (footnotes omitted).

<sup>140</sup> Freund, *Constitutional Limitations*, *supra* note 91, at 615; see also Pound, *supra* note 109, at 455 (reviewing leading treatises, none of which, incidentally, is Cooley).

<sup>141</sup> Bruce, *supra* note 92, at 24.

<sup>142</sup> Greeley, *supra* note 124, at 223.

<sup>143</sup> Edward S. Corwin, *Book Review*, 26 *Am. Pol. Sci. Rev.* 270, 271 (1912).



ceives to be included under the Fifth Amendment's guarantee of 'life, liberty and property.'"<sup>144</sup>

Revisionist denial of the substantive due process basis for *Lochner*-era judicial decisions puts too much stock in the precise label for what judges were doing. Revisionist scholars, such as G. Edward White and James Ely, insist that substantive due process could not have been the concern because no one even used the phrase during this period.<sup>145</sup> Accurately reporting the revisionist line, Gary Rowe explains that "it turns out that there was no such doctrine as substantive due process in the nineteenth and first third of the twentieth century. The phrase is an anachronism, of which no judge of the period would have been able to make any sense."<sup>146</sup>

Revisionists fail to recognize, however, that even if *Lochner*-era judges often framed their discussion in terms of whether the police power permitted certain regulation, such language is not inconsistent with the conventional substantive due process story. As a practical matter, the question of whether there is a "liberty of contract" is but the flip side of the question whether government has the power to regulate a given contract. As Richard Fallon has recognized elsewhere, the point is almost "banal."<sup>147</sup>

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<sup>144</sup> Francis Bowes Sayre, *The Minimum Wage Decision: How the Supreme Court Becomes Virtually a House of Lords*, 50 *Survey* 150, 151 (1923).

<sup>145</sup> Ely, *supra* note 59, at 967 ("It bears emphasis that the very phrase 'substantive due process' is anachronistic when used to describe decisions rendered during the supposed heyday of the doctrine."); White, *supra* note 13, at 88 ("[P]rior to 1940s, substantive due process cases were not designated by that term at all."). Morton Horwitz also argues that criticisms of the substantive aspect of due process were "largely produced by later critical Progressive historians intent on delegitimizing the *Lochner* court." Horwitz, *supra* note 31, at 158.

<sup>146</sup> Rowe, *supra* note 17, at 244; accord *id.* at 239-40 ("Not so, say revisionists: there was no switch in time; rights had nothing to do with the matter. The only thing at issue was whether an act was within the national or state government's limited commerce or police power.").

<sup>147</sup> Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 *Ga. L. Rev.* 343, 361 (1993) (noting that "right and . . . power" are not conceptually independent); see also Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 *J. Legal Stud.* 725, 731 (1998) ("Thus, a 'compelling state interest' test requires courts to determine the scope of rights with reference to the justifications government offers for limiting them. That is because rights are better understood as means of realizing certain collective interests; their content is necessarily defined with reference to those interests."); Introduction to *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal 3* (Ellen Frankel Paul & Howard Dickman eds., 1989) (comparing *Lochner* to typical strict scrutiny due process test).

Rebecca Brown explains this point clearly:

The Court's consistent and serious discussion of reasons in this entire line of liberty cases under the Fourteenth Amendment, however, has a more significant purpose than merely to show that the laws at issue are or are not within the regulatory power of the state. Rather, the nature of the State's response is

Thus, the substantive due process test simply asks the police powers question: whether the legislative “end” is legitimate, and whether the means achieve the end. Or, as the *Lochner* Court itself said, in the familiar language of substantive due process:

It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree to the public health, does not necessarily render the enactment valid.<sup>148</sup>

For the most part, *Lochner* reads much like a modern-day substantive due process case. Although obviously the two-tiered form of analysis had not yet worked its way explicitly into the doctrine, *Lochner* addresses the very question at the heart of modern substantive due process cases: whether the state has sufficient reason to enact a statute that curtails constitutional liberty and whether the statute achieves that end:

The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.<sup>149</sup>

Indeed, nowhere is the discrepancy between revisionist interpretation and contemporary criticism more sharp than with regard to *Lochner* itself. Revisionists would understand *Lochner* as a case in which the Court invalidated the law because it represented impermissible class legislation.<sup>150</sup> Consistent with the revisionist class legislation theme, it has become fashionable to argue that the law at issue in *Lochner* was enacted to aid commercial bakeries operating as union shops in competition with nonunion family-owned and smaller bakeries.<sup>151</sup> Thus, the “class” benefited by the law actually was one set of business interests.

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a part of the analysis of the liberty claim itself [ ]. . . [L]iberty is a relational concept reflecting the individual’s relationship to the community, for whose benefit alone liberty may be restricted.

Brown, *supra* note 74, at 74.

<sup>148</sup> *Lochner v. New York*, 198 U.S. 45, 57 (1905); see also *id.* at 56 (“[T]he question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty . . . ?”). The *Lochner* Court does not consider whether contract is a fundamental right, or whether it deserves a higher level of scrutiny. Those formulations developed as an answer to the conventional story.

<sup>149</sup> *Id.* at 57.

<sup>150</sup> See *infra* Part II.C (discussing class legislation thesis).

<sup>151</sup> See Siegan, *supra* note 20, at 117 (“Working hours were much longer in the small bakeries than in the large ones, and the maximum hours provision hit employers and em-

This revisionist story about *Lochner* simply does not hold up. Perhaps it is not surprising that the academic pieces most commonly understood to advance this claim offer no primary authority for its particulars.<sup>152</sup> The law at issue was enacted to help journeymen bakers (not commercial baking companies) as part of a political campaign waged by those workers and their unions. The most careful histories of the case show that representatives of the bakers themselves suggested the law.<sup>153</sup> The journeymen bakers saw it this way: after the decision was handed down baking unions threatened to take out as many as 85,000 bakers on strike if their demand for a ten-hour day was not met.<sup>154</sup> The *New York Times* saw it this way, too: In an edito-

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ployees of the former much more.”); see also Rebecca L. Brown, *Constitutional Tragedies: The Dark Side of Judgment*, in *Constitutional Stupidities, Constitutional Tragedies* 139, 142 (William N. Eskridge Jr. & Sanford Levinson eds., 1998) (“[S]ubsequent analysts . . . have demonstrated that the law at issue in *Lochner*, despite its guise as a health regulation, was probably a rent-seeking, competition-reducing measure supported by labor unions and large bakeries for the purpose of driving small bakeries and their large immigrant workforce out of business.”); Richard A. Epstein, *Pennsylvania Coal v. Mahon: The Erratic Takings Jurisprudence of Justice Holmes*, 86 *Geo. L.J.* 875, 884 (1998) (“Its basic purpose was not to protect these workers, but rather to insulate the unionized bakeries that employed workers in two ten-hour shifts against competition from nonunion firms that deployed their workers in single twenty-hour shifts, and thus were caught by the statute.”).

<sup>152</sup> Matthew S. Bewig captures the situation well: “Epstein cites no primary source authority to support these contentions” that the statute at issue in *Lochner* “was championed by rival unions and their employers who . . . were not touched by a ten hour statute.” Matthew S. Bewig, *Lochner v. The Journeymen Bakers of New York: The Journeymen Bakers, Their Hours of Labor, and The Constitution*, 38 *Am. J. Legal Hist.* 413, 427 (1994) (quoting Epstein, *supra* note 78, at 17). “Bernard Siegan, on the other hand, does cite to primary sources indicating that working conditions were far worse at smaller bakeries, and admits that he cannot find evidence of the position taken by the large bakeries on the statute.” *Id.*

<sup>153</sup> See Kens, *Judicial Power*, *supra* note 9, at 50-54 (detailing important role played by union leader Henry Weismann and muckraking journalist Edward Marshall in passage of New York Bakeshop Act); Bewig, *supra* note 152, at 417 (recognizing “the crucial role played by the [journeymen] bakers of New York in agitating for passage of bakeshop reform”); Sidney G. Tarrow, *Lochner Versus New York: A Political Analysis*, 5 *Lab. Hist.* 277, 283-90 (1964) (tracing efforts of union leaders in mobilizing support for, and passing, bakeshop legislation).

<sup>154</sup> See *New York 10-Hour Law Is Unconstitutional*, *N.Y. Times*, Apr. 18, 1905, at 1 (carrying subtitle, “Big Strike Is Threatened”); *An Unconstitutional Ten-Hour Law*, *supra* note 106, at 918 (“The union will continue to stand for ten hours, and it is predicted by labor leaders that 50,000 bakers will strike if the general demand for ten hours is not granted on May 1st.”). It is altogether possible the union shops refused to give in to the demand unless and until all bakeries were covered by law, but the news reports suggest it was unions (not master bakers) pushing for the law. Moreover, Henry Weismann, the man who agitated to get the law passed as international secretary for the bakers’ union, and then changed direction and represented *Lochner* in the challenge to the law after Weismann became counsel for the master bakers of New York, claimed not to oppose the same law if it merely required the payment of overtime, rather than being framed as a criminal prohibition. *Made The 10-Hour Law, Then Had It Unmade*, *N.Y. Times*, Apr. 19, 1905, at 1. Given that payment of overtime by the smaller bakeries would give a competi-

rial, the *Times* praised the Supreme Court for striking down “any contracts which may have been made between the demagogues in the Legislature and the ignoramuses among the *labor leaders*. . . .”<sup>155</sup>

If one stops to think about it, the problems with treating *Lochner* as a “class” legislation case are far more than trivial. It is true that the “health” rationale for the bill was in part simply that working shorter hours would lead to better lives<sup>156</sup> and that under existing doctrine such *labor* measures were understood frequently as “class” legislation. And it is true that the *Lochner* Court alludes to some suspicious unnamed motive for the legislation.<sup>157</sup> Yet nowhere in the *Lochner* decision is the class principle mentioned despite the demonstrated ability of judges to be quite explicit when they were applying the principle.<sup>158</sup>

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tive advantage to the larger ones under revisionist theory, see Epstein, *supra* note 78, at 17, it is unclear why large baking companies would care what form the law took.

Revisionists similarly misunderstand the politics that got the law enacted. Scholars have questioned how the bakers, if they had sufficient clout in the legislature, would not have had it with employers. See Jonathan R. Macey, *Public Choice, Public Opinion, and the Fuller Court*, 49 *Vand. L. Rev.* 373, 389 (1996) (reviewing Ely Jr., *supra* note 6, and questioning how “if individuals were without bargaining power in their relationships with their own employers” they could possibly “exert more bargaining power in their relations with the legislature”). The answer is that labor sometimes had more power in politics precisely because of the ability to attract allies there. The reason the bakers’ law received *unanimous* support in the New York legislature (twice, actually) had to do with a series of muckraking articles that ginned up substantial support among reformers concerned about tenement conditions and other social ills. *Id.*; see also Kens, *Judicial Power*, *supra* note 9, at 53 (noting that *New York Press* “also claimed credit for the victory”); Tarrow, *supra* note 153, at 285 (“[T]he [*Baker’s*] *Journal* became the major vehicle for the demands of the journeymen bakers for legislation, especially for shorter working hours and improved sanitary conditions.”). Edward Marshall’s exposé “Bread and Filth Cooked Together” in the *New York Press* in September 1894 “created the publicity” that “supplied the needed political muscle.” Kens, *Rehabilitated and Reviled*, *supra* note 9, at 37. The cause was taken up by leaders of the tenement movement, most of whom were independent Republicans. *Id.* They, in turn, “wielded significant political power” because the political machine needed them. *Id.* “With their support, and an election pending, the proposal to clean up urban bakeries and limit the number of hours bakers could work unanimously passed through the New York legislature.” *Id.*

<sup>155</sup> Fussy Legislation, *supra* note 115 (emphasis added).

<sup>156</sup> Cf. *Lochner v. New York*, 198 U.S. 45, 69 (1905) (Harlan, White, and Day, JJ., dissenting) (presuming that belief underlying statute was that “labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor”). That is how *The Independent* saw it, asking: “Will not longer hours shorten the life of the average man, and does not the police power of a State have the right to control hours of labor which will reduce human life?” *The Ten-Hour Decision*, 58 *Independent* 969, 969 (1905).

<sup>157</sup> *Lochner*, 198 U.S. at 62-63 (“[T]he contention that the law is a ‘health law,’ . . . gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.”).

<sup>158</sup> See Gillman, *supra* note 5, at 128 (“Peckham’s majority opinion . . . does not explicitly rely on the language of unequal, partial, or class legislation in striking down the New York act.”).

It should not come as a surprise if contemporary commentators saw the case as one not about class legislation but about rights; the *Lochner* majority itself said so numerous times. After a brief and somewhat incoherent opening, the *Lochner* majority struck at the heart of the matter: "The statute necessarily interferes with the *right of contract* between the employer and employees. . . . The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."<sup>159</sup>

Contemporaneous news reports of the *Lochner* decision clearly saw the right to contract as central to the Court's holding. In banner headlines and opening paragraphs, newspapers reported "CONTRACTS INVIOLEABLE"<sup>160</sup> and understood the case as a holding about the "[r]ight[ ] of [c]ontract."<sup>161</sup> The lead story in the *New York Times* stated that "[t]he decision was based on the ground that *the law interferes with the free exercise of the rights of contract between individuals*."<sup>162</sup> The *Washington Post* reported that the decision "was based on the ground that the law interferes with the free exercise of the rights of contract between individuals."<sup>163</sup> The *New York Sun* claimed that the bakers' law was "void as in violation of the freedom of contract guaranteed by the Constitution."<sup>164</sup> The *Independent* stated that *Lochner* held that the state cannot use its police and sanitary authority as "a pretext for interfering with the right of contract,"<sup>165</sup> and *The Outlook* understood the Court as saying that the state's powers are "limited by the Fourteenth Amendment of the Federal Constitution," and that "[t]his liberty, *it holds*, cannot be denied unless its exercise is clearly shown to be a menace to the health, safety, or general welfare of the people."<sup>166</sup>

What the *Lochner* Court did not tarry over, of course, is the very thing contemporary critics attacked: the existence and source of the right that served to trump legislative will. Critics did not question the methodology of the Court's analysis. Instead, as we have seen, they

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<sup>159</sup> *Lochner*, 198 U.S. at 53 (emphasis added). The Court asserts the existence of this "right" numerous times throughout the opinion. See, e.g., *id.* at 54, 57, 61.

<sup>160</sup> See *Labor Not Restricted*, N.Y. Tribune, Apr. 18, 1905, at 1.

<sup>161</sup> *Bakery Law Invalid*, Wash. Post, Apr. 18, 1905, at 1 ("Supreme Court Holds that It Interferes With Rights of Contract Between Individuals"); see also *New York 10-Hour Law Is Unconstitutional*, supra note 154 ("U.S. Supreme Court Holds It Violates Freedom of Contract").

<sup>162</sup> *New York 10-Hour Law is Unconstitutional*, supra note 154 (emphasis added).

<sup>163</sup> *Bakery Law Invalid*, supra note 161.

<sup>164</sup> *10-Hour Bakery Law Invalid*, N.Y. Sun, Apr. 18, 1905, at 4.

<sup>165</sup> *The Ten-Hour Decision*, supra note 156.

<sup>166</sup> *The Ten-Hour Labor Decision*, supra note 106 (emphasis added).

challenged the very thing revisionists seek to deny, i.e., inappropriate identification of the specific right itself.

### C. *Judicial Class Bias and Laissez-Faire Economics*

Convention holds that *Lochner*-era cases were decided on the basis of laissez-faire ideology and class bias, but revisionists vehemently deny such claims.<sup>167</sup> G. Edward White calls the claims of reliance on laissez-faire a “mythology”<sup>168</sup> and explains that when *Lochner*-era courts struck down social legislation, “they were thought of as doing so” not because they were giving a conservative, laissez-faire reading of those clauses, but because they were “prevent[ing] legislative tyranny or corruption.”<sup>169</sup> Samuel Olken proclaims that “[r]ecent historiography suggests that nineteenth and early twentieth century judges relied relatively little upon laissez-faire economics.”<sup>170</sup> Howard Gillman cautions against understanding the *Lochner*-era decisions as “a desire to see members of their class win specific lawsuits.”<sup>171</sup> Benedict challenges the “orthodox view” that “beneath the rhetoric [of decisions], ‘the major value of the Court . . . was the protection of the business community against government.’”<sup>172</sup> “[T]he purpose of the laissez-faire propagandists was not to protect the property of the rich from the ravages of the poor. Their purpose was to preserve liberty.”<sup>173</sup>

It is difficult to know what to make of revisionist claims in light of overwhelming contemporary commentary that outright accused judges of importing their biases into the law. The milder of the commentary focused on judges necessarily imposing their views when the Constitution was itself indeterminate. As Jackson Harvey Ralston said: “To the courts the Constitution is a peg on which to hang predictions in politics and sociology and call them law.”<sup>174</sup>

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<sup>167</sup> See, e.g., Benedict, *supra* note 8, at 298 (“Laissez-faire constitutionalism . . . was congruent with a well-established and accepted principle of American liberty.”).

<sup>168</sup> White, *supra* note 13, at 88; see also *id.* at 28 (“‘Liberty of contract’ in due process cases was thus not simply a surrogate for an ideology of ‘laissez faire,’ as distinguished from one of ‘paternalism,’ as Holmes’s dissent suggested.”).

<sup>169</sup> White, *supra* note 67, at 246.

<sup>170</sup> Olken, *supra* note 63, at 5.

<sup>171</sup> Gillman, *supra* note 5, at 199; see also *id.* at 10 (“I hope to show that the standards used by these judges to evaluate exercises of legislative power were not illegitimate creations of unrestrained free-market ideologues . . .”).

<sup>172</sup> Benedict, *supra* note 8, at 293 (quoting Robert McCloskey, *The American Supreme Court* 105 (1960)).

<sup>173</sup> *Id.* at 311.

<sup>174</sup> Jackson Harvey Ralston, *Shall We Curb the Supreme Court?*, 71 *Forum* 561, 564 (1924).

Harsher critics emphatically argued that judges were—consciously or subconsciously—furthering the interests of the rich at the expense of the poor.<sup>175</sup> In 1912, Jesse Orton wrote that “[t]he same Constitution which is unable to protect the life or liberty of innocent persons, is quick and powerful to guard the property of public service corporations. Were the Constitution and its amendments written this way? Or has some one inserted a ‘joker’ clause which favors privilege?”<sup>176</sup> As Edward Whitney wrote in *The Forum*:

I do not think that it is good in the long run for the rich man, that the immense majority of the people in this country should have a just grievance against the fortunate holders of accumulated property. It is said that there are no classes in this country and that class distinctions should never be alluded to. Unfortunately there is a distinction between rich and poor which cannot be wiped out under our present civilization.<sup>177</sup>

Then-Circuit Judge William Howard Taft provided a clear statement of the sentiment of the time in an address before the American Bar Association.<sup>178</sup> Taft contended that the guilty party was corporate corruption and greed, and jurisdictional rules that allowed cases involving the corporations into federal court,<sup>179</sup> but he acknowledged

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<sup>175</sup> See Walter Clark, *Judicial Supremacy*, 39 *Arena* 148, 155 (1908) (identifying danger that people will “see their enrobed judges doing their thinking on the side of the rich and powerful”); *Death of the Income Tax*, *Literary Digest*, June 1, 1895, at 4, 6 (“To-day’s decision shows that the corporations and plutocrats are as securely [e]ntrenched in the Supreme Court as in the lower courts which they take such pains to control.” (quoting *St. Louis Post-Dispatch*, commenting on *Pollock*)); Drone, *supra* note 101, at 657 (“Consciously or unconsciously, honestly or otherwise, judges on the supreme bench have been controlled or influenced by their political beliefs, by partisan bias, by public sentiment . . . [by] the theories of the party with which they have acted or may sympathize.”); Orton, *supra* note 111, at 1289 (leaving reader to judge—though proper conclusion is not left much in doubt by article—“[w]hether the Supreme Court of the United States has been executing ‘a roving commission’ to fight the battles of ‘vested interests,’ in its decisions under the fourteenth amendment”); *The Political Function of the Supreme Court*, 29 *New Republic* 236 (1922) (decrying role of “unconscious partiality”); *The Supreme Court Under Fire*, *supra* note 53, at 558 (“Its enemies habitually picture the Supreme Court as a citadel of special privilege, unresponsive to popular feeling and neglectful of the rights of the weak and lowly.”); W. Trickett, *Judicial Nullification of Acts of Congress*, 185 *N. Am. Rev.* 848, 856 (1907) (decrying frustration of legislative purposes by judges with “narrow, sectarian, professionally biased, or class-biased views of the Constitution”).

<sup>176</sup> Orton, *supra* note 111, at 1284.

<sup>177</sup> Edward B. Whitney, *Political Dangers of the Income-Tax Decision*, 19 *Forum* 521, 527-28 (1895).

<sup>178</sup> William H. Taft, *Criticisms of the Federal Judiciary*, *Annual Address Before the American Bar Association* (Aug. 28, 1895), in 29 *Am. L. Rev.* 641 (1895) (presenting defense of federal courts against current attacks).

<sup>179</sup> *Id.* at 641, 652-53.

that courts had come by some of the criticism justifiably.<sup>180</sup> Taft turned Jefferson's famous phrase to his advantage, referring to the "corporate miners and sappers of public virtue."<sup>181</sup> Even John Wigmore, no flaming radical,<sup>182</sup> based the controversy over judicial decisions on "[e]conomic and class bias."<sup>183</sup>

Many critics specifically identified judicial decisions as a product of a "laissez-faire" mentality or, worse yet, a derivative of Herbert Spencer's social theories, the very theories tagged by Holmes and alluded to by Harlan in *Lochner*.<sup>184</sup> Learned Hand insisted that "it is too late for the adherents of a strict *laissez-faire* to condemn any law for the sole reason that it interferes with the freedom of contract."<sup>185</sup> Roscoe Pound explained:

The idea that unlimited freedom of making promises was a natural right came after enforcement of promises when made, had become a matter of course. It began as a doctrine of political economy, as a phase of Adam Smith's doctrine which we commonly call *laissez faire*. It was propounded as a utilitarian principle of politics and legislation by Mill. Spencer deduced it from his formula of justice. In this way it became a chief article in the creed of those who sought to minimize the functions of the state, that the most important of its

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<sup>180</sup> Id. at 669 ("The efficacy . . . has led to the charge, which is perfectly true, that judicial action has been much more efficient to restrain labor excesses than corporate evils and greed.").

<sup>181</sup> Id.

<sup>182</sup> Indeed, in the later controversy over the Sacco and Vanzetti executions, Wigmore defended the trials, taking on Frankfurter publicly. See N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 Duke L.J. 1302, 1320 ("Wigmore's intemperate article attacking Frankfurter and praising Judge Thayer and the legal system of Massachusetts enraged liberal legal academics.").

<sup>183</sup> John H. Wigmore, *The Qualities of Current Judicial Decisions*, 9 Ill. L. Rev. 529, 536 (1915). Wigmore notes that this bias "was shared with the profession and the community as a whole; it was not a peculiar trait of the judicial system." Id.

<sup>184</sup> Aviam Soifer argues that by pursuing a policy against government paternalism, the judges actually adopted a paternalistic stance. See Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 L. & Hist. Rev. 249, 250 (1987) ("[U]nder the guise of a formalistic, unitary vision of categories such as individual autonomy and citizenship, the Justices subdivided and manipulated legal doctrine about suitable protection in a way that arrogated tremendous discretionary power to themselves.").

<sup>185</sup> Hand, *supra* note 91, at 502; see also Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 Harv. L. Rev. 353, 363 (1916) (describing "unmistakable dread of the class of legislation under discussion" and attributing that to "prevailing philosophy of individualism" that will protect some needy individuals but not sustain labor legislation). Note that Oliver Wendell Holmes Jr. had hinted at these same concerns as early as 1894 in his famous article, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 8 (1894) (commenting that there is "a doubt whether judges with different economic sympathies might not decide" cases differently).



functions was to enforce by law the obligations created by contract.<sup>186</sup>

These legal commentators expressed what the broader public also condemned as judges imposing their own economic views.<sup>187</sup> For example, *The Survey* published an article criticizing Justice Sutherland's opinion in *Adkins v. Children's Hospital*<sup>188</sup> for trying "to save a theoretical bargaining equality which in fact does not exist, and 'individual liberties' based upon a *laissez faire* theory of government of a former generation."<sup>189</sup>

Indeed, Michael Les Benedict, one of the earliest revisionists, argues quite persuasively that *laissez-faire* was the mood that supported the controversial decisions—and if not strictly speaking *laissez-faire* economic theory, then worse yet that of Herbert Spencer.<sup>190</sup> Benedict argues that in actual application economics, *laissez-faire* was less than compelling even to "businessmen whom it was supposed to protect."<sup>191</sup> Yet, he explains, "[o]f course they were willing to marshal *laissez-faire* economic arguments against legislation that they perceived to be contrary to their interests, and they shared a vague notion

<sup>186</sup> Pound, *supra* note 109, at 456-57 (footnotes omitted).

<sup>187</sup> See, e.g., Robert M. LaFollete, Address Before the Annual Convention of the American Federation of Labor (June 14, 1922), reprinted in 62 Cong. Rec. 9077 (1922) (condemning interpretation of Constitution "to mean whatever suited their peculiar economic and political views"); Corwin, *supra* note 32, at 672 ("[T]he Court found reason to abandon its early conservative position [on the breadth of the Fourteenth Amendment] and in the interest of private and particularly of property rights to take a greatly enlarged view of its supervisory powers over State legislation."); Freund, Limitation of Hours, *supra* note 91, at 413 ("[T]here has been a marked tendency for courts to . . . nullify statutes that were contrary to their own views of sound and free government.").

<sup>188</sup> 261 U.S. 525 (1922).

<sup>189</sup> Sayre, *supra* note 144, at 151.

<sup>190</sup> Benedict, *supra* note 8, at 307-08 (explaining *laissez-faire* underpinning of objection to labor laws); *id.* at 301 (explaining influence of Herbert Spencer, though making point that Spencer's American devotees never advocated extremes of his position). Benedict's broader thesis is that "[l]aissez-faire constitutionalism received wide support in late nineteenth-century America not because it was based on widely adhered-to economic principles, and certainly not because it protected entrenched economic privilege, but rather because it was congruent with a well-established and accepted principle of American liberty." *Id.* at 298. Lawrence Lessig concurs in Benedict's assessment of the importance of *laissez-faire* as "rights talk" rather than merely as economic theory, but insists it is a "mistake . . . to make too much of the point. Certainly there are strong currents of both social and economic theory within the *laissez-faire* tradition, indeed, within Justice Holmes' dissent itself." Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 456 n.282 (1995); see also Herbert Hovenkamp, The Political Economy of Substantive Due Process, 40 Stan. L. Rev. 379, 446-47 (1988) (arguing that judges' decisions were product of judges grabbing ideas from classical economic theory).

<sup>191</sup> Benedict, *supra* note 8, at 303.

that economic problems were not amenable to government-imposed solutions."<sup>192</sup>

It ought not to come as a surprise that laissez-faire ideology motivated some of the decisions: These laissez-faire views of government were commonly expressed among conservative protagonists of the Court's decisions and many thinkers, lawyers and judges of the time.<sup>193</sup> *The Nation*, exulting in the decision in *Lochner*, fairly crowed that "the factory laws were read as a burial service over the doctrine of *laissez faire*; and, except for Herbert Spencer and a few other old fogies, the inprescriptible rights of the individual were lost sight of in the solicitous anxiety manifested for the health of 'social tissue.'"<sup>194</sup> In 1886, Christopher Tiedeman worried that the "political pendulum is again swinging in the opposite direction" from laissez-faire.<sup>195</sup> As George Alger explained some twenty-five years later: "To these conservatives, the courts seem the main, and at times the only power against what is to them the new barbarism, whose principal means of expression is legislation."<sup>196</sup>

Given that many probusiness factions supported laissez-faire economics and saw social legislation as attempts to bury the doctrine, it likewise ought to come as no surprise that many critics saw the courts as witting accomplices of big business in the class war. For example, commenting on the *Sugar Trust* decision,<sup>197</sup> *The American Law Review* claimed that usurpation of jurisdiction "has placed the heel of the private corporation so effectually on the necks of the American people that they are struggling to get from under it like Enceladus struggling to get from under Mount Etna."<sup>198</sup> Invariably critics saw the courts as favoring corporations, if not in cahoots with them. "Large business interests are, of course, enthusiastic defenders of the 'sanctity' of the Supreme Court, as the power of the court to declare

<sup>192</sup> *Id.* at 303-04. Benedict's conclusion that laissez-faire was not the primary defining term of the jurisprudence, but that it was trotted out to protect economic interests, only lends weight to the notion that something was going on besides even a pure application of laissez-faire.

<sup>193</sup> See Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 *Berkeley J. Emp. & Lab. L.* 1, 9 (1999) (noting ascendancy of laissez-faire ideology between World War I and Great Depression).

<sup>194</sup> A Check to Union Tyranny, *supra* note 103, at 346.

<sup>195</sup> Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States*, at vi (1886) (quoted in Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895*, at 17 (1960)).

<sup>196</sup> George W. Alger, *Criticizing the Courts*, 108 *Atlantic Monthly* 656, 663 (1911).

<sup>197</sup> *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (refusing to apply federal anti-trust monopoly law to company monopolizing sugar refining).

<sup>198</sup> *Power of the Judiciary to Nullify Acts of Congress*, 29 *Am. L. Rev.* 594, 596 (1895) (criticizing courts' invalidation of congressional acts).

laws unconstitutional is more often a benefit to conservatism than to progress.”<sup>199</sup> In 1912, *Everybody's Magazine* published a series entitled “Big Business and the Bench,” detailing corporate control of the judiciary, corruption of judges and corporations, and movement from the bench into corporate jobs. The last issue contained a cartoon poem that ended:

This is the people, bound and sold  
 By the crafty Boss all brazen and bold,  
 That joins with Business, out for gold,  
 To send the lawyer in to mold  
 The mind of the judge all proud and cold.<sup>200</sup>

During this period, Charles Beard published his *An Economic Interpretation of the Constitution of the United States*, and though he later disclaimed doing so in order to further the Progressive agenda,<sup>201</sup> the book obviously added fuel to the fire of class warfare.

The perceived bias of courts was enhanced by a general understanding that the judiciary's ranks were filled by corporate lawyers. Commentators were quick to point out not only that the judiciary was staffed by former members of corporate America, but also that the door to judicial chambers revolved to a certain extent.<sup>202</sup> Class bias

<sup>199</sup> Ratliff, *supra* note 117, at 579; see also J. Allen Smith, *The Spirit of American Government* 359 (photo. reprint 1965) (1907) (“It is not a mere accident that the United States Senate is to-day the stronghold of railway and other corporate interests.”). Smith further commented that “[i]t is a notorious fact that it is much easier to buy the representatives of the people than to buy the people themselves.” *Id.* John Akin noted the correspondence between large political contributions and the ability of Sugar Trust millionaires to escape punishment while Socialist Party Chairman Eugene V. Debs went to jail:

It is a curious coincidence that about this time Havemeyer, and other millionaires of Sugar Trust fame, who defied the Senate and refused to disclose the secret manipulations between United States senators and Wall [S]treet manipulators, and the amount and character of the political contributions by this greatest of trusts, went forth from the Federal courts unpunished; while Debs and his [collaborators] were lying in a Federal jail to which they had been sent, without the privilege of a trial by a jury, under this most extraordinary and revolutionary decision.

John W. Akin, *Aggressions of the Federal Courts*, Annual Address Before the Georgia Bar Association (July 7, 1898), in 32 *Am. L. Rev.* 669, 689 (1898).

<sup>200</sup> C.P. Connolly, *Big Business and the Bench VI*, 27 *Everybody's Mag.* 116, 119 (1912). The fourth article, subtitled “Trust-Busting That Helps the Trusts,” was followed by an editor's note calling it “perhaps the most important single article that EVERYBODY'S has published. . . . The most damning indictment of our judiciary is a plain statement of incontrovertible facts.” C.P. Connolly, *Big Business and the Bench IV*, 26 *Everybody's Mag.* 659, 659 (1912).

<sup>201</sup> Forrest McDonald, Introduction to Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, at xlii (1986) (noting that Beard “had in mind no thought of forwarding the interests of the Progressive party”).

<sup>202</sup> Weaver observed that most universities hired prominent railroad attorneys to teach; almost all qualified members of the bar were also employed by large corporations. He

thus seemed inevitable, as judges necessarily imported the perspective they held in their prior corporate practice.<sup>203</sup>

Nowhere was the class bias of judges more evident than in labor decisions. As Judge Bruce observed while questioning application of the "class legislation" principle: "Strangely enough, however, the Illinois court, in its labor decisions, *but in none others*, seems to have arrived at a contrary conclusion."<sup>204</sup> Others pungently observed that judicial decisions had "'a definite bias of policy' against statutes favoring 'the interest . . . of labor.'"<sup>205</sup> Or, as Learned Hand concluded: "That the legislature may be moved by faction, and without justice, is very true, but so may even the court."<sup>206</sup>

An important example that receives very little attention from revisionists is the use of the labor injunction by judges, particularly federal judges, to quash labor strikes. Labor injunctions were widely reviled throughout the Populist-Progressive Era.<sup>207</sup> Labor injunctions

asked, "How can we construct a safe building from unsound timber? When we shall most need it as a refuge from the storm, it will prove to be our greatest point of danger, and fall upon and crush us." James B. Weaver, *A Call to Action* 82 (1892). Weaver noted the departure of Judges McCrary and Dillon from federal circuit judge positions to general consulting counsel at railroad companies. He wondered that "[t]heir great value as legal advisors had not attracted railroad interests until they reached the bench." *Id.* at 101.

Another critic watched as the courts were filled with "men who for years and decades had faithfully served the interests of privileged corporations and trusts in their battle against the interests of the people," and concluded that the plutocracy would "have in the most invulnerable position a bulwark composed of men habituated to see things, not from the view-point of the people or even from a broad and impartial point of vision, but from the vantage-ground of privileged wealth." B.O. Flower, *The Courts, the Plutocracy and the People; or, the Age-Long Attempt to Bulwark Privilege and Despotism*, 36 *Arena* 84, 85 (1906).

<sup>203</sup> Drone, *supra* note 101, at 657 ("They have no business to import into it their own notions of what the Constitution should be, or what they may think the people or any political party would like it to be."); *The Political Function of the Supreme Court*, *supra* note 175, at 237 ("[L]et . . . us face the fact that five justices of the Supreme Court *are* conscious molders of policy instead of the impersonal vehicles of revealed truth."); Ralston, *supra* note 174, at 564 ("For the ideas of the Fathers, necessarily restricted by their civilization, the courts really have substituted their own ideas of right and wrong, and have fitted the Constitution to these reactionary ideas. . . ."); Sayre, *supra* note 144, at 150 (complaining of Supreme Court striking down laws that "fail to accord with the social theories of five of its members").

<sup>204</sup> Bruce, *supra* note 92, at 7 (emphasis added). Professor Freund also questioned how the Court could affirm class legislation limiting hours worked in coal mines in *Holden v. Hardy*, 169 U.S. 366 (1898), while striking down similar legislation in *Lochner*. See Freund, *Limitation of Hours*, *supra* note 91, at 412-13; see also Corwin, *supra* note 32, at 666 (noting flip in Court's analysis between *Holden* and *Lochner*).

<sup>205</sup> McCurdy, *supra* note 128, at 165 (quoting James Willard Hurst, *Freedom of Contract*, in 2 *Encyclopedia of the American Constitution* 774, 778 (Leonard W. Levy et al. eds., 1986) (citation omitted)).

<sup>206</sup> Hand, *supra* note 91, at 508.

<sup>207</sup> See, e.g., Thomas Speed Mosby, *The Court is King*, 36 *Arena* 118, 120 (1906) ("We did not get freedom of the press, free speech, trial by jury or religious toleration or the

often were based on a reading of the Sherman Act,<sup>208</sup> and it took labor many years to get Congress to strip the courts of this injunctive power, one of the few successful pieces of jurisdiction-stripping legislation of the era.<sup>209</sup> Yet, at the same time that judges were making aggressive use of the antitrust-based labor injunction, they were denying use of that same antitrust law to combat monopolization, the very purpose for which many felt it was enacted.<sup>210</sup> As *The American Law Review* commented: "The Sherman 'Anti-Trust Law' has at last been vetoed by the third House of Congress and sponged out of existence, *except for the purpose of enabling the Federal courts to enjoin railway strikes*, as effectually as though it had never been enacted."<sup>211</sup>

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*habeas corpus* from the courts, but the judiciary has given us the summary process of contempt, and 'government by injunction'. . . The ascendancy of the judiciary is thus complete."); The Political Function of the Supreme Court, *supra* note 175, at 236 (discussing decision of Chief Justice Taft "holding that the right to an injunction is one of those 'immutable principles of liberty and justice' which have been forever enshrined in the Constitution" and arguing that by decision "Chief Justice Taft has justified the worst fears about him more quickly than the sturdiest [skeptic] was entitled to fear"). As the United Mine Workers Journal explained in its May 1, 1928 issue in response to the question "What is an injunction?":

An injunction is a 'law' that is found on no statute book.

A 'law' that has never been voted on by any set of legislators.

A 'law' which has never been signed by any governor or president.

A 'law' which exists without the consent of the people.

Injunction Defined, United Mine Workers J., May 1, 1928, at 6.

<sup>208</sup> Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1994 & Supp. V 1999)). For an example of a case discussing the Sherman Act, see *In re Debs*, 158 U.S. 564, 599-600 (1895), in which the Court decided the case on Commerce Clause grounds, but noted that the lower court reached the same result through interpretation of the Sherman Act. See also Forbath, *supra* note 30, at 71 (describing how lawyers and judges used Sherman Act to enjoin labor strikes).

<sup>209</sup> Initially labor convinced Congress to pass an amendment to the Sherman Act as part of the Clayton Act that ostensibly would have avoided the problem, Forbath, *supra* note 30, at 122, 156-58, but that proved not to solve the problem. Ultimately, Congress passed a prohibition on certain labor injunctions as part of the Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101-115 (1994)); see also Torbath, *supra* note 30, at 159-62.

<sup>210</sup> On the development and use of the labor injunction throughout American history, see generally Forbath, *supra* note 30. See also Fiss, *supra* note 6, at 107-54 (discussing Fuller Court's antitrust decisions).

<sup>211</sup> *Combinations in Restraint of Interstate Commerce: Sherman Anti-Trust Act—Triumph of the Sugar Trust Over the People of the United States*, 29 Am. L. Rev. 293, 306 (1895) (emphasis added) (quoted in Paul, *supra* note 195, at 183); see also Forbath, *supra* note 30, at 151 (pointing out that in four states, state legislation shielding unions from antitrust and restraint of trade suits was "struck down by federal courts as 'class legislation' trenching on the fourteenth amendment"); Wiebe, *supra* note 27, at 92 (noting that while "the Supreme Court removed the threat of . . . [the] Sherman Act from almost all major corporations by a tortuous distinction between manufacturing and commerce," a lower court "anchored the labor injunction to the Sherman Antitrust Act").

The apparently biased outcome of the injunction (and related antitrust) decisions—protecting property rights while limiting the rights of employees to act in a way that bettered their lot—found strident expression in a dissent Justice Brandeis drafted, but did not publish, in the *Coronado Coal* case.<sup>212</sup> As described by Robert Burt, Brandeis's dissent was pulled when Taft joined the Court and brought a majority round to Brandeis's position.<sup>213</sup> But Brandeis's draft dissent was an acid comparison of the doctrine regulating companies and miners, of which the following is but a small taste: "To destroy a business is illegal. It is not illegal to lower the standard of working men's living or to destroy the union which aims to raise or maintain such a standard. A business is property. . . . A man's standard of living is not property. . . ."<sup>214</sup>

Thus, once again the conventional story finds its roots squarely in what occurred during the Populist-Progressive Era. Whether or not there was a firm doctrinal basis for judicial decisions, the law was seen as indeterminate. And in the face of that perceived indeterminacy, observers accused judges of applying their own political and class biases, rather than acting consistently with law.

### III

#### THE "COUNTERMAJORITARIAN" CRITIQUE

Everyone knows that Holmes's famous dissent in *Lochner* holds a central place in the conventional story about the countermajoritarian nature of judicial review. Revisionists argue that Holmes's *Lochner* dissent was idiosyncratic and not at all a reflection of the thinking of the era. G. Edward White writes that "[b]etween 1905 and 1909 not a single analysis of the *Lochner* case in a legal periodical felt compelled to allude to the conception of judicial review articulated in Holmes's dissent."<sup>215</sup> He goes on to say that "Holmes's reading of due process cases as raising a question of the extent to which judicial glosses on constitutional language could be justified in a majoritarian democracy eventually emerged as the mainstream reading."<sup>216</sup> Simi-

<sup>212</sup> *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925) (holding that miners' strike violated Sherman Act by preventing low-priced nonunion coal from reaching market).

<sup>213</sup> See Robert A. Burt, *Two Jewish Justices: Outcasts in the Promised Land* 32 (1988) (reporting Brandeis as saying to Frankfurter, "[t]hey will take it from Taft but wouldn't take it from me. If it is good enough for Taft, it is good enough for us, they say—and a natural sentiment." (quoting Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis* 97 (1957))).

<sup>214</sup> *Id.* at 31 (quoting Bickel, *supra* note 213, at 87).

<sup>215</sup> White, *supra* note 13, at 104.

<sup>216</sup> *Id.* at 112 (emphasis added). White points out that, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), "a majority of the Court had come to endorse Justice William O.

larly, Gillman states that Holmes's admonition that judges should "respect the 'right of a majority to embody their opinions in law' and let the 'natural outcome of a dominant opinion' prevail" constituted a perceived "abdication of judicial responsibility that was as unacceptable to his peers as it would be today if the same was said about the Court's approach to racial classifications."<sup>217</sup> Charles McCurdy writes that "[i]n 1908 all but one [J]ustice on the Supreme Court worked from the same 'free labor' premise" and that "one [J]ustice . . . was Oliver Wendell Holmes, Jr."<sup>218</sup> According to McCurdy, Holmes alone sought to "defer to the judgment of legislative majorities."<sup>219</sup>

Holmes's *Lochner* dissent is legendary but not because it was pathbreaking. Rather, it captured trenchantly the thoughts of numerous contemporary critics who opposed court decisions invalidating social legislation.<sup>220</sup> Holmes did not think up these ideas, he merely presented them in a particularly quotable form.

This Part establishes that the conventional story about the countermajoritarian difficulty, which advises judges to be wary of second-guessing majority will and legislative judgment, arose during the Populist-Progressive Era. Indeed, Holmes was not alone even in *Lochner*. As we will see, Justice Harlan's dissent in *Lochner*—joined by two other Justices—mirrored Holmes's arguments. Thus, contrary to revisionists, four of the nine Justices on the *Lochner* Court joined in expressing concern about the Court's countermajoritarian role. Section A summarizes the main points made by Justice Holmes in his *Lochner* dissent and demonstrates that Justice Harlan made the same arguments regarding countermajoritarian concerns about judicial review. Following a brief discussion in Section B of the era's democratic beliefs—which motivated countermajoritarian concerns—Section C re-

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Douglas's assertion that "we decline [the] invitation [to treat] *Lochner v. State of New York* [as] our guide. . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of law that touch economic problems, business affairs, or social conditions." White, *supra* note 13, at 112-13 (quoting *Griswold*, 381 U.S. at 482 (alteration in original)).

<sup>217</sup> Gillman, *supra* note 5, at 131.

<sup>218</sup> McCurdy, *supra* note 128, at 179.

<sup>219</sup> *Id.* at 180. McCurdy acknowledges the similarity of Holmes's views and those of Thayer, but points out that Holmes's position, as stated in earlier works, antedated Thayer. *Id.* Of course, these views were present in the law before either man wrote. See *infra* note 263; see also Friedman, *Political Court*, *supra* note 21 (manuscript at 19 & n.63) (noting that in 1868 members of Congress espoused view that legislative enactments should only be held unconstitutional when clearly so).

<sup>220</sup> Owen Fiss errs to the extent that he joins other revisionists in suggesting Holmes's dissent was unprecedented in terms of prevailing intellectual thought. See Fiss, *supra* note 6, at 179 ("Holmes sounded themes that were to provide the framework for the repudiation of the legacy of the Fuller Court and the eventual triumph of progressivism."). But he surely is correct in noting its value precisely because it was the dissent of *Holmes*—a prestigious judge who "already had achieved considerable fame." *Id.* at 7.

views *Lochner*-era arguments that courts should, when faced with novel questions, defer to legislative judgment. Finally, Section D demonstrates that countermajoritarian rhetoric dominated criticism of the courts in both pre- and post-*Lochner* years, further buttressing the claims made by the four dissenters in *Lochner* and effectively refuting revisionist claims that countermajoritarian concerns arose only in the years after *Lochner*.

### A. *Lochner Dissents*

Holmes's legendary dissent in *Lochner* is fairly simple in structure.<sup>221</sup> First, Holmes explained that "[t]his case is decided upon an economic theory which a large part of the country does not entertain."<sup>222</sup> This is the complaint about "laissez-faire" bias, discussed above, which Holmes summed up, famously, by saying, "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."<sup>223</sup> Second, Holmes reviewed cases that seemed, in his view, contrary to the *Lochner* outcome,<sup>224</sup> cases which demonstrated the very indeterminacy of doctrine of which the Court also was widely accused. Third, Holmes recognized the existence of "liberty to contract" but explained that like all liberty it necessarily must be juxtaposed with the majoritarian principle—" [t]he right of a majority to embody their opinions in law."<sup>225</sup> Fourth, Holmes resolved this tension, setting forth the notion of deference to the legislature "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been un-

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<sup>221</sup> Nor were the views expressed in it novel for Holmes, as he had made the same points eight years earlier in his famous "The Path of the Law" address:

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions. . . .

O.W. Holmes, 10 Harv. L. Rev. 457, 467-68 (1897). And so on, all the way to the familiar "not even Mr. Herbert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors." *Id.* at 466.

<sup>222</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>223</sup> *Id.*

<sup>224</sup> See *id.*

<sup>225</sup> *Id.*



derstood by the traditions of our people and of our law."<sup>226</sup> This, of course, is the Thayerian principle, coupled with the due process test the Court later would come to adopt in many cases. Holmes pointed out that whether the law should be upheld is essentially a question of fact, whether "[a] reasonable man might think it a proper measure on the score of health."<sup>227</sup>

Harlan's dissent for himself and Justices White and Day shares precisely the same elements as Holmes's dissent. It is true, and revisionists properly note this, that Harlan goes on longer than Holmes about the police power, and Harlan conducts an extensive examination of the facts to show that the challenged measure can be sustained as a regulation of health. But, as explained earlier, Progressive Era critics did not deny either the rights or class arguments; rather, they seized on indeterminacy and argued for legislative deference. Holmes himself acknowledged both "liberty to contract,"<sup>228</sup> and the impropriety of legislatures enacting laws without a reasonable basis.<sup>229</sup> Then Holmes, often notoriously lazy when it came to facts, simply stated, "[i]t does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health."<sup>230</sup>

Holmes complained that laissez-faire economics decided the case and argued that the Constitution did not embody any economic theory.<sup>231</sup> Harlan was only a bit more polite. "I do not stop," he wrote, "to consider whether any particular view of this economic question presents the sounder theory."<sup>232</sup> Indeed, here Harlan was every bit as skeptical as the famously skeptical Holmes: "There are very few, if any, questions in political economy about which entire certainty may be predicated."<sup>233</sup>

Just as Holmes juxtaposed the rights of the plaintiffs against majority will, so, too, did Harlan. Indeed, Harlan quoted at great length from his opinion in *Atkin v. Kansas*<sup>234</sup> rendered two years earlier. "The responsibility . . . rests upon legislators, not upon the courts," as legislation has duly "received the sanction of the people's representa-

<sup>226</sup> Id. at 76.

<sup>227</sup> Id.

<sup>228</sup> Id. at 75.

<sup>229</sup> Id. at 76 (proposing rational-basis-type review for assessing legislative acts).

<sup>230</sup> Id.

<sup>231</sup> Id. at 75.

<sup>232</sup> Id. at 72 (Harlan, J., dissenting).

<sup>233</sup> Id.

<sup>234</sup> 191 U.S. 207, 223 (1903).

tives.”<sup>235</sup> Of course, “it is the solemn duty of the courts . . . to guard the constitutional rights of the citizen.”<sup>236</sup> But it remains true “that legislative enactments should be recognized and enforced by the courts *as embodying the will of the people.*”<sup>237</sup>

Finally, Harlan—as does Holmes—resolves the tension between rights and legislative power by adopting the Thayerian principle of legislative deference. This is, according to Harlan, the precise question in the case: “[W]hat are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void?”<sup>238</sup> Harlan goes on at length on this point earlier in his opinion, sounding at times more like Thayer than Thayer himself. Thus, “a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.”<sup>239</sup> Rather, “[i]f there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.”<sup>240</sup>

Here then we have it. Not one, but four, Justices shared a theory of what the majority did wrong in *Lochner*. Moreover, that theory is precisely the countermajoritarian problem advanced by the conventional story.

### B. *The Roots of the Dissenters’ Democratic Theory*

Given that the dominant political movements of the time shared, at least at the level of rhetoric, a taste for popular democracy, it should come as no surprise that four of the Justices of the Supreme Court framed their decisions in terms of deference to majoritarian legislative will.<sup>241</sup> Both the Populist and Progressive movements shared a widespread belief that genuine reform required breaking the back of

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<sup>235</sup> *Lochner*, 198 U.S. at 74 (Harlan, J., dissenting) (internal quotation marks omitted) (quoting *Atkin*, 191 U.S. at 223).

<sup>236</sup> *Id.* (internal quotation marks omitted).

<sup>237</sup> *Id.* (internal quotation marks omitted) (emphasis added).

<sup>238</sup> *Id.* at 68.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> See Robert H. Wiebe, *Self Rule: A Cultural History of American Democracy* 124 (1995) (claiming that according to Populists, “the People *were* the government”); *id.* at 163 (“One reform strategy [of Progressives] called for new means of direct democracy: popular initiative in legislation, a referendum on a significant law or issue, and ways to recall public officials, perhaps even judicial decisions.”); see also Wiebe, *supra* note 27, at 61 (noting that according to the agrarian vision of democracy, formal political structures “constituted an artificial barrier between the people and the government”).

the existing political system.<sup>242</sup> Chief among the tools to do so were a variety of reforms aimed at putting politics back in the hands of the voters.<sup>243</sup>

Though there were serious limits on the inclusiveness of both movements<sup>244</sup> (with Progressives actually quite leery of the people),<sup>245</sup>

<sup>242</sup> See Richard L. McCormick, *The Discovery That "Business Corrupts Politics": A Reappraisal of the Origins of Progressivism*, 86 *Am. Hist. Rev.* 247, 266-67 (1981) ("[R]ather suddenly, the discovery that business corrupts politics suggested concrete answers to a people who were ready for new policies but had been uncertain how to get them or what exactly they should be . . . [and showed] how prevalent was the determination to abolish existing forms of politico-business corruption.").

<sup>243</sup> See Wiebe, *supra* note 241, at 163 (noting that reformers "made sustained efforts to adapt the 19th century tradition of community self-government for 20th century urban-industrial society").

<sup>244</sup> Both Populists and Progressives distrusted racial minorities. See Wiebe, *supra* note 241, at 124-27 (describing how skilled workers and farmers organized to assert their political power while marginalizing racial minorities into unskilled lower class); David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 *Vand. L. Rev.* 797, 832-33 (1998) (stating that Progressivist commentators supported state's authority to prohibit integration); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 *Vand. L. Rev.* 881, 885 (1998) (arguing that Court decisions in first two decades of twentieth century that appeared to be civil rights victories actually represented low point in post-Civil War race relations). Both Populists and Progressives also were skeptical of the immigrant classes, whom one prominent lawyer referred to as "scum." Paul, *supra* note 195, at 196 (quoting *Current Topics*, 51 *Alb. L.J.* 161, 161 (1895)). For their part, the new immigrants often found that they fared better in the hands of the machine bosses than with the reformers. Wiebe, *supra* note 27, at 30 ("Excessive mobility, disrupted neighborhoods, and waves of Europeans all contributed to a peculiarly apolitical climate in the major cities, and in this atmosphere the ward boss gained a particularly deep loyalty from old and new residents alike by acting as their intermediary in a bewildering world.").

For an excellent discussion of voter disenchantment and dropping voter turnout throughout the Progressive Era, see McCormick, *supra* note 242. McCormick explains that as corruption was uncovered, voters became less active in politics and interest group activity began to dominate. See *id.* at 250-52, 256-70.

<sup>245</sup> Populists seemed genuinely to desire popular control of government, but Progressives were far more elitist, viewing political structures as artificial barriers between the people and government as "an antidemocratic mechanism which 'lawyer-politicians' used as they, not the voters, saw fit." Wiebe, *supra* note 27, at 61; see also Hofstadter, *Age of Reform*, *supra* note 27, at 133 ("While too sharp a distinction between Populist and Progressive thinking would distort reality, the growth of middle-class reform sentiment, the contributions of professionals and educated men, made Progressive thought more informed, more moderate, more complex than Populist thought had been."). The Progressive movement did incorporate certain elements of business and was never so dominated by common people as the Populists had been. Ross, *supra* note 44, at 13 ("Few reform movements . . . have had the support of more wealthy men." (quoting George E. Mowry, *Theodore Roosevelt and the Progressive Movement* 10 (1946) (alteration in original))). Although the Progressives favored electoral control, many of them had in mind an educated electorate, seeking to rest political control in the hands of "qualified" voters, rather than actually favoring resting political control in the hands of the masses. See Wiebe, *supra* note 241, at 164 ("Phrased another way, progressives favored quality, not quantity: better informed, more alert, less gullible citizens."); see also Hofstadter, *Age of Reform*, *supra* note 27, at 163 (noting that Progressivism was movement "whose goal was not a

the *rhetoric* of the times was given over to direct democracy.<sup>246</sup> The intensity of the call for direct democracy throughout this period rivals, if not surpasses, that of the Jacksonian era. Echoing Jackson, Theodore Roosevelt voiced his creed: "I believe in pure democracy."<sup>247</sup> "The power is the people's, and only the people's."<sup>248</sup> "I believe in the short ballot."<sup>249</sup> "I believe in the election of United States Senators by direct vote."<sup>250</sup> "I believe in the initiative and the referendum . . . ."<sup>251</sup> The call for direct democracy was so strong during the Populist-Progressive period that prominent authors, including a Supreme Court Justice,<sup>252</sup> a United States Senator<sup>253</sup> and others felt the need to write tracts explaining why democracy was not about popular rule.<sup>254</sup>

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sharp change in the social structure, but rather the formation of a responsible elite"); Link & McCormick, *supra* note 27, at 56 ("The progressive era brought a halt to the historic American trend toward universal suffrage and established a countertrend toward making not more but 'better' voters.").

<sup>246</sup> Eldon Eisenbach explains the use of "public opinion" as a means of breaking the back of "governing institutions dominated by political parties" and notes that Progressives "seemed to agree . . . that public opinion did *not* represent simple and ad hoc majority preferences." Eldon J. Eisenbach, *The Lost Promise of Progressivism* 74-75 (1994). Similarly, in his magisterial work, *America in the Age of the Titans*, Sean Cashman stated that "Progressives wanted to make governments truly responsive and responsible by a package of democratic measures." Sean Dennis Cashman, *America in the Age of the Titans: The Progressive Era and World War I*, at 52 (1988). Nonetheless, he, too, noted the tension between this view and the Progressive "tendency to elitist solutions that also led them to urge proposals that would curtail, rather than extend, the part played in government by the people." *Id.* at 55.

<sup>247</sup> Theodore Roosevelt, *A Charter of Democracy*, Address Delivered Before the Ohio Constitutional Convention, in 100 *Outlook* 390, 390 (1912).

<sup>248</sup> *Id.* at 391.

<sup>249</sup> *Id.* at 395.

<sup>250</sup> *Id.* at 396.

<sup>251</sup> *Id.*

<sup>252</sup> Horace H. Lurton, *A Government of Law or a Government of Men?*, 193 *N. Am. Rev.* 9, 12 (1911) (noting that historically, direct democracy has been regarded as unworkable on any large scale, beyond scope of "small community of intelligent and conservative citizens"); *id.* at 17 (blaming current criticism of court on "great influx of an enormous mass of immigrants unaccustomed to democratic government and wholly unfamiliar with the American constitutional idea").

<sup>253</sup> Henry Cabot Lodge, *The Compulsory Initiative and Referendum, and the Recall of Judges*, Address at Princeton University (March 8, 1912), in *The Democracy of the Constitution and Other Addresses and Essays*, 88, 105 (1915) ("[W]hatever its defects there is nothing so essential, so vital to human rights and human liberty, as an independent court.").

<sup>254</sup> See, e.g., Butler, *supra* note 43, at xiii (declaring that representative government is "a more advanced, a more just, and a wiser form of government" than direct democracy); *id.* at 73 (asserting need for representative democracy because "[t]he American people cannot solve these questions of banking and currency, of the railways and of the great industrial corporations, either with rhetoric or in passion"). Butler also claimed that the Populist movement suggested that "the people are either incompetent or unable to choose representatives who will really serve their highest interests, and who will be beyond the reach of

Not only was the Populist-Progressive message one of direct democracy, but many of the reforms urged in this direction actually were implemented. Despite their differences with the Populist agenda, Progressives advanced and worked for the adoption of many Populist democratic reforms<sup>255</sup>—movements that gave us the initiative, the referendum, the direct primary, direct election of Senators through enactment of the Seventeenth Amendment, and de facto direct election of Presidents.<sup>256</sup> At the era's beginning it was fashionable to describe the antidemocratic nature of the Constitution and to argue that it should be changed to reflect popular democracy.<sup>257</sup> As time progressed, speakers and authors stressed the inconsistency between remaining "anti-democratic" structures and the progress that had been or was being made on other fronts.<sup>258</sup>

Thus, Holmes's and Harlan's dissents invoked an existing and expanding belief in majority will. It mattered not that even the most

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the temptation offered by money, or by power, or by place." *Id.* at 5; cf. Dougherty, *supra* note 43, at 112 ("It may shock the unreflecting to hear that the rule of the people would be synonymous with anarchy—but this is strictly true.").

<sup>255</sup> See Ely, *supra* note 95, at 68 (mentioning that Progressives maintained Populist agenda to correct economic imbalance associated with new industrial order); Hofstadter, *Age of Reform*, *supra* note 27, at 134 (noting that "a great deal of Progressive political effort was spent enacting proposals that the Populists had outlined fifteen or even twenty years earlier"); Wiebe, *supra* note 27, at 180 (pointing out that Populist's agenda included direct primaries, initiative, referendum, recall, stern antitrust laws, and rigid rules to restrain political activities of large corporations).

<sup>256</sup> The Populists supported the initiative and referendum to "guard representative bodies against temptation by divesting them of all powers which they [were] liable to misuse and conferring them directly upon the people." Smith, *supra* note 199, at 352.

<sup>257</sup> E.g., Weaver, *supra* note 202, at 101-03 (arguing that political system and its institutions were beholden to corporate interests rather than those of American people).

<sup>258</sup> Commentators pointed to the popular election of the President and Senators and the prevalence of judicial recall among the states to justify their proposals for the election and recall of judges on a national level. See Goodnow, *supra* note 102, at 211-12 (celebrating election of President and U.S. Senators through adoption of extralegal methods of political action); see also 47 Cong. Rec. 3359-60 (1911) (statement of Sen. Owen) (stating that resisting judicial election and recall to preserve judicial independence impairs liberties of "self-governing people").

Some commentators claimed that the Constitution itself was undemocratic. Judge Walter Clark suggested that the present Constitution was an antidemocratic response to the 1776 democratic convention. Walter Clark, *Address at the Department of Law of the University of Pennsylvania* (Apr. 27, 1906), in 47 Cong. Rec. 3374 (1911) (attached as Ex. B to statement of Sen. Owen) ("The convention which met in 1787 was as reactionary as the other had been revolutionary and democratic."). Citing the lack of public participation in the selection of the judiciary, Clark argued that "a constitution so devised was intended not to express, but to suppress, or at least disregard, the wishes and the consent of the governed." *Id.* at 3375. J. Allen Smith used a comparison with the English judiciary to distinguish the undemocratic nature of the American judicial system. "It was designed as a check, not upon an irresponsible executive as was the case in England, but upon the people themselves. Its aim was not to increase, but to diminish popular control over the government." Smith, *supra* note 199, at 69.

direct of democratic reforms, such as the initiative and referendum, in reality had little effect,<sup>259</sup> or even that voter turnout generally was low.<sup>260</sup> What mattered was that the idea of popular control was on the lips of many and that these dominant ideas framed notions of judicial deference and the proper scope of judicial review.

### C. *Judicial Deference to Legislatures*

In light of this democratic impulse, *Lochner*-era critics commonly and quite naturally advanced the principle that in close cases, constitutional courts owed deference to legislative judgments. This is, of course, the very heart of the conventional story. While revisionists seek to undermine that story by presenting the cases as an attempt by judges to adhere to subtle doctrinal distinctions, numerous people within and without the academy argued that the proper posture in these cases was one of judicial deference.<sup>261</sup>

The notion of deference to legislative judgment emerged at least as early as the 1890s.<sup>262</sup> After all, this was the idea for which Thayer became famous, though he, too, simply paraphrased a sentiment expressed earlier.<sup>263</sup> Richard McMurtrie complained, "how invariably

<sup>259</sup> Devices such as the initiative and referendum actually got little use after their adoption. Hofstadter, *Age of Reform*, supra note 27, at 261 (noting that many reform proposals were "of very limited use" once adopted). When they were employed they often proved to be less a vehicle of direct democracy and more a tool of interest groups. As Arthur Link and Richard McCormick write, "[n]o one could have imagined or designed the new political system which emerged, but its key features clearly had been sought by many progressives: the regulation of parties, the 'improvement' of the electorate, and the legitimization of interest groups." Link & McCormick, supra note 27, at 58.

<sup>260</sup> Link & McCormick, supra note 27, at 55 ("The percentage of eligible voters who cast ballots declined sharply in all sections of the country after 1900, with women, blacks, and younger voters among the least active."). As a result, "[e]lection campaigns generally ceased to be rousing affairs based on competing party appeals." *Id.* at 56. Rather, "they became calmer, more oriented around special issues, and more easily dominated by charismatic personalities." *Id.*

<sup>261</sup> See infra notes 268-75 and accompanying text; see also The Supreme Court Supplants Congress, 116 *Nation* 484, 485 (1923) ("Upon an economic question, in other words, the court [in *Adkins v. Children's Hospital*, 261 U.S. 525 (1922)] reached the opposite conclusion from that reached by Congress. And in part at least upon that economic conclusion, outside of its sphere, the court declared the law unconstitutional.").

<sup>262</sup> In a review of *Lochner*-era decisions by the New York Court of Appeals, Felice Batlan argues that this idea was a part of that court's jurisprudence throughout the period, including its *Lochner* decision. See Felice Batlan, *The Other Lochner: A Counter-Reading of the New York Court of Appeals' Police Power Jurisprudence 1885-1905*, at 9-14, 24, 34 (unpublished manuscript, on file with the *New York University Law Review*).

<sup>263</sup> See Friedman, *Political Court*, supra note 21 (manuscript at 19 & n.63) (noting that Thayer's notion of judicial deference was one voiced by others before him). Arnold Paul notes that a *Harvard Law Review* article in 1892 had argued for deference to legislative judgment, and that this article might have had some effect on police power legislation in the following year. See Paul, supra note 195, at 51 (citing Herbert Henry Darling, *Legisla-*

have the courts fallen into the snare of substituting the question of right for the question of power, thus converting themselves into a legislature!"<sup>264</sup>

The Progressive reaction to *Lochner* harped repeatedly on the theme of judicial deference to majoritarian judgments.<sup>265</sup> It was understood that the New York legislature had enacted the bill struck down in *Lochner* as a measure related to conditions in the bakeries, and numerous commentators wondered why deference to this legislative judgment was not appropriate.<sup>266</sup> Justice Peckham even felt the need to respond to such criticism in *Lochner*, asserting somewhat self-servingly: "This is not a question of substituting the judgment of the court for that of the legislature."<sup>267</sup>

Critics frequently pointed to Populist and Progressive Era courts' failure to defer to legislative findings.<sup>268</sup> An article in *Atlantic Monthly* in 1913 explained that "[t]he essential conflicts between the courts and the legislatures on these subjects are over questions of fact."<sup>269</sup> But the concern ran broader and extended to the Court's

tive Control Over Contracts of Employment: The Weavers' Fines Bill, 6 Harv. L. Rev. 85, 85-97 (1892)).

<sup>264</sup> McMurtrie, *supra* note 136, at 5 (arguing that such judging by courts "tends to remove from the legislature all sense of obligation").

<sup>265</sup> See Boudin, *supra* note 102, at 264 ("One cannot read the latest decisions of our courts, either state or federal, without being forced to admit that they have usurped supreme legislative power . . ."); Frankfurter, *supra* note 185, at 370 ("On the particular issue involved in the *Lochner* case 'study of the facts has shown that the legislature was right and the court was wrong.' . . . Happily the fundamental constitutional doctrine of the assumption of rightness of legislative conduct, where the court is uninformed, is again rigorously being enforced." (quoting Pound, *supra* note 109, at 480)).

<sup>266</sup> See Bruce, *supra* note 92, at 19 (concluding that in long line of cases prior to *Lochner*, Court had trusted discretion of state courts and legislatures); Freund, *Limitation of Hours*, *supra* note 91, at 416 (arguing that if "choice between the comparative benefits of the public welfare and private liberty of action has, by the constitution, been committed to the legislature, it must also be believed that *Lochner v. New York* has been wrongly decided").

<sup>267</sup> *Lochner v. New York*, 198 U.S. 45, 56-57 (1905).

<sup>268</sup> See Corwin, *supra* note 32, at 670 (writing that Court moved "beyond the precincts of judicial power . . . into that of legislative power which determines policies on the basis of facts and desires"); Freund, *Constitutional Limitations*, *supra* note 91, at 622 (stating that even though Court might expect "that the legislative [judgment] be supported by a respectable body of fact and opinion accessible to the public," judicial decisions "may be substituted for legislative conjecture and it is quite as possible that right legislation will be annulled as that wrong legislation will be sustained"). Freund concluded that "[a]fter the eight-hour law for miners had been sustained, the disapproval of the ten-hour law for bakers was, to say the least, a grave inconsistency." *Id.* at 622; see also *The Ten-Hour Decision*, *supra* note 156 (discussing holding in *Lochner* that working more than ten hours is not unhealthy and noting that matter was "question of fact which must be referred to sanitarians"). But see *The Week*, 80 *Nation* 301, 301 (1905) ("The labor of the baker is in no wise peculiarly perilous to life or limb.").

<sup>269</sup> Alger, *supra* note 106, at 348.

denial of the Thayerian principle. "By this decision," *The Outlook* explained, "the Supreme Court . . . does not give the legislative branch of the Government even the benefit of a doubt."<sup>270</sup> In 1913, a political scientist named Blaine Moore published a historical study of the extent to which courts actually adhered (or failed to adhere) to the Thayerian precept.<sup>271</sup>

Critics persistently noted that by failing to follow Thayer's rule, the courts rendered legislatures powerless to do their job. An article in the *New Republic* about the Child Labor Decision used the word "impotent" no less than three times,<sup>272</sup> condemning the Court for having "disregarded their own wise cautions in the past that legislative motive or policy is a matter for the legislative conscience and not for Court review."<sup>273</sup> Similarly, *The Nation* commented on *Adkins v. Children's Hospital*<sup>274</sup> "that the Supreme Court by this decision has substituted its judgment of economic wisdom for the [judgment] of Congress and that as a result the people of the United States are without power unless they amend the Constitution."<sup>275</sup>

#### D. *Countermajoritarian Rhetoric*

As the foregoing discussion makes clear, critics chastised the judiciary for interfering with popular will throughout the Populist-Progressive Era. The volume and longevity of that criticism nonetheless is remarkable, lost to us even as the conventional story has been passed on from one generation to the next. As this din of yesteryear indicates, the countermajoritarian problem, whose origin revisionists

<sup>270</sup> The Ten-Hour Labor Decision, *supra* note 106.

<sup>271</sup> See Blaine Free Moore, *Supreme Court and Unconstitutional Legislation*, 54 *Studies in Hist. Econ. & Pub. L.* 95 (1913). Moore concluded that as of the 1898 decision in *Smyth v. Ames*, 169 U.S. 466 (1898), which upheld the enjoining of enforcement of a state statute regulating the maximum rates for railroads, "the court seems to have quite reversed its *ancient* attitude in approaching this question." *Id.* at 168 (emphasis added).

<sup>272</sup> *States' Rights vs. the Nation*, 15 *New Republic* 194, 194 (1918) (noting that "Supreme Court now says Congress is impotent"); *id.* (writing that "Supreme Court declares nation impotent"); *id.* at 195 (declaring that "Supreme Court has thrown us back to the days of the impotent Confederacy").

<sup>273</sup> *Id.* at 194-95.

<sup>274</sup> 261 U.S. 525 (1922).

<sup>275</sup> The Supreme Court Supplants Congress, *supra* note 261. Writing in *The Survey*, Francis Bowes Sayre explained that,

[U]pon the careful observance of this time-honored principle [of deference to legislative judgments] rests the independence of the legislative branch of our government. The Supreme Court still professes the principle; but the decisions of latter days have caused some to wonder whether the principle is still maintained in fact. The minimum wage decision seems to shake it to its very roots.

Sayre, *supra* note 144, at 150.



place at least several years after *Lochner*, perhaps even during the New Deal Court-packing fight, actually began much earlier.

Countermajoritarian criticism found full voice as early as the 1890s,<sup>276</sup> at first in response to the anti-Granger decisions, and then in response to the income tax and antitrust decisions and the use of labor injunctions. During this period Colonel James Weaver, later a presidential candidate for the People's Party, wrote his populist treatise, *A Call to Action*. Commenting on the anti-Granger decisions, Weaver questioned "[w]hat responsibility . . . this judge [could] assume" given that "[b]oth he and the Court for which he was speaking were beyond the reach of the ballot box."<sup>277</sup> As Weaver explained: "The decision in this case created great indignation among the people of Minnesota, and indeed throughout the whole country where its full meaning was understood."<sup>278</sup> The farmers in Minnesota protested in explicitly countermajoritarian terms. "That a judge should assume to disregard the will of the people was to them incomprehensible, and deserving of nothing less than impeachment."<sup>279</sup> And of course, in 1893, Thayer's historic work, *The Origin and Scope of the American Doctrine of Constitutional Law*, while not strictly speaking countermajoritarian, identified the underlying problem with judicial review of legislative action, and discussed the *Chicago, St. Paul, etc.* case.<sup>280</sup>

The *New York Times* put it mildly, when it stated that "[t]he reception by the public of the action of the Supreme Court on the income tax law is not flattering."<sup>281</sup> The *Evening Star* ran a column with the bold headline "BY THE PEOPLE," suggesting that the Court's decision would mobilize forces to push for the election of federal judges.<sup>282</sup> "The argument is that the Supreme Court as at present constituted does not spring from the people, and therefore does not prop-

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<sup>276</sup> See supra notes 32-36 and accompanying text.

<sup>277</sup> Weaver, supra note 202, at 122.

<sup>278</sup> Id. at 131.

<sup>279</sup> Charles B. Elliot, *The Legislatures and the Courts: The Power to Declare Statutes Unconstitutional*, 5 Pol. Sci. Q., 224, 250 (1890) (describing "exaggerated reverence" in Western states for majority rule). At a meeting of the Minnesota State Farmers' Alliance, the members adopted a resolution rejecting the Supreme Court's decision in the Granger cases, and complained that their "liberties thus [had been] wheedled away from them, on technicalities, by a squad of lawyers, sitting as a supreme authority high above Congress, president and people." Minnesota State Farmers' Alliance, *Constitution and By-Laws, Declaration of Principles, Resolutions, Officials, etc.* 20 (1890).

<sup>280</sup> *Chi., Milwaukee, & St. Paul Rwy. Co. v. Minn.*, 134 U.S. 418 (1890); see also Thayer, supra note 97, at 136 (noting that legislature has "power, not merely of enacting laws, but of putting an interpretation on the Constitution[.]" yet Supreme Court assumes authority to strike down such laws).

<sup>281</sup> *The Court and Public Opinion*, N.Y. Times, Apr. 10, 1895, at 1 (critiquing Court's decision but ultimately calling it "not so bad, and, whether good or bad, . . . inevitable").

<sup>282</sup> *By the People*, Evening Star, May 21, 1895, at 1.

erly represent the people.”<sup>283</sup> A fierce debate took place in *The American Law Review* with Governor Sylvester Pennoyer claiming that “[o]ur constitutional government has been supplanted by a judicial oligarchy.”<sup>284</sup>

Similar criticism arose with respect to “government by injunction,” the use of federal injunctive power to restrain prouction, antiporporate behavior, and to punish violations of injunctions by contempt without jury trial.<sup>285</sup> For example, in a highly populist address entitled “Aggressions of the Federal Courts,” the President of the Georgia Bar Association explained:

[T]he court passed upon nothing but the *ex parte*, unsigned, unverified application [for an injunction] and . . . no hearing was had on the rightfulness of the injunction. No Caesar with all the legions of Rome at his back ever attempted a more arbitrary exercise of absolute power than did the United States judge who granted this injunction.<sup>286</sup>

Thus, countermajoritarian criticism emerged long before *Lochner*. In 1898, Walter Clark—a Justice of the North Carolina Supreme Court—commenced his attacks on the federal courts, writing that the “most dangerous, the most undemocratic and unrepubli­can feature of the constitution, and the one most subject to abuse, is the mode of selecting the Federal judges.”<sup>287</sup> That same year, Boyd Winchester, in an effort to defend the federal courts, nonetheless recognized the dangers of courts interfering with popular will.<sup>288</sup> Writing

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<sup>283</sup> *Id.*

<sup>284</sup> Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 *Am. L. Rev.* 550, 558 (1895). The following articles chronicle the ensuing debate. See Lafon Allen, *The Income Tax Decision: An Answer to Gov. Pennoyer*, 29 *Am. L. Rev.* 847, 849 (1895) (countering that courts served to protect sovereignty of people and that “[t]o disregard, and thereby declare void, an act of Congress which is deemed done outside of the powers given the body, would be not only the right but . . . the duty of the humblest court in the land”); Sylvester Pennoyer, *A Reply to the Foregoing*, 29 *Am. L. Rev.* 856, 862-63 (1895) (retorting that Justice John Marshall undermined framers’ intentions when, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), he created power of judicial review and “‘aristocracy of the robe’”); *Power of the Judiciary to Nullify Acts of Congress*, *supra* note 198, at 596 (suggesting amendment to Constitution “defining and restricting the power of the Supreme Court to declare unconstitutional acts of Congress and of the State legislatures”).

<sup>285</sup> See *supra* notes 207-11 for a sampling of works commenting on the use of “government by injunction.”

<sup>286</sup> Akin, *supra* note 199, at 689.

<sup>287</sup> Walter Clark, *The Revision of the Constitution of the United States*, 32 *Am. L. Rev.* 1, 7 (1898).

<sup>288</sup> Winchester quoted Emile Boutmy as saying, “I do not know of any more striking political paradox than this supremacy of a non-elected power in a democracy reputed to be of the extreme type.” Emile Boutmy, *Studies in Constitutional Law* 117-18 (E.M. Dicey trans., 1891) (quoted in Winchester, *supra* note 98, at 803). Writing in 1891, Boutmy com-

in 1895, James Ashley, urging constitutional amendment, stated that judicial review was “a menace to democratic government,”<sup>289</sup> and that “[i]n all cases we must reserve the right to appeal from this court to the people.”<sup>290</sup> In 1903 Justice Harlan, writing for the Court, said: “[T]he public interests imperatively demand . . . that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.”<sup>291</sup>

In the years following *Lochner*, the countermajoritarian criticism grew steadily.<sup>292</sup> Given that there is some suggestion in revisionist scholarship that criticism of *Lochner* and “Lochnerizing” did not begin until as late as 1909, and was led primarily by “‘progressive’ intel-

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mented at length on the undemocratic character of the United States Constitution. See id. at 110-18. Nothing was more remarkable to Boutmy than the Supreme Court:

The sovereign people after a time conquers the other powers, but this Supreme Court almost always remains beyond its reach. For more than twenty or even thirty years twice the *grande mortalis avi spatium*, it may misuse its authority with impunity, may practically invalidate a law voted by all the other powers, or a policy unanimously accepted by popular opinion.

Id. at 117.

<sup>289</sup> James M. Ashley, Should the Supreme Court be Reorganized?, 14 *Arena* 221, 221 (1895).

<sup>290</sup> Id. at 222.

<sup>291</sup> *Atkin v. Kansas*, 191 U.S. 207, 223 (1903) (upholding Kansas statute setting eight-hour work day for state and municipal employees and contractors).

<sup>292</sup> Professor Ely expresses a common revisionist theme, noting that the reaction to *Lochner* was somewhat delayed, coming to full bloom some years after the decision. See Ely, *supra* note 95, at 99 (“The *Lochner* decision initially aroused little public interest.”). A clear response would require some sort of comparison in the reaction to controversial cases, but this observation does seem to sell *Lochner* short. The case was on the front page of the *New York Times* the day it was decided, with the lead paragraph quoting dissenting Justice Harlan as saying “no more important decision has been rendered in the last century.” *New York 10-Hour Law Is Unconstitutional*, *supra* note 154. Following that lengthy story was a short story on the bakers’ announcement of a strike should their demands for a ten-hour day not be met. *85,000 Bakers May Strike*, *N.Y. Times*, Apr. 18, 1905, at 1. The next day the papers ran, again on the front page, the story of Harvey Weismann, the man who agitated to pass the law and represented *Lochner* in overturning it. *Made the 10-Hour Law, Then Had It Unmade*, *supra* note 154. That day’s paper also contained a lengthy editorial on the subject applauding the decision. *Fussy Legislation*, *supra* note 115. *The Nation*, a weekly, reported the story in its wrap-up of the week’s news, in a column approving of the decision. *The Week*, *supra* note 268. *The Nation* was back the next week, leading its coverage of the news about the “far-reaching import of” the decision, reporting a speech AFL president Samuel Gompers had given at the Quill Club attacking the decision, with which *The Nation* disagreed. *The Week*, 80 *Nation* 321, 321 (1905). A week later *The Nation* was still foaming about the case. See *A Check to Union Tyranny*, *supra* note 103, at 346-47. Meanwhile, the decision was getting bashed in the Progressive press. See, for example, the lengthy report entitled *An Unconstitutional Ten-Hour Law*, *supra* note 106, and the extremely lengthy coverage entitled *The Ten-Hour Labor Decision*, *supra* note 106, which led that week. By 1906 there already was a law review article analyzing the case, Groat, *supra* note 124, and coverage continued in law reviews and Progressive papers. See, e.g., Clark, *supra* note 175, at 151-52 (discussing *Lochner* critically).

lectuals,"<sup>293</sup> it is useful to get a sense of the escalating drumbeat of the criticism.<sup>294</sup> In a 1905 article in the *Virginia Law Register*, the author asserted "[t]hat there has notably in the past twenty years been a judicial usurpation of power can not be successfully denied."<sup>295</sup> In 1906 Roscoe Pound gave his famous address, *The Causes of Popular Dissatisfaction With the Administration of Justice*.<sup>296</sup> Although he did not speak precisely in countermajoritarian terms, Pound brought together the themes of the times: distrust of courts acting inconsistently with popular will, and judicial interpretation of the Constitution in mechanical terms.<sup>297</sup> In that same year, Walter Clark gave an address at the University of Pennsylvania Law School in which he complained that "[t]he control of the policy of government is thus not in the hands of the people, but in the power of a small body of men not chosen by the people and holding for life."<sup>298</sup> In this vein Theodore Roosevelt, while President, spoke out in 1907 in his last address to Congress against government by injunction.<sup>299</sup> Also in 1907, William Trickett,

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<sup>293</sup> White, *supra* note 13, at 104; see also Gillman, *supra* note 5, at 132 (noting that few commentators thought that Court's limitation on police powers was "anachronistic in post-industrial America").

<sup>294</sup> Although not mentioning *Lochner* by name, in a 1906 article in *The Arena*, Thomas Mosby argued that the Supreme Court was usurping power that rightfully belonged to the Executive Branch—the power to veto legislation:

The law-making power is vastly inferior to any power whose function is to ultimately say whether or not a given legislative act shall be the law, and in such condition it must necessarily follow that the executive power in its last analysis is but a perfunctory agency for carrying into effect the mandate of the law-declaring power and not that of the law-making power.

Mosby, *supra* note 207, at 118-19; see also William Meigs, *Some Recent Attacks on the American Doctrine of Judicial Power*, 40 *Am. L. Rev.* 641, 641-42 (1906) (describing as "radical" view that Congress may pass any law and courts will lend "aid to the usurpation").

<sup>295</sup> Camm Patteson, *The Judicial Usurpation of Power*, 10 *Va. L. Reg.* 855, 859 (1905) (criticizing decision in *South Dakota v. North Carolina*, 192 U.S. 286 (1904), where Court enforced debt obligations created during Reconstruction).

<sup>296</sup> Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, Address Before the Annual Convention of the American Bar Association (1906), in 46 *J. Am. Judicature Soc'y* 54 (1962) (discussing causes of dissatisfaction with administration of justice and noting most constant cause as mechanical operation of legal rules).

<sup>297</sup> *Id.* at 56 (noting dissatisfaction with "mechanical operation of laws" and "inevitable difference in rate of progress between law and public opinion").

<sup>298</sup> Clark, *supra* note 111, at 725. Clark observed: "If five lawyers can negative the will of one hundred million intelligent people, then the art of government in this country is reduced to the selection of those five lawyers." *Id.* at 724. Complaining (still) of the Income Tax decision, he said, "[u]nder an untrue assumption of authority, supposedly given by thirty-nine dead men, one man nullified the action of Congress and the President and the will of seventy-five millions of living people." *Id.*

<sup>299</sup> Theodore Roosevelt, *Seventh Annual Message, Address Before the Senate and House of Representatives* (Dec. 3, 1907), in 10 *A Compilation of the Messages and Papers of the Presidents* 7450, 7466 (1911) (asking Congress to come up with legislation to "limit

the Dean of the Dickinson School of Law, published an extremely strongly worded attack on the courts:

These nine men can quash the legislation of the representatives of ninety millions of people. The time is at hand when they will be able to quash the legislation of the representatives of two hundred millions of people, though that legislation were unanimously enacted and unanimously approved by the people.<sup>300</sup>

A political science professor, J. Allen Smith, published a rambling criticism of the antidemocratic nature of the Constitution in which he targeted the courts as the worst offenders—"they can, and often do, defeat the will of the majority after it has successfully overcome opposition in all other branches of the government."<sup>301</sup> Just one year later, Clark entered the debate again, chastising the Senate for considering the opinion of the Court when considering railroad regulation.<sup>302</sup> That same year Learned Hand joined the fray, in an article specifically aimed at *Lochner* and its ilk entitled, *Due Process of Law and the Eight-Hour Day*.<sup>303</sup>

The countermajoritarian problem was a hot issue in the 1912 election, fueled in part by two Supreme Court antitrust decisions the year before in which the Court read a "rule of reason" into the antitrust act, over a harsh dissent by Justice Harlan.<sup>304</sup> Theodore Roosevelt, campaigning for the presidency, published several articles on his stance on the judiciary in *The Outlook*, arguing that if the courts continue to strike down laws of public interest, "it will prove well-nigh

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the abuse of injunctions and protect those rights which from time to time it unwarrantably invades"). Nonetheless, Roosevelt remained cautious, insisting that "[t]he court's decision must be final." *Id.*

<sup>300</sup> Trickett, *supra* note 175, at 851.

<sup>301</sup> Smith, *supra* note 199, at 356 (advocating elimination of judicial review or other mechanisms by which to exercise control over courts).

<sup>302</sup> Clark, *supra* note 175, at 149 ("In no other country in all time has it ever been claimed that the judges thereof had power to impose their veto upon the action of the law-making power. Elsewhere the judges have been bound by the laws and are not superior to them.").

<sup>303</sup> Hand, *supra* note 91. Hand decried legislatures that shied away from legislation in the face of judicial decisions, arguing that "we should not have the inconsistent spectacle of a government, in theory representative, which distrusted the courage and justice of its representatives, and put its faith in a body which was, and ought to be, the least representative of popular feeling." *Id.* at 508.

<sup>304</sup> *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (interpreting act to forbid only undue restraint of trade and to give protection to rights of property and contract); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (same). Harlan protested that the rule of reason "surprises me quite as much as would a statement that black was white or white was black." *Am. Tobacco*, 221 U.S. at 191 (Harlan, J. concurring in part and dissenting in part). Harlan continued that "the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the government has exclusive cognizance." *Id.* at 192.

impossible to prevent States from acting when they have a furiously indignant public opinion behind them, and there will be a real popular loss of confidence in the courts . . . ."<sup>305</sup> Roosevelt urged a recall of unpopular judicial decisions and condemned courts "steeped in some outworn political or social philosophy . . . [that] totally misapprehend their relations to the people and to the public needs."<sup>306</sup> At the Progressive Convention, Roosevelt said: "The American people and not the courts are to determine their own fundamental policies."<sup>307</sup>

Seeing an advantage, William Howard Taft, on accepting the Republican nomination, stated: "It is said this [concern about the courts] is not an issue in the campaign. It seems to me it is the supreme issue."<sup>308</sup> In the run-up to the election, Gilbert Roe, a former law partner of Robert LaFollette, wrote a book—*Our Judicial Oligarchy*—in which he accused the judges of "using the great powers of the judicial office to block and thwart the public will"<sup>309</sup> and advocated the recall of judges. The debate tapered off significantly after the election of 1912, although 1913 saw a number of defenses of judicial indepen-

<sup>305</sup> Roosevelt, *supra* note 102, at 536.

<sup>306</sup> Theodore Roosevelt, *Judges and Progress*, 100 *Outlook* 40, 40 (1912).

<sup>307</sup> Theodore Roosevelt, *Purposes and Policies of the Progressive Party*, Speech Before the Progressive Convention (Aug. 6, 1912), in S. Doc. No. 62-904, at 8 (1912).

<sup>308</sup> William Howard Taft, *Speech of William Howard Taft Accepting the Republican Nomination for the President of the United States* (Aug. 1, 1912), in S. Doc. No. 62-902, at 11 (1912). Taft argued, as did others, that the people's will was embodied in the Constitution. "They ask for a change in Government so that the Government may be restored to the people, as if this had not been a people's Government since the beginning of the Constitution." *Id.* at 9; see also Charles A. Boston, *Some Conservative Views Upon the Judiciary and Judicial Recall*, 23 *Yale L.J.* 511, 511 (1914) (deriding proposals for judicial recall as "not rational," and equating criticism of judicial review with criticism of Constitution); Ralph W. Breckenridge, *The Constitution, the Court and the People*, Address Delivered at Annual Meeting of California State Bar Association (Nov. 22, 1912), in 22 *Yale L.J.* 181, 196-97 (1913) (insisting that judicial review came from "supreme will of the people" embodied in Constitution, making possible "reversal of the will of a popular majority as crystallized in legislation"). William Sutherland warned of the dangers of forcing the judiciary to cater to popular demands: "Whenever a Judiciary becomes directly responsible to the popular will, either of the people or the people's representatives, its capacity for everything save harm is destroyed. It would be better to destroy the Judiciary itself than to destroy its independence." William A. Sutherland, *Politics and the Supreme Court*, 48 *Am. L. Rev.* 390, 401 (1914).

The issue was debated at bar conferences as well: "It is urged that the recall of judges would subject the judiciary to the clamor of the mob, that we must have a fearless judiciary. The man who believes the people are a mob does not believe in republican form of government. . . . A fearless judge would never fear the people." James Manahan, *The Recall of Judges*, Address Before the Minnesota State Bar Association (July 19, 1911), in S. Doc. No. 62-941, at 12 (1912).

<sup>309</sup> Roe, *supra* note 102, at 197.

dence, including a book by Taft attacking the idea of popular government.<sup>310</sup>

Although criticism of the courts quieted during the war years, it roared back as of the turn of the decade. Organized labor initially led the charge. During the 1919 convention of the American Federation of Labor (AFL), a resolution was adopted by unanimous vote decrying judicial usurpation: "The power of our courts to declare legislation enacted unconstitutional and void is a most flagrant usurpation of power and authority by our courts and is a repudiation and denial of the principle of self-government recognized now as a world doctrine."<sup>311</sup> Quick to follow were Senators Borah and LaFollette, each of whom had his own proposed remedy for the problem of judicial activism.<sup>312</sup> In a 1922 address delivered to the AFL, and repeated on the floor of Congress, LaFollette stated that "[t]o-day the actual ruler of the American people is the Supreme Court of the United States."<sup>313</sup>

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<sup>310</sup> William Howard Taft, *Popular Government: Its Essence, Its Permanence and Its Perils*, at ix (1913) (recognizing that "movement for more direct government now seems to be spreading" and hoping that electorates will realize "that it is not a panacea"). Senator Lodge wrote that the breakdown of the judiciary would lead to "an all powerful executive" which would "deprive the representative bodies of all responsibility and turn them into mere machines of record." Henry Cabot Lodge, *The Public Opinion Bill, Address Before the Central Labor Union of Boston* (Sept. 15, 1907), in *The Democracy of the Constitution and Other Addresses and Essays*, supra note 253, at 1, 8-9. Senator Breckenridge also emphasized the importance of the judiciary as a safeguard from the Legislative and Executive branches. Breckenridge, supra note 308, at 196-97 (stressing importance of separation of powers among branches of federal government). Charles Boston stressed that judges who are sworn to support the Constitution should be able to "refuse to give effect to a legislative act in defiance" of it. Boston, supra note 308, at 512.

<sup>311</sup> American Federation of Labor, *Report of Proceedings of the Thirty-Ninth Annual Convention* 361 (1919).

<sup>312</sup> Borah's proposal to curb the Court was a supermajority requirement for invalidating laws. Borah would have required seven judges to concur before invalidating acts of Congress. 64 Cong. Rec. 3959 (1923) (statement of Sen. Owen) (introducing into Congressional Record letter authored by Senator William E. Borah). Stating that "[d]uring the last 30 years there have been some forty-odd exceedingly important cases determined in the Supreme Court by decisions of five to four," Borah acknowledged all were not constitutional cases. *Id.* Borah insisted that "neither the will of the people of the State nor the will of the people of the United States should be thwarted upon a decision rendered by a bare majority of the court." *Id.* For a discussion of Senator LaFollette's court reform proposals, see supra notes 52-54 and accompanying text. Opponents of the proposal noticed the anomaly, however, of permitting minority views to triumph on the Court. Joseph D. Sullivan, *Curbing the Supreme Court*, *Geo. L.J.*, May 1923, at 10, 13 (recognizing that would allow minority of court to govern).

<sup>313</sup> LaFollette, supra note 187, at 9077. Actually, in light of the five-to-four decisions, matters were worse: "[F]ive of these nine men are actually the supreme rulers, for by a bare majority the Court has repeatedly overridden the will of the people as declared by their Representatives in Congress, and has construed the Constitution to mean whatever suited their peculiar economic and political views." *Id.*

Taft conceded that “[t]he Supreme Court irritates a party, checks, temporarily at least, some laws dear to a majority, ‘popular.’”<sup>314</sup> Nonetheless, he viewed the LaFollette and Borah proposals as “only revivals and imitations” of prior attacks on the Court, which—as with their predecessors—the Court would survive.<sup>315</sup> “Congresses have their little hour of strut and rave. The court stays.”<sup>316</sup>

LaFollette made much of judicial tyranny during his 1924 presidential campaign. In a raucous gathering in Madison Square Garden, LaFollette stirred the waters against the Court:

Either the court must be the final arbiter of what the law is, or else some means must be found to correct its decisions. If the court is the final and conclusive authority to determine what laws Congress may pass, then, obviously, the court is the real ruler of the country, exactly the same as the most absolute king would be.<sup>317</sup>

It should be noted that countermajoritarian attacks on the courts throughout this period hardly reflected a one-sided debate. Arnold Paul’s book, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895*, (dedicated, incidentally, to Holmes) includes a wealth of remarkable statements by many prominent lawyers, including Supreme Court Justices, regarding the need for courts to stem the popular tide.<sup>318</sup> In light of these statements, and the equally great

<sup>314</sup> The Supreme Court and Partisan Passion, *supra* note 51, at 14 (quoting Chief Justice Taft defending Supreme Court and claiming that people inevitably see Court as “guardian and guarantee of their liberties and rights”).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> Full Text of LaFollette’s Speech Attacking Supreme Court, *N.Y. Times*, Sept. 19, 1924, at 2. Lest there be any doubt as to LaFollette’s central message, the *New York Times* headlined the speech on its front page. See 14,000 Pack Garden, Cheer LaFollette in Attack on Court, *N.Y. Times*, Sept. 19, 1924, at 1.

<sup>318</sup> Paul, *supra* note 195. The first senator from West Virginia, Waitman Wiley, in a speech to the West Virginia Bar Association, declared that the traditional conservation of lawyers was necessary to serve as “a wholesome check upon those tendencies to licentiousness and disorder incident to popular institutions.” *Id.* at 21 (internal quotation marks omitted). Similarly, former U.S. Circuit Court Judge John F. Dillon called upon the judiciary to prevent the “unjust exercise of popular power” by exercising the independence granted to them in state and federal Constitutions. *Id.* at 28. Even Supreme Court Justices expressed their views. Justice David Brewer echoed the importance of protecting property rights in a commencement address at Yale Law School:

It [the police power] is the refuge of timid judges to escape the obligations of denouncing a wrong, in a case in which some supposed general and public good is the object of legislation. . . . [T]he demands of absolute and eternal justice forbid that any private property, legally acquired and legally held, should be spoliated or destroyed in the interests of public health, morals, or welfare, without compensation.

David J. Brewer, Commencement Address Before the Graduating Classes at the Sixty-Seventh Anniversary of Yale Law School (June 23, 1891), in 55 *New Englander & Yale Rev.* 97, 108 (1981) (quoted in Paul, *supra* note 195, at 71 (footnote omitted) (alteration in



flood of statements condemning courts for interfering with popular opinion, it is not so difficult to see why Holmes's *Lochner* dissent—as well as Harlan's—read the way it did.<sup>319</sup> The conventional story derives from the profound debates of the time.

#### IV

#### THE LESSON OF *LOCHNER*

The problem with the revisionist project is not its history, it is its revisionism. As would be true of any historical project, *Lochner*-era revisionism unquestionably fills out our understanding of what happened to constitutional law at the beginning of the last century. Yet revisionism often claims to do more—no surprise given the amount of scholarly attention devoted to the project. It claims to teach us something important about the legitimacy of judicial review, to correct something distorted by the conventional story. And that is where the revisionists go astray.

This Part explains why, if normative concerns are the issue, neither convention nor revisionism standing alone leads us in precisely the right direction. Revisionists may well be correct regarding the jurisprudential antecedents of the *Lochner* era. But convention is correct that even if there was a jurisprudential basis for *Lochner*-era decisions, the critique of constitutional judging as inconsistent with democracy still found full voice. In a sense the two stories talk past one another, revisionism making a claim about legal legitimacy, convention (perhaps unintentionally) doing the same about social legitimacy.

The function of this final Part is to bring these two stories together, explaining the relationship between legal and social legitimacy. The conclusion suggested here is that in a post-Realist world it is unlikely (although perhaps not impossible) that a series of decisions emanating from different courts such as occurred during the *Lochner* era would as a whole lack legal legitimacy. Nonetheless, a failure of social

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original)). Edward Phelps, former president of the American Bar Association, stated that the Founding Fathers “placed the protection of personal rights beyond the reach of the popular will, and found in an independent judiciary the true and final custodian of the liberty of the subject.” Paul, *supra* note 195, at 63. Supreme Court Justice Stephen J. Field expressed similar sentiments, noting that as class distinctions increased, “it becomes more and more the imperative duty of the Court to enforce with a firm hand every guarantee of the Constitution. . . . It should never be forgotten that protection to property and to persons cannot be separated.” *Id.* at 63-64.

<sup>319</sup> Nor, in fact, was Holmes's statement unprecedented in Supreme Court decisions, for the Court had said the very same thing in *Munn*, years earlier: “For protection against abuses by legislatures the people must resort to the polls, not to the courts.” *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

legitimacy may well cause critics to assert, and perhaps believe, that judges are acting unlawfully. Thus, the lesson of *Lochner* is that whether or not judicial decisions have a jurisprudential basis, if they lack social legitimacy, judges will be attacked as acting unlawfully.

### A. Revisionism Fails

In order to get a window into the inherent difficulty with revisionists' normative claims, it is useful to consider a puzzle that the revisionists repeatedly use to challenge convention. It is a puzzle of numbers. Among conventionalists, *Lochner*-era misconduct is taken to be noteworthy not only for its impropriety but for its scope.<sup>320</sup> The overreaching of the courts, and especially the Supreme Court, was understood to be widespread. "From the decision in *Lochner* in 1905 to the mid-1930s, the Court invalidated approximately 200 economic regulations, usually under the due process clause of the fourteenth amendment."<sup>321</sup>

Advancing an argument made at the time by the eminent historian Charles Warren, and refined since, revisionists routinely point out that *Lochner*-era judges upheld far more legislation than they struck down.<sup>322</sup> Barry Cushman recently explained that "the number of

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<sup>320</sup> The Court invalidated statutes that set minimum wages, regulated prices, limited business entry, and forbade employers from requiring employees to agree not to join a union. See Geoffrey R. Stone et al., *Constitutional Law* 830-31 (3d ed. 1996) (collecting cases).

<sup>321</sup> *Id.* at 829.

<sup>322</sup> According to Warren, from 1887 to 1911, the Supreme Court rendered 560 decisions involving the validity of state statutes and state action challenged under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and it held only three of these unconstitutional. Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 *Colum. L. Rev.* 294, 295 (1913) [hereinafter Warren, *Progressiveness*]. In a later book, *Congress, the Constitution, and the Supreme Court*, Warren argued that the Court had not systematically acted in opposition to the interests of organized labor. He pointed out that in at least sixty cases the Court had sustained challenged state labor statutes whose "variety and radical nature . . . is remarkable," while invalidating only six of these statutes (including those at issue in *Lochner*). Charles Warren, *Congress, the Constitution, and the Supreme Court* 233 (new rev. & enlarged ed. 1935). Regarding the insignificance of the Supreme Court's invalidation of federal law, Warren noted that, from 1789 to 1924, only fifty-four Acts of Congress were invalidated by the Supreme Court. *Id.* at 134.

Michael Phillips attempts to evaluate Warren's claim in his article *The Progressiveness of the Lochner Court*, 75 *Denv. U. L. Rev.* 453 (1998). Phillips differs from Warren on the numbers, but substantiates Warren's assessment "that the *Lochner* Court rejected considerably more substantive due process claims [than] it granted." *Id.* at 489. Statistics can also be found in Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* 131-42 (2001), in which Novkov demonstrates that the Court was more willing to uphold legislation that benefited women and children. Novkov's thesis is a powerful one, although she perhaps overstates the extent to which gender drove the entire story. Several commentators make the point that legislation protecting the "weaker" elements of society avoided invalidation on the

cases in which the Justices of this period invalidated economic regulation simply pales in comparison to the number of such statutes they sustained."<sup>323</sup> Revisionists suggest that these numbers present a challenge to the conventional story's denial of the legitimacy of *Lochner*-era judging. Rebecca Brown put it trenchantly:

Those who charge that the *Lochner*-Era judges illegitimately imposed their own laissez-faire political values on the law, without a genuine care for liberty under the Constitution, bear the burden of explaining why these same judges *upheld* many state regulations of business of various kinds during this same period.<sup>324</sup>

What if we looked at the numbers question through the eyes of the Progressive Era? The years following the Civil War saw a chastened Court climbing its way back to credibility. The period immediately before 1890 was one in which the Court permitted a great deal of novel state regulation, such as railroad tariffs. But all that seemed to change suddenly during the Populist-Progressive Era.<sup>325</sup> As Herbert Hovenkamp recently stated, "during the substantive due process era the Supreme Court seemed to give government regulation much closer scrutiny, striking down many more statutes that it had in the past."<sup>326</sup> Thus, what may seem to those authoring the conventional story to be a small absolute number of overrulings looked like a sea change to observers living at the time.

Of course, even the change in numbers says nothing about the nature and significance of legislation that the Court struck down.

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grounds this was not "class" legislation, but advanced the general welfare. See Forbath, *supra* note 30, at 53 (noting that laws protecting "children, women, and men in certain dangerous or especially vulnerable callings" generally were upheld); Link & McCormick, *supra* note 27, at 80-83 (noting that number of states successfully adopted laws limiting hours worked by women and children); see also Frankfurter, *supra* note 185, at 367 (noting that emphasis shifted to "affirmative enhancement of the human values of the whole community").

<sup>323</sup> Barry Cushman, *Lost Fidelities*, 41 *Wm. & Mary L. Rev.* 95, 100 (1999). Cushman cites Thomas Reed Powell to support his position, but Powell was attacking judges, not defending them. Writing in 1924, Powell viewed the Court's limited number of annulments to be glaringly inconsistent with its stated position that "freedom of contract is . . . the general rule and restraint the exception." Powell, *supra* note 115, at 555 (quoting *Adkins v. Children's Hospital*, 261 U.S. 525, 546 (1923)). Continually sustaining such regulatory legislation was, in Powell's eyes, tantamount to judicial imposition of its "personal views of desirable governmental policy." *Id.*

<sup>324</sup> Brown, *supra* note 74, at 86-87 (footnote omitted).

<sup>325</sup> See Charles M. Hough, *Due Process of Law—To-Day*, Annual Lecture on the Frank Irvine Foundation at Cornell University (May 3, 1918), in 32 *Harv. L. Rev.* 218, 228 (1919) ("The court was changing, the tide of litigation rising fast in response to business demands . . . . It is from . . . [the *Chicago, Milwaukee, & St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890)] decision that I date the flood."); see also Friedman, *supra* note 129, at 311 (discussing growth in judicial overrulings by state courts that occurred by 1900).

<sup>326</sup> Hovenkamp, *supra* note 6, at 2312.

Many of the laws that were struck down during the Populist-Progressive Era were taken to be among the most important. “[A]lthough only a few decisions . . . came down to invalidate . . . laws, they invariably generated the majority of press commentary about the courts.”<sup>327</sup> Howard Gillman explains that judges upheld most of the challenged regulations, except “when the subject was labor legislation.”<sup>328</sup> But labor laws were precisely what mattered to many people at the time. For that reason, fine-grained explanations for the reversal of these laws, like those Gillman explores in his book, were not likely to be persuasive, or even heard. As work being done today on regulatory cascades suggests, a single legal decision like *Lochner* “can signal how an entire area of law should be understood.”<sup>329</sup>

This was precisely the case with *Lochner* itself. Media coverage (fed incidentally by Harlan’s, and not Holmes’s, dissent)<sup>330</sup> indicated that the case was vastly important and threatened devastating consequences for labor laws nationally.<sup>331</sup> Some revisionists claim that the immediate reaction to *Lochner* was understated, but the fact remains that lengthy stories of the Court’s decision appeared on the front pages of newspapers throughout the country the day after it was rendered.<sup>332</sup> Stories about *Lochner* regularly stressed the importance of the case. The media repeatedly referred to Harlan’s comment that “no more important decision had been rendered in the last cen-

<sup>327</sup> Urofsky, *supra* note 30, at 88.

<sup>328</sup> Gillman, *supra* note 5, at 87.

<sup>329</sup> Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 *Stan. L. Rev.* 683, 765-66 (1999) (explaining how legal event, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), or *Roe v. Wade*, 410 U.S. 113 (1973), can trigger understanding of how entire body of law should be understood).

Revisionists make little effort to judge the relative seriousness or importance of laws struck as opposed to those upheld. See *Brown*, *supra* note 74, at 86-87 (focusing on number of state regulations courts upheld rather than on types of regulations being upheld or invalidated). Warren states that even if the three statutes that were held unconstitutional between 1887 and 1911 were wrongly decided, this was “only three mistakes in twenty-five years, certainly . . . a remarkable record.” Warren, *Progressiveness*, *supra* note 322, at 295. From this statement, it can be inferred that he believed the few “mistakes” made by the Court could not have significant deleterious impact.

<sup>330</sup> See *infra* note 333.

<sup>331</sup> See *infra* notes 332-35 and accompanying text.

<sup>332</sup> See, e.g., *Bakery Law Invalid*, *supra* note 161 (describing *Lochner* decision); *New York 10-Hour Law Is Unconstitutional*, *supra* note 154 (same). Not all Supreme Court decisions of the era received this coverage. For example, the *New York Times* did not do a next-day story on the Court’s decision in *Muller v. Oregon*, 208 U.S. 412 (1908), the case upholding a limitation on women’s hours (in which Brandeis and Josephine Goldmark submitted the first “Brandeis brief”). *Lochner* made it to page one with a long story, but the day of *Muller*, front-page news was the use of a live boa constrictor at a charity event. See *Live Snake Figures in Astor Tableaus*, *N.Y. Times*, Feb. 25, 1908, at 1.

ture.”<sup>333</sup> One commentator explained that the case “disposes once and for all of the constitutionality of the labor laws throughout the United States.”<sup>334</sup> According to one historian, “[n]ot since the debacle of 1895 had a case stirred as much protest in the popular press and professional journals. What was at issue was not simply the law in the case but a nationwide movement to use government to redress imbalances in the industrial society.”<sup>335</sup>

To make matters worse, courts were striking down some laws while upholding others that seemed virtually indistinguishable.<sup>336</sup> Similar regulations were upheld in one jurisdiction and invalidated in another. Differences that seemed of no consequence decided cases. And nothing but the particular identity of the judges appeared to resolve pressing issues. In light of such inconsistency, it mattered not that most laws were upheld; what mattered was that there appeared no rhyme or reason to a law’s success or failure. In a sense the numbers game works against revisionists, for if laws were struck down in one jurisdiction but upheld in another, there was bound to be public furor. It did not help matters that the law at issue in *Lochner* had been upheld by three state courts before making its way to the Supreme Court.<sup>337</sup>

In a sense, then, revisionists ask and answer the wrong question. They ask scholars to explain why the *Lochner*-era judges were criticized when those judges upheld so many laws. But it was the laws that were invalidated that captured public opinion and created the environment described by the conventional story. As Paul Kens observes with regard to this battle over numbers, “[i]mportant as these studies may be, they fail to explain why the judiciary, and the Supreme Court in particular, was the target of reformers’ barbs from the late nineteenth century through the 1940s.”<sup>338</sup>

For this very reason, it is ironic, but true, that the more correct the revisionists’ historical claims, the weaker their normative claims. Suppose the revisionists are right both that a sound jurisprudential

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<sup>333</sup> See *Bakery Law Invalid*, supra note 161; *Labor Not Restricted*, supra note 160; *New York 10-Hour Law Is Unconstitutional*, supra note 154.

<sup>334</sup> *Future of Labor Laws*, N.Y. Trib., Apr. 19, 1905, at 1 (summarizing views of Laffin Kellogg, known authority on labor law).

<sup>335</sup> John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920*, at 184 (1978).

<sup>336</sup> For a full discussion of doctrinal inconsistency during the *Lochner* era, see supra Part II.A.

<sup>337</sup> Urofsky, supra note 30, at 79 (“Of the twenty-two judges who participated in the four decisions, twelve thought it constitutional, but because five of the ten who disagreed sat on the United States Supreme Court, the law went down.”).

<sup>338</sup> Kens, *Judicial Power*, supra note 9, at 139.

basis existed and that the raw number of overrulings was small. Nonetheless, convention is one hundred percent correct that judges during the period were attacked—consistently and vociferously—for acting out of class bias or substituting their social judgments for law. Because the conventional story accurately captures popular reaction to *Lochner*-era judging, we can see that “legal legitimacy” is not enough to justify and protect judicial review. It is a necessary, but not a sufficient, condition. Judicial review will survive, and garner respect and credibility, only if there is social legitimacy as well.

### B. *Problems With the Conventional Lesson of Restraint*

Nonetheless, the conventional story is problematic as well. Just like revisionism, convention appears to rest on an argument about legal legitimacy. Convention holds that judges were acting illegitimately and imposing their own views as law. Sometimes the complaint was that judges were incorrectly interpreting the Constitution. But to the extent the Constitution created a vacuum, the lesson was one of deference: If the set of “facts” underlying a legislative enactment was uncertain, and if the Constitution did not clearly forbid the enactment, then—as a matter of law—judges should defer to the legislative will.

As the foregoing makes clear, however, the real source of difficulty during the *Lochner* era was social, not legal, legitimacy. At bottom, *Lochner*-era critics could not accept that what courts were doing was right. Those critics had great sympathy for the legislative enactments struck down by courts, and could not believe the Constitution prohibited them.

Indeed, what we are able to see from our own historical vantage point is that dissatisfaction with judicial outcomes is what led critics to see that constitutional indeterminacy existed, and not the converse. In other words, for the most part, critics were not disturbed in some abstract way that judges acted when the Constitution was unclear. Rather, they were sympathetic to the legislative outcomes invalidated as unconstitutional. This led them to see that the Constitution was capable of interpretation in a way that would permit judges to uphold legislative initiatives. From this insight, Realism was born.

What this suggests is that there is a relationship between legal and social legitimacy. If in fact the revisionists are correct, then the *Lochner*-era decisions were legally legitimate. Because of their strong disagreement with the outcomes, however, contemporary critics did not (and perhaps could not) see it that way. The disagreement of these contemporary critics really was about the social—not legal—legitimacy of the judicial decisions. But the depth of those feelings

caused opinions about social legitimacy to spill over into their perception of what was lawful decisionmaking.

### C. *The Relationship Between Legal and Social Legitimacy*

Thus the question: What is the relationship between legal and social legitimacy? Legal legitimacy asks whether the decisions of judges find support in existing sources and understandings of law. Social legitimacy asks if those same decisions are met with acceptance by a substantial part of the public in terms of the felt necessities of the time. It is open to question whether these two notions are—or indeed can be kept—separate and distinct.

Think about the question of separation this way: How likely could it be that the revisionists are wrong? In a sense, it depends on the strength of their claim. If their claim is that *Lochner*-era decisions were *correct* in the sense that the law was determinate and required the results the courts reached, we would all justifiably be acting skeptically. After all, were the judges that ruled in the opposite way themselves acting unlawfully? Revisionists do not seem to make this claim.

Even if such an argument were tenable during the *Lochner* era itself, it is flat-out implausible now. That is because Realism's claim of doctrinal indeterminacy has had its way with all of us. At least at the level of constitutional adjudication in the nation's highest courts, few would argue that most cases have clear answers, so clear that lawyers arguing the losing side, and dissenting judges, are acting beyond the scope of their legitimate authority.

But if the revisionists are arguing something less than doctrinal determinacy, it is equally difficult to see how they could be wrong. Indeed, in some sense their claim that *Lochner*-era judges were acting in a lawful fashion cannot be very big news. This is not to denigrate the work of historical recovery that revisionists have provided to us. But some scholars see the revisionist project as having normative bite; their claim rests in part on the supposedly surprising discovery that *Lochner*-era judges were acting lawfully, in that there was jurisprudential and precedential support for their decisions.

Could it possibly be otherwise? Is it imaginable that numerous judges around the country simply began to decide cases in a lawless fashion? They were, after all, lawyers brought up in a common law system. It is difficult to picture them (all of them, some quite independently) deciding cases out of the blue, without reliance on existing doctrine and jurisprudential ideas.

What this suggests is that lawlessness, at least in the way that revisionists paint the conventional claim, must be quite rare. On the scale

on which controversial decisions were rendered during the *Lochner* era, it must be virtually nonexistent. Common law judges are unlikely, under relatively ordinary circumstances and across a range of many cases, to cast the law aside in a way that we would be willing to say the decisions were legally illegitimate.

Nonetheless, as Parts II and III demonstrated quite clearly, this in part was what contemporary commentators were claiming. They were arguing that class bias and ideology were deciding cases, not law. They accused the judges of employing novel and unprecedented rules to resolve legal controversies.

From this we can see that legal and social illegitimacy may be related. At the time of *Lochner* intense social disagreement with judicial decisions gave rise to the insight that the doctrine was indeterminate. From that state of affairs, one might conclude that decisions could be socially illegitimate, but not legally so. After all, the judges were, in a sense, within the range of reasonableness. Indeed, that is precisely how Thayer defined the applicable test: Judges must defer to legislative decisions if those decisions rest within an area of constitutional reasonableness.<sup>339</sup>

Yet, *despite* the recognition that law was indeterminate, and that the judges' decisions thus were within that range, contemporary critics took exactly the opposite position. They argued that judges' decisions invalidating those statutes were not law, but politics. They argued that within that range, judges simply should defer.<sup>340</sup>

What we can now see, looking back at the *Lochner* era, is that sharp disagreement with legal outcomes easily can lead to claims of legal illegitimacy. That is the lesson of *Lochner*. Social legitimacy is not separate from legal legitimacy, but can spill back upon it. When feelings of social illegitimacy are strong enough, the claim easily may be made that the judges are acting illegitimately in a legal sense.

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<sup>339</sup> See, e.g., Thayer, *supra* note 97, at 152 (emphasizing that while "ultimate arbiter of what is rational and permissible is indeed always the courts," judiciary "must not step into the shoes of the law-maker").

<sup>340</sup> Had the conventionalists thought through their argument, they would have seen that the argument for deference proved too much. Because so many cases litigated so fiercely through appellate layers of review could come out either way and still be within the bounds of law, the rule of deference—standing alone—would spell the end to most judicial review. Years later there were some who essentially would take this strong position, but they were at most a tiny group. Even Felix Frankfurter, the Justice most famous for his stance of judicial restraint, voted to overturn legislation that offended his understanding of constitutional principles. See Isidore Silver, *The Warren Court Critics: Where Are They Now That We Need Them?*, 3 *Hastings Const. L.Q.* 373, 376-77 (1976) (noting instances in which Justice Frankfurter relaxed his notions of strict judicial restraint).



Indeed, what we can see today is that if these claims are strong enough, they can lead ultimately to changes in the law.<sup>341</sup> The Progressives did not prevail overnight. It took many years on some issues. On a few it took the Depression and a threat to judicial independence. But it should come as little surprise that intense social disagreement with judicial decisions over a period of time increases the probability of seeing those judicial decisions changed. In that sense, intense social illegitimacy can lead to legal illegitimacy as well.

### CONCLUSION

It may well be that legal legitimacy is a necessary condition that must be met by constitutional judges. That this is so seems obvious enough from the claims that judges were berated during the *Lochner* era for acting in a legally illegitimate way. Those criticisms certainly create the impression that there is an expectation of legal legitimacy.

But legal legitimacy, at least under ordinary circumstances and with regard to constitutional litigation, is a relatively easy test to meet. Cases rarely are litigated through the hierarchy of trial and appellate courts with no plausible doctrinal and jurisprudential argument on the other side. Legal legitimacy demands no more.

Standing alone, however, legal legitimacy may not suffice in the eyes of the public to legitimate the work of constitutional judges. Judges rendering decisions that are legally legitimate but socially unacceptable will be attacked. Moreover, the attack may well take the form that judges are acting lawlessly.

Stated differently, strong disagreement over social legitimacy puts pressure on perceptions of legal legitimacy. When decisions are seen as contrary to the needs of society, observers are unlikely to concede legal legitimacy, and rest entirely upon a claim about social propriety. Critics of the judicial decisions will attack the law as itself the problem. And, decisions that are understood as socially illegitimate may ultimately cause the law to change.

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<sup>341</sup> Today scholars debate whether Franklin Roosevelt's threat to pack the Court was the proximate cause of the shift in doctrine, or whether it shifted more gradually in response to social pressure and a recognition of changing circumstances, but no one would pause to doubt that the doctrine shifted fundamentally between the *Lochner* era and 1938. For a discussion of this debate, see Friedman, *Law's Politics*, supra note 21, which examines the constitutional and historical events surrounding the 1937 Court-packing plan.