The Art of Reading *Lochner*

Rebecca L. Brown

ABSTRACT

The Art of Reading *Lochner*
by Rebecca L. Brown
Allen Professor of Law
Vanderbilt Law School

(forthcoming in NYU Journal of Law & Liberty, Summer 2005)

This essay argues that the Repudiation of *Lochner v. New York* is an event that has been cloaked in mystique and power, the very uncertainty of which has led to a kind of paralysis in the realization of constitutional aspiration. Yet because of its largely incorporeal nature, the meaning and implications of this important event have largely eluded focused critique and reevaluation. Those with a mind to question or rethink the Repudiation have focused their efforts primarily on revisionist accounts of Lochner itself. These are helpful in highlighting the possible meanings of the Repudiation, not descriptively, but normatively. They invite us to think about what we wish to consider ourselves to have repudiated with Lochner—a question that has, incredibly, not been adequately debated.

The Art of Reading *Lochner*

Rebecca L. Brown*

Imagine a very young child, walking along a city street with her mother one night and seeing the following sight. On the sidewalk stands a young woman, dressed in a short skirt, skimpy blouse despite cold temperatures, high heels, heavy make-up, chewing gum. A car approaches, words are exchanged with the male driver; she gets in the car, they kiss and drive away. The mother of the small child says to her, in a tone signaling gravity, "Don't you ever do that!" And the child knows that she never must. But as she grows up, she finds the memory to be troubling. The words of warning haunt her when she gets her first pair of high-heeled shoes. When she puts on a skirt, she hears its whisper again. When she applies her first lipstick, chews gum, waits by the road one day for a ride from a friend, rides in a car with a date, or experiences her first kiss—each of these events triggers a traumatic sense that she has disobeyed her mother's rule. Caution drives her toward life as a lonely recluse in sensible shoes.

As she matures, the girl tries to free herself of the paralysis caused by the command of her now-dead mother. She hires investigators to discover as much as possible about that night—witness descriptions, police reports. If only she could find out more, she thinks. But as the data mount, none of these details helps her. She is still paralyzed, unable to dress, to drive, to kiss, without severe anxiety and self-doubt. The girl discovers that knowing more about the night scene does not relieve her of the burden of understanding her mother's command. She realizes that through a failure of

* Allen Professor of Law, Vanderbilt Law School. I am grateful to John Goldberg and Bob Rasmussen for helpful discussions.

understanding, her mother's admonition, which surely was made in the hope of helping the child lead a better life, has had the opposite effect, constraining her from achieving her full potential.

Hoping to gain some insight into her mother's concerns, she consults counselors of various kinds. The first, a nurse, suggests that the mother must have intended to counsel the girl to dress warmly in cold weather. The next, a feminist poet, is sure that the command was to avoid putting herself under the power of a man; always be, metaphorically, in the driver's seat. Still another, an elderly socialite, sees chewing gum in public as obviously the command-worthy dereliction, especially when combined with more makeup than just a touch of blush. A police officer confidently opines that the mother was concerned about her daughter's taking rides from strangers. The street-wise friend sees none of that: the mother was clearly warning her daughter not to get sucked into a life of prostitution. Each saw a theme, a piece, or a deep meaning in the story that suggested the sound lesson to be taken away. But each lesson had different consequences for the girl's later life.

* * *

And so it has been for the courts, widely admonished, and apparently all agreed, that they should not repeat the mistake of *Lochner*, but not necessarily having the tools to determine what exactly the admonition means in their quest for a "good life" for the Constitution. What we know is that, in 1905, the Supreme Court invalidated, under the Due Process Clause, a state law limiting the working hours of bakers.[1] It held that, because the law was not justified by a valid public purpose such as health, it exceeded the police power of the state and consequently caused an unreasonable interference with the

[1] Lochner v. New York, 198 U.S. 45 (1905).

right of the individual to his personal liberty. At some later time, this holding came to be understood as incorrect, and an ethereal consensus developed indicting the opinion for serious judicial transgression. Over time, a kind of paralysis has ensued. Fears of repeating the unstated mistakes divert constitutional discourse to arguments about whether or not a certain position is "*Lochner*ian," without encouraging substantive engagement on what that should mean from a normative point of view. Thus, the opportunity to realize the full potential of a robust constitutional theory, self-consciously built on selected foundations of what has gone before, has been diminished.[2] Many sense this loss, and have responded. Even now, much scholarly effort is devoted to determining what "really" happened in and around *Lochner*, just as the girl in the story sought to find out what really happened on that night so important to her. While those efforts have been valuable in enriching some common understandings of collective experience, they fall short of answering the question at the heart of constitutional theory for so many decades and still today: what did we condemn when we repudiated *Lochner*? As long as we allow that question to remain beyond the bounds of critical discussion, we will deny ourselves the opportunity to participate in the construction of our Constitution going forward.

A. What Did We Condemn When We Repudiated *Lochner*?

That inquiry is even more elusive than most questions in law, due to a confluence of several coincidental factors. First, the Supreme Court's decision was quite bare in its analysis and reasoning, lending itself to being supplied with any number of personas by diverse readers. The stinging accusation of Justice Holmes's trenchant dissent only adds

[2] *See* Gary D. Rowe, Lochner *Revisionism Revisited*, 24 L. & SOC. INQUIRY 221, 235 (1999) ("the orthodox New Deal position rendered the protection of individual rights a suspect judicial activity").

to the interpretative opportunities. Not only is his critique subject, like any dissent, to debate about whether it accurately describes the majority's reasoning, but it adds the further dimension of being, itself, subject to interpretation.[3] *Lochner* provides plenty of fodder for hermeneutics.

Moreover, despite its brevity, the opinion entailed several different jurisprudential features, any one or combination of which could conceivably provide a defensible basis for overruling. So it is that *Lochner* could be thought to stand for, broadly or narrowly understood, judicial enforcement of rights, judicial enforcement of rights not explicitly listed in the Constitution, judicial recognition of natural rights, judicial protection of economic rights, judicial activism, judicial ideological bias, judicial skepticism of interest-group influence in legislation; artificial definition of state neutrality; or an unreasonably parsimonious definition of police power, among others.

Second, while discredited, *Lochner* was never explicitly overruled. This means that the scope and justification of the rejection of *Lochner* have never been definitively fleshed out by a court in the setting of a concrete legal issue with an explicit discussion to

[3] *See generally* G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 88 (1997). I am intrigued, for example, by the possibility that Justice Holmes did not necessarily mean to suggest that the Court was improperly resolving a constitutional dispute by favoring a contested tenet of economic theory, as most readers of his dissenting opinion believe. It is at least possible that when Justice Holmes said that the Constitution "does not enact Mr. Herbert Spencer's Social Statics" he was referring to the substance, rather than the mere symbolism, of that book. In the Social Statics, Spencer defends the claim that regulation of private economic relations is categorically *never* in the interest of the common good. HERBERT SPENCER, SOCIAL STATICS: OR, THE CONDITIONS OF HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED 121 (1851) (arguing that "[e]very man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man). If the Court had indeed acted on that view, it would have arguably been abdicating its duty to make the required constitutional judgment, in this case, about whether New York's law had been passed for the common good and thus had fallen within its police powers. This approach would have meant a codification of Spencer's preemptive principle that no such law could ever satisfy a public-good requirement, such that the Constitution would automatically ban any such regulatory measure categorically.` This would, indeed, be a constitutionalization of Mr. Herbert Spencer, importing a presumption from a controversial theory as a substitute for the required constitutional inquiry. This reading of Holmes's critique might support a theory that the mistake of *Lochner* was failure to engage in a meaningful examination of what the common good actually entails. Other decisions of the period cast serious doubt on the accuracy of this characterization of the majority's position, but that does not resolve whether Justice Holmes intended that characterization.

shed light on what it was rejecting and why. Indeed, because no case embodies the idea that the rejection of *Lochner* came to represent, even discussing that idea entails an act of reification that complicates honest debate. Scholars talk about the rejection of *Lochner* as an "image,"[4] a "mythology,"[5] a "hypnotic fascination"[6]—all quite strange portrayals of a dominant jurisprudential mandate within a formal legal culture. Out of need for some way to discuss this potent specter, in this essay I will take the bold step of giving it a name, referring to the discrediting of *Lochner* as the Repudiation.

By that term I mean the doctrinal shift on the Supreme Court that began permitting regulation of economic relations in 1937,[7] as well as the aura surrounding that doctrinal shift. Describing that aura accurately is a difficult task. Generally, the Repudiation is understood to have declared that what the Court in *Lochner* did was triply wrong: (A) it was incorrect as constitutional doctrine; (B) it was illegitimate as judicial behavior; and (C) it was fueled by inappropriate motivations. Although separable, the three prongs of this devil's trident are not unrelated. The doctrinal error lay in recognizing a right to liberty of contract not specified in the text of the Constitution.[8] The illegitimacy charge is the most complicated of the attacks on *Lochner*. Depending on the critic, the decision was illegitimate (not simply wrong) because the Court exceeded the proper scope of judicial authority by placing itself into the role of legislator

[4] JAMES W. ELY JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at 1 (1995).
[5] White, *supra* note 3, at 88.
[6] Felice Batlan, *A Reevaluation of the New York Court of Appeals: The Home, the Market, and Labor,* 27 L. & SOC. INQUIRY 489, 492 (2002).
[7] *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (sustaining state minimum-wage statute against a constitutional claim based on liberty of contract); United States v. Carolene Products, 304 U.S. 144 (1938) (sustaining federal prohibition as against a due-process challenge by recognizing a presumption in favor of the constitutionality of regulation where basis for law is "at least debatable").
[8] *See* PAUL KENS, JUSTICE STEPHEN FIELD 6 (1997) ("The Court's critics claimed that judges had constructed these theories from thin air, that liberty of contract and substantive due process were not based on the words of the Constitution.").

or policy-maker,[9] or because the content of the rights recognized under the Court's due process formulations was too "meaningless and circular" to be applied in a principled manner.[10] Another version of the illegitimacy critique puts activism at the top of the list of sins, either alone or in combination with other features of *Lochner*, such as lack of firm textual basis or activism based on what might be said to be legislative, rather than judicial, judgments. The critique from motivation attributes the errors of doctrine and legitimacy to the Court's reactionary resistance to progressive "social legislation designed to relieve inequalities in the industrial marketplace." [11] Perhaps the most damning of all, this charge brands the justices as unprincipled ideologues who turned their policy preferences into constitutional law.[12]

Finally, the turbulence of the times—the *Lochner* era and subsequent radical transformation of the social order culminating in the New Deal—rendered the intellectual territory fraught with incentives for political advocates to enlist the decision in aid of their various competing causes. Justice Holmes's dissent provided a powerful critique

---

[9] *See* HERBERT CROLY, PROGRESSIVE DEMOCRACY 137-40 (1914) (accusing courts of usurping the policymaking role of legislatures through their interpretation of due process).

[10] *See* Albert M. Kales, *"Due Process," The Inarticulate Major Premise and the Adamson Act*, 26 YALE L.J. 519, 526 (1917); EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 11-38 (1908) (arguing that several constitutional clauses, including due process, had been interpreted so as to give Court complete discretion to decide cases based on what they thought was the best policy outcome).

[11] White, *supra* note 3, at 124.

[12] *See* Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 545-46 (1924) (arguing that due process does nothing more than reflect policy preferences of judges). For more recent characterizations of this critique, *see e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 NYU L. REV. 1383, 1385 (2001) (describing conventional understanding that courts who "substitute their own view of desirable social policy for that of elected officials often are said to *Lochner*ize"); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 1 (1993) (describing "common wisdom" that the 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"); James Ely, supra note 4, at 1 (critically describing accepted image, "fixed by Progressives, of a bench single-mindedly devoted to safeguarding corporate interests"); David E. Bernstein, Lochner*'s Legacy's Legacy*, 82 TEX. L. REV. 1, 3-5 (describing traditional view that *Lochner* reflected "the Justices' personal ideological biases").

from within, which made this particular decision an apt target for critique from without.[13] Thus, some attribute the construction of the Repudiation to the deliberate efforts of those seeking particular political ends.[14] The especially fertile ground for opportunistic characterization, with its blurring of the lines between advocacy and scholarship—a natural feature of an era in flux—makes it all the more difficult to attach any fixed, durable, or universal meaning to the Repudiation. Together, all these attributes of the *Lochner* case conspire to obscure for later readers the answer to the critical question, what did we condemn when we repudiated *Lochner*?

The problem is even more acute because the record has never completely clarified *who* repudiated *Lochner*. Of course, Supreme Court cases indicate rejection of some of its doctrinal aspects.[15] But if repudiating *Lochner* carries the much larger gravamen of calling into question an entire belief system about the role of the Court and the place of individual rights in a constitutional democracy, then the Repudiation cannot be laid at the feet of the New Deal Court itself. The mythic status of *Lochner* as the embodiment of all that is wrong with judicial review or judicial enforcement of rights, or recognition of rights under the Liberty Clause, did not arise ineluctably from any decisions of the Court. Those responsible for the Repudiation must, then, include people other than the Court—

---

[13] OWEN FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 7 (1993).

[14] James Ely, for example, suggests 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." James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 953, 967 (1998).

[15] West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage for women), is usually credited with this feat, although one could place the shift a bit earlier. *See* Nebbia v. New York, 291 U.S. 502 (1934) (upholding state milk-pricing law as against a due-process challenge, because individual liberty must yield to public need where interference is neither unnecessary nor unwarranted). *Nebbia*, addressing laws passed in the heart of the Depression, was the first opinion to acknowledge the fluid, as opposed to categorical, nature of "public good" and thus to assume a more deferential posture toward legislative judgments about what was needed to cure the economic ills facing the nation. It voiced nearly the same constitutional principle that had guided the *Lochner* Court—that due process requires a "real and substantial" relation between the regulatory interference and the public good—but animated that test with a new deference toward legislative judgments about what is needed. *Id*. at 536.

scholars, commentators, perhaps politicians, maybe even people at large.[16] What a strange source for an iconic principle of constitutional law!

Nor is it clear *when* the decision took on this laden meaning. There is evidence that, following *Lochner* and some similar decisions, voices were raised in the political realm against the Court's reactionary obstruction of legislative reform.[17] Such sentiments, mostly unembellished accusations of class bias and remoteness from popular will, can be found expressed throughout the period leading up to 1937.[18] When the Court changed course in 1937, it did not offer much in the way of Repudiation constitutional theory, and even purported to adhere, to some degree, to prior constitutional principles in deciding the new cases.[19] The only place we can find such theory is in the writings of various prominent academics and judges who pressed the case against *Lochner* in their articles.[20] Edward Corwin was one of the most prominent and outspoken critics of the

---

[16] Barry Friedman refers to the architects of the conventional wisdom about *Lochner* as "commentators," "observers," "contemporary critics," and even "general public." *See* Friedman, *supra* note 12, at 1388-1404. The sources he uses to establish the widely held view include some law review articles, newspaper articles, congressional record excerpts, and various quotes from politicians, state judges, and other assorted persons. The hermeneutic problem is not resolved, however, because one who seeks to define and analyze the Repudiation searches in vain for a comprehensive exposition of the jurisprudential position that it propounds. It seems more plausible to look to the academic writings of the anti-*Lochner* scholars who later celebrated the Court's change of course. Indeed, if anyone can fairly be said to have articulated the position that later became the dominant view, it would be these scholars.

[17] *See* Friedman, *supra* note 12, at 1436-47 (describing criticism, mostly in popular press, of the Court for failure to defer to legislatures during post-Lochner period); FISS, supra note 13, at 6-8 (discussing critiques of the Court in the post-*Lochner* period).

[18] Roscoe Pound, for one, noted that the inevitable time lag between public opinion and law was a source of frustration for the people. While this is not a condemnation of *Lochner*, per se, it is one voice in the chorus that ultimately led to the Supreme Court's more deferential view of the Due Process Clause. *See* 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 AM. JUDICATURE SOC'Y 54, 56 (1962).

[19] *See* West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937) (reaffirming prior rule that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process," while giving new leeway to states on what might be reasonable).

[20] *See, e.g.*, Felix Frankfurter, *The Red Terror of Judicial Reform*, 40 NEW REPUBLIC 110, 112 (1924), *reprinted in* FELIX FRANKFURTER, LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1938, at 10-13 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1939) (arguing against the Court's jurisprudence under the Due Process Clause); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 508 (1907-1908) (arguing that legislatures must be permitted to experiment in search for public good, as the branch that is representative). One 1910 Progressive account sometimes

Lochner approach. His special focus was on the indeterminacy (and consequent subjectivity) of the rights-based concepts that the Court had recognized. Observing the development of the link between validity under the Due Process Clause and a "reasonable relation to the public good," Corwin argued that this balance (later referred to by Justice Cardozo as "ordered liberty"[21]) could permit any result. "The Court had thus rendered the substance of the 'right' of substantive due process completely malleable, depending on whether it was inclined to emphasize the importance of liberty or the reasonableness of the legislation."[22] Corwin's profound rights-skepticism led him to criticize even Justice Holmes, who, he claimed, had conceded too much in *Lochner* by not protesting the basic idea that the *making*, as opposed to the *enforcement*, of a law could ever possibly raise due process concerns.[23]

Perhaps it was Corwin's work that we embraced when we accepted the Repudiation. But perhaps it was the theory propounded by someone else. Commager, for example, had a different theory for the error of *Lochner*. By his lights, the imputation of substantive limits on legislatures through the Due Process Clause was counter-productive for the cause of rights, because legislatures had generally been more friendly to the protection of individual rights than had courts, an almost instrumental objection to

---

cited as a source of Repudiation theory, on careful reading, actually undertakes a very pro-individual rights critique of the labor cases, suggesting that the real problem with these cases was that they put the courts in the position of having to second-guess legislative factual findings regarding public need, when the quickly changing nature of society called for a more nimble method for assessing that need. A greater presumption in favor of legislative findings, he suggested, would be salutary to the cause of individual rights. Ernst Freund, *Constitutional Limitations and Labor Legislation*, 4 ILL. L. REV. 609, 621-23 (1910). While critical of the *Lochner* holding, that is hardly an articulation of the rights-skeptical, or anti-judicial-review position attributed to the Repudiation.

[21] *See* Palko v. Conecticut, 302 U.S. 319, 325 (1937); *see also* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[22] John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1783 (1998).

[23] Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 670 (1909).

the *Lochner* approach.[24] Yet another objection to *Lochner* lay in its apparently formalist adherence to a "jurisprudence of conceptions," such as the conception of liberty of contract, which, when invoked without reference to its practical operations, "defeat[s] liberty."[25]

Judging from these examples, it would not be right to conclude, for instance, that the Repudiation necessarily represented skepticism about the idea of rights as such. Yet that has been one of its instantiations. Corwin's absolute rejection of any application of due process standards to the making of laws would also be an overstatement of the Repudiation, judging at least from the Court's own approach. Even in *West Coast Hotel v. Parrish*, the Court did not disavow the conception of due process as applicable to the content of law, as Corwin advocated. The Court nominally adhered to the substantive rule, albeit with a radically different inflection, when it affirmed the definition of due process as "regulation which is reasonable in relation to its subject and is adopted in the interests of the community."[26] Upon finding a reasonable relation between the law and the common good, the Court upheld the statute, thus departing from the burden-shifting aspect of the *Lochner* opinion, but not from that aspect of *Lochner* that held law to at least a nominally substantive standard of non-arbitrariness and rationality under the Due Process Clause.

It is a challenge, therefore, to identify a version of the Repudiation of *Lochner* that could be thought to be in any way authoritative as an understanding of the constitutional role of the courts. At the time of the about-face in constitutional doctrine, there was some celebration among progressives for the triumph of their legislative

[24] *See* HENRY STEELE COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 43-56 (1943).
[25] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615-16 (1908).
[26] West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937).

agenda,[27] but at that time it was unknown what conception of the Constitution had triumphed, as the mythical status of the Repudiation had not yet taken shape. Its contours, even after 1938, were not clear.[28]

B. From Case to Epithet

The period between 1938 and 1965 is the most likely source for the views that eventually became the full-fledged orthodoxy of Repudiation. During that period, constitutional theory was struggling to find itself, impaled on the horns of a dilemma resulting from a concern that if *Lochner* was wrong then *Brown v. Board of Education*,[29] also activist, might also have to be considered wrong.[30] In the effort to grapple with these conflicting intuitions, the scholarly community appears to have moved in the direction of vilifying, not just rejecting, the *Lochner* approach, perhaps to create some safe distance from *Brown*.[31] Different interpretations emerged on what had been left behind in 1937. Some stressed the lesson of humility for the Court, restraining itself from the temptation to act as a super-legislature for the nation.[32] Others began to see the lesson of 1937 as the rejection of the "wrong" kind of activism, protecting the wrong kind of rights, but leaving room for robust enforcement of other rights. The newly-emphasized countermajoritarian difficulty entailed in judicial review gained resonance in this period and, together with the quest for neutral principles in decisionmaking,

---

[27] *See* CORWIN, CONSTITUTIONAL REVOLUTION LTD., *supra* note 10, at 112-17 (celebrating the Supreme Court's abandonment of the approach that dominated the *Lochner* era).
[28] *See* FISS, *supra* note 13, at 9 ("the so-called settlement of 1937 remained unquestioned" for almost two decades).
[29] 347 U.S. 483 (1954).
[30] *Id*. at 12 ("the familiar lawyerly arguments used to distinguish the activism of *Brown* and *Lochner* collapsed").
[31] *See* Morton Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 HARV. CIV. RTS-CIV. LIB. L. REV. 599, 602 (1979); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 65-66 (1991) (noting that modern lawyers feel the need to vilify *Lochner* in order to legitimate the modern activist state).
[32] *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 19-20 (1996) (quoting Frankfurter).

contributed to a conception of *Lochner* as the symbol for the judicial evil of failing to achieve decisions that transcend results.[33]

Significantly, the use of *Lochner* as an accusation among the justices does not appear in Supreme Court opinions until 1965, nearly three decades after the doctrinal Repudiation. By then, the fuller Repudiation story had gelled, but even when used pointedly by dissenting justices against majority opinions, the snipe did not always have clear or uniform meaning. When, in 1965, Justice Black accused the *Griswold* majority of following *Lochner*, for example, he meant a "natural law due process philosophy" that he utterly rejected.[34] The following year, in the case invalidating the poll tax on equal protection grounds, dissenting Justices Harlan and Stewart suggested the syllogism that as due process is to laissez-faire, so is equal protection to "unrestrained egalitarianism"[35]—a clear reference to *Lochner*ism. For them, the salient part of the Repudiation story was apparently the rejection of all kinds of broad-based ideological interpretations of the Constitution. For the dissenters in the First Amendment case of *Tinker* in 1968, *Lochner* symbolized the invalidation of laws the justices thought unwise.[36] Thus, they jabbed, because the majority's invalidation of a school's ban on black arm-band protests against the Vietnam War amounted to no more than its policy disagreement about the prohibited practice, they equated the holding to *Lochner*ism. The dissent in *In re Winship*, which required the beyond-a-reasonable-doubt standard in

[33] *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 9, 11-12 (1959) (noting that if a judgment turns on the immediate result, courts are free to become a "naked power organ," a critique reminiscent of, while not mentioning, *Lochner*).
[34] Griswold v. Connecticut, 381 U.S. 479, 515 (1965) (Black, J., dissenting).
[35] Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 686 (1966) (Harlan & Stewart, JJ., dissenting).
[36] *See* Tinker v. Des Moines Independent Comm. Sch. Dist., 393 U.S. 503, 524 (1969) (Harlan, J., dissenting).

criminal cases,[37] looked to the repudiation of *Lochner* as support for the claim that the Court had rejected all substantive protection under the Due Process Clause. The list goes on, as dissenters more frequently began accusing majorities of repeating the sins of *Lochner*, but in a variety of sometimes surprising ways.[38] Whether the respective majorities, so accused, can fairly be read to have rejected their dissenters' proffered readings of the Repudiation is not obvious. The Repudiation, therefore, remains an amorphous constraint, never squarely defined as authoritative command.

Still, like a black hole, the invisible Repudiation has caused powerful and perceptible effects on decisions of the Court.[39] In *Griswold v. Connecticut*,[40] for example, the Court, for the first time since the Repudiation, appeared uncomfortable with what appeared to be its implications. If taken to the limits of its claim, the Repudiation could be understood to mean that courts simply have no business enforcing rights that are not clearly specified in the text of the Bill of Rights. To do so, indeed, had been suggested by some to be the absolute nadir of judicial responsibility.[41] Courts, the theory went, should allow legislatures the broadest leeway in their own regulatory affairs, limited by only the loosest obligation of rationality.[42] Eventually, however, as luck

---

[37] 397 U.S. 358, 359-61 (1970).
[38] So far, the list has grown to 49. For a few examples, *see, e.g.*, Lawrence v. Texas, 539 U.S. 558, 535 (2003) (Scalia, J., dissenting) (comparing majority's invalidation of sodomy law under Due Process Clause to *Lochner*'s invalidation of maximum-hours law for bakers); College Sav. Bank v. Florida Prepaid Post Secondary Educ. Expense Bd., 527 U.S. 666 (1999) (Breyer, J., dissenting) (same for majority's recognition of sovereign immunity under eleventh amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (same); United States v. Lopez, 514 U.S. 549, 605, 06 (1995) (Souter, J., dissenting) (same for majority's invalidation of gun control law under commerce clause); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 424-25 (1996) (Souter, J., dissenting) (same for majority's invalidation of solid waste ordinance under dormant commerce clause).
[39] One account describes the avoidance of *Lochner*'s error as the "central obsession, the (oftentimes articulate) major premise, of contemporary constitutional law." Rowe, *supra* note 2, at 223.
[40] 381 U.S. 479 (1965).
[41] *See* LEARNED HAND, THE BILL OF RIGHTS 70 (1958).
[42] *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws").

would have it, the Court was presented with a state law that pushed the limits of the Court's willingness to defer to legislative policies, a prohibition on the use of contraceptives by married couples.[43] If it felt obliged to strike down the law, the Court faced a dilemma. Either disavow the Repudiation and be accused of *Lochner*ism, a formidable assault, or find a way to reshape the Repudiation so as to distinguish the case at bar from its reach. The horror of the first option, along with the malleability of the unwritten Repudiation, made the second option the more palatable, I suspect.

And reshape Justice Douglas did. His opinion for the majority sought to insulate the decision in *Griswold* from an attack of *Lochner*ism in two important ways. First, he grounded the right of privacy in different textual sources from that on which the Court relied in *Lochner*.[44] This defended it from those who might understand the Repudiation only as a renunciation of enforceable rights to individual liberty under the Due Process Clause. For those who might have a more capacious understanding of the Repudiation, such that unstated rights should not be protected by courts at all, he offered his own revision of the Repudiation message. Thus, he justified protection of *this* right on the ground that it was qualitatively a different kind of liberty from that protected in *Lochner*. The privacy right at issue in *Griswold* deserved special status because of the personal and private nature of the right, in contrast to the mere economic right illegitimately protected in *Lochner*.[45] To support this qualitative distinction between classes of liberty, he

---

[43] Griswold v. Connecticut, 381 U.S. 479 (1965) (Black, J., dissenting).

[44] The right protected in *Lochner* resided in the liberty protected by the Due Process Clause, while the right that the Court recognized in *Griswold* was grounded in the penumbras of enumerated rights, employing the Fourteenth Amendment's Due Process Clause only for purposes of incorporating the Bill of Rights. *Id*. at 482-486.

[45] *See id.* at 481-82. Indeed, Justice Douglas went so far as to make his disavowal explicitly in orthodox Repudiation terms, declaring that "[o]vertones of some arguments suggest that *Lochner v. New York* … should be our guide. But we decline that invitation as we did in *West Coast Hotel v. Parrish* …. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic

cleverly resurrected two *Lochner*-era precedents, *Meyer v. Nebraska* from 1923,[46] and *Pierce v. Society of Sisters* from 1925.[47] These cases had recognized substantive rights under the Due Process Clause, and thus, perhaps, might have been assumed to have been discredited along with *Lochner*. But Justice Douglas relied on them as good law on the ground that the rights protected there (which he inaccurately located in the First Amendment) were ostensibly closer to an individual right of privacy than to an economic right.[48]

Curiously, Justice Douglas received from the New Deal Court an unintended boost in his effort to resurrect *Meyer* and *Pierce* after the Repudiation. In the 1938 case perhaps representing the height of New Deal deference to legislative judgment and anti-*Lochner*ian thinking, *United States v. Carolene Products*,[49] the Supreme Court had dropped the famous footnote, in which it acknowledged a possible limit to that deference. In Footnote 4, the Court suggested that the strong presumption of constitutionality might not be available for statutes "directed at particular religious or national or racial minorities,"[50]—the now-classic basis for distinguishing *Lochner*-type activism from

---

problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife…." *Id.*

[46] 262 U.S. 390 (1923).

[47] 268 U.S. 510 (1925).

[48] Even this step took an act of art over nature, in that the two *Lochner*-era cases might reasonably have been read to involve economic rights, just as *Lochner* did. In *Meyer*, the plaintiff was a teacher of the German language who challenged a statute making it illegal to teach German to children. His claim and the Court's decision were both based on his right to pursue a calling, with no mention of the right of parents. Two years later, the operators of a Catholic School challenged a statute requiring all children to attend public school. Here the institutional plaintiffs did raise vicariously the right of parents to choose an appropriate school for their children , and the Court read the earlier case, *Meyer*, to have recognized a "liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-5 (1925). The *Pierce* case itself validated the more commercial right of "business enterprises against interference with the freedom of patrons or customers." *Id*. at 536. Thus, the qualitative categorization of the liberties into two distinct groups to avoid the unfavorable association with *Lochner* was something of a stretch.

[49] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[50] *Id*. at 152, n.4.

judicial review designed to protect against discrimination.[51] The two cases cited by the *Carolene Products* Court as examples of statutes in which this threat to equality might support greater judicial scrutiny were—you guessed it—*Meyer* and *Pierce*. The underlying facts of those cases did, indeed, support an "insular minority" interpretation, because the statutes at issue were inspired, respectively, by anti-German hysteria following World War I,[52] and Ku-Klux Klan-sponsored enmity toward the Catholic Church,[53] although those motivations were not noted by the deciding Court in either case. The New Deal Court rescued these two *Lochner*-era cases from the Repudiation by interpreting them as equality, not liberty or due process, cases—even though they had been decided as liberty cases under the Due Process Clause and the decisions had relied explicitly on *Lochner* as authority. When Justice Douglas later cited them in *Griswold*, therefore, he was relying on cases that had received an authoritative reprieve from the Court, albeit on a different rationale from the one he advanced. Having started life as economic liberty cases, then having survived the New Deal transition disguised in the garb of equality, *Meyer* and *Pierce* passed briefly through an incarnation as exemplars of freedom of thought, and eventually would live on as tributes to the special importance of familial rights under a "fundamental liberty" approach.[54]

Thus was born the fragmentation of the Liberty Clause, creating protection for a few rights deemed to be qualitatively "fundamental," while relegating all others to the

---

[51] JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
[52] WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927, at 73-114 (1994).
[53] *Id.* at 148-73.
[54] This interpretation was later ratified by the Supreme Court. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (characterizing *Meyer* and *Pierce* as recognizing liberties related to "child rearing and education"); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 501 & n.8 (1977) (distinguishing *Meyer* and *Pierce* from *Lochner* on the ground that they were built on "what has survived"); Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 743 (1989) (referring to *Meyer* and *Pierce* as among the "true parents of the privacy doctrine").

status of "ordinary," to be enjoyed at the sufferance of legislative grace. This approach was not an auspicious beginning for the protection of individual liberty, which has been struggling ever since to find an appropriate textual home and theoretical foundation,[55] but it masked the resemblance to *Lochner* at least enough to get a majority.[56] The story of the Repudiation, trimmed a little at the edges, survived.

C. The Role of "Revisionism"[57]

To document the amorphous source and contours of the Repudiation is not, by any means, to suggest that it was unimportant or imagined. To the contrary, the elusive origins and scope of this pillar of constitutional belief probably contributed to its salience and especially to its remarkable immunity to criticism. Usually, when the Supreme Court directly overrules one of its prior decisions, it focuses on the aspects of the prior decision that it views as wrong, and offers grounds to justify its change of course. It tends to address, on the merits, the relevant issues leading it to its disapproving posture. If later courts or scholars wish to challenge the overruling decision, they have a clear target, either on the merits or on the institutional role that the Court assumed in ruling as it did, or both. Take *Plessy v. Ferguson*, for example.[58] In *Brown v. Board of Education*, the Supreme Court examined and expressly rejected certain aspects of the earlier case for reasons explained in the opinion. Academics or subsequent Courts were then free to

---

[55] *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 NYU L. REV. 1491, 1502–05 (2002)(discussing how "fundamental rights" approach to liberty has facilitated a parsimonious protection of rights). The Court finally acknowledged the Liberty Clause of the Fourteenth Amendment as the source of protected rights in 1992. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

[56] But not to avoid condemnation. *See* Griswold v. Connecticut, 381 U.S. 479, 529 (1965) (Black, J., dissenting). (accusing majority of repeating the mistakes of *Lochner* by adopting "natural law due process philosophy").

[57] I use the word "revisionism" reluctantly, because its reductionist tone does not accurately capture the project of those who seek to reopen the issues raised by *Lochner* and its Repudiation. As this appears to be its common usage, however, I bow to convention.

[58] 163 U.S. 537 (1896).

attack *Brown* for its rejection of *Plessy*, along any of several possible lines. The *Brown* Court could be accused of reading *Plessy* incorrectly, of being wrong on what the Equal Protection Clause requires, such that the critic could defend *Plessy* directly, or on the Supreme Court's legitimacy in deciding the later case as it did. Indeed, *Brown* received a number of such criticisms.[59] This process of proposition and counter-proposition between Court and commentary is a dynamic that allows for progress in the evolution of constitutional law. Ultimately, stability is achieved as the critiques die down, or perhaps they arise again in another era,[60] but the organic development of doctrine proceeds.

In the profoundly important case of *Lochner*, however, the corpse did not receive the proper burial that a formal overruling supplies. There was no decision containing the essential features of the Repudiation as it came to be understood. That is, no subsequent Court examined the *Lochner* decision, set forth its reading of what the earlier Court had done, and explained what change of course would require that the case be overruled. In important respects, the New Deal position, which cast such doubt on the judicial protection of individual rights, was "at bottom devoid of a legitimating theory."[61] Nonetheless, that did not keep the Repudiation, with the broader meaning that came to attend it, from acquiring extremely powerful force in (or behind) judicial opinions and in academic writing, despite its incorporeal status.[62] Yet, this ethereal quality presents a

[59] There was even speculation about whether any of *Plessy* remained, due to the Court's failure to overrule it explicitly. *See* KALMAN, *supra* note 31, at 27-28. But the discredited decision still got more discussion than did *Lochner*.

[60] Justice Rehnquist threatened this when The Court overruled *National League of Cities v. Usery*. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court").

[61] Rowe, *supra* note 2, at 235.

[62] *See* Robert Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1494 (1998) ("The ghost of *Lochner* has haunted efforts at aggressive judicial protection of

serious difficulty to subsequent theorists who wish to question prior assumptions or contribute to a development of constitutional doctrine and theory over succeeding generations. Consider the options confronting later scholars or Courts who wish to reconsider the Repudiation, either in whole or in part. What can or should they do?

It is significant that, when later scholars began to reach a point at which they were ready to suggest that the Repudiation of *Lochner* may need rethinking, they did not attack the Repudiation directly. Instead, they went all the way back to the *Lochner* opinion itself, and began to offer reconstructions of what the Court might be understood to have done in that case.[63] It is not obvious why the *Lochner* opinion would be thought to be an effective target of this revisionary inquiry. Seemingly, there is little to be gained by challenging the orthodox story about what led the Court in *Lochner* to do what it did.

To tell a new story about *Lochner* is not useful until one has successfully thrown off the mantle of the Repudiation and has begun a new task of constructing a more defensible theory for judicial behavior going forward. But it takes something more than the retelling of the *Lochner* story to provide a plausible means for removing that mantle in the first place. As long as the Repudiation retains its presumptive authority, the Repudiation command remains what it is, even if proven to be based on a false or debatable reading of *Lochner* itself.

Thus, one might expect a wave of *West Coast Hotel* revisionism,,or attacks on the New Deal cases, rather than *Lochner* revisionism. Although there has certainly been voluminous history written about the New Deal era, it has largely not been explicitly

---

constitutional rights since the New Deal, even when such protection has been informed by a liberal agenda as in the days of the Warren Court.").

[63] *See, e.g.*, Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 893 (1987).

revisionist or critical in the sense used by constitutional theorists.[64] That scholarship tends to explain the roots and mission of the Legal Realist and Progressive schools of thought that fueled the Repudiation, and the political and social forces that came together to make the New Deal a reality. Those who wish to question the Repudiation, however, tend to go back to *Lochner* itself. Indeed, the return to *Lochner* has risen to what has been called, perhaps uncharitably, a "cottage industry."[65]

Some think this approach misses the point or worse, because it ignores evidence of what the Repudiators meant, or what contemporary observers understood, by the Repudiation.[66] But that critique seems both unfair and misguided. Unfair, because, after all, we do not have a solid target at which to direct criticism of the Repudiation. Taking aim at the Repudiation is like shooting at a ghost. We do not even know who the original Repudiators should be understood to be, let alone those who contributed to the Repudiation's metamorphoses over the ensuing decades. To attack the "true" meaning of the Repudiation is a more elusive originalist quest than seeking the intent of the founders of the Constitution, in some ways. At least there, a written product emerged from an engaged discussion of many of the underlying issues. For the Repudiation, all we have is an orthodoxy, not enshrined in any particular written record, that somewhere along the way acquired a death grip on all of constitutional theory and would not let go, continuing

---

[64] *See, e.g.*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (offering a revisionist account of the reasons for the New Deal decisions, but without criticizing their implications for constitutional law going forward); ACKERMAN, *supra* note 30, at 64-66 (advancing a revisionist account of the meaning of the New Deal, but still emphasizing that it is the reading of *Lochner* itself that has consequences for present-day constitutional law).

[65] Bernstein, *supra* note 12, at 8.

[66] *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three*: *The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1447 (2001) (criticizing the revisionist project in its entirety because, although it "unquestionably fills out our understanding of what happened to constitutional law at the beginning of the last century," "revisionists go astray" when they seek "to correct something distorted by the conventional story").

"to suck the lifeblood out of constitutional law."[67] It should not be immune to revision or criticism merely because it did not become word.

More importantly, the criticism is misguided. Like originalism in constitutional interpretation itself, this argument against revisionist *Lochner* scholarship relies on a faulty premise about the source of constitutional authority. It implies a command theory, according to which later generations have the obligation to do the best they can to understand the commands of prior generations and to follow them. If the task of current constitutional scholars were merely to understand with some degree of historical accuracy what the authors of the Repudiation collectively meant by it, then it would be true that seeking deeper or different understandings of the problem presented in *Lochner* would not be of interest.

But the persistence of scholars, both historians and theorists, in revisiting *Lochner* itself despite this obvious logical flaw, is profoundly instructive. It suggests commitment to a theory of constitutional law that is not confined to interpreting the original or true meaning of a long-ago authoritative command.[68] Rather than seeking to find out what the authors of our authoritative commands really meant, their efforts suggest they conceive of their project much more in the Hercules[69] mode, that of constructing the best of what our constitutional traditions can support, with a goal of going forward with integrity and coherence. Because the goal is not the originalist, command-driven goal of finding the true meaning of the Repudiation, the project can be more comprehensive, logically

---

[67] Rowe, *supra* note 2, at 250.
[68] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 878–79, 885–90 (1996) (arguing that our system of constitutional law rejects the Austinian tradition that sees law as a command of a sovereign, and accepts instead a source of authority "in understandings that evolve over time").
[69] In the Dworkinian sense. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105–30 (1977) (describing method by which a judge identifies and applies principle by using history and judgment).

encompassing both the vertical historical inquiries, looking back to the jurisprudential roots of the *Lochner* decision, and the horizontal analyses of the period, other case law, and intellectual dynamics influencing the thought of that time and since. The revisionist inquiry seeks an opportunity to rethink the Repudiation in the way that courts traditionally approach important issues of constitutional judgment, in light of history, principle, and precedent. The quirky features of this unique authority make it difficult to reconsider directly, without first having cleared away the obstacles—the myths, the ghosts, the elusive interments—before engaging in the enduring quest to achieve, through judicial review, an appropriate balance between individual liberty and the common good.[70] This is the art of reading *Lochner*.

Because history is the means that many have employed to disarm the mystique, most of the battles among those who would rethink *Lochner* and its Repudiation have taken place with at least one foot on the battleground of history, *Lochner*'s history. As one significant contributor to this project, Howard Gillman, explained, his historical undertaking sought to remove from conservatives "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."[71]

The resulting literature has been hugely edifying. The quest has produced rigorous and incisive work drawing out a complex tapestry of threads and strands of political and constitutional thought in the ages preceding *Lochner*, whose traces might be discerned in the case. The revisionist historians have contributed enormously to the richness of knowledge about constitutional traditions, illuminating in particular the ways

[70] *See* Rowe *supra* note 2, at 250 (describes revisionist "signal achievement" as "laying the groundwork for a new set of approaches to problems of American constitutionalism").
[71] HOWARD GILLMAN, THE CONSTITUTION BESIEGED 205 (1993).

in which commitments to equality and liberty have emerged in unexpected and complex ways through decades of jurisprudence and social ordering. Tracing different roots of the multifaceted *Lochner* problem, different scholars emphasize different themes from the history and jurisprudence leading up to and following *Lochner*. What they seem to share, however, is a commitment to bringing an intellectual coherence to the *Lochner* decision and other cases of the period that has heretofore been denied to them. The possibility that *Lochner* may not have been "wrong," in the way that is conventionally understood, is an important first step toward escape.

But it also explains why history cannot be the end of the pursuit. To read *Lochner* is an art, it is not data recovery. History cannot answer the question of what the Repudiation should be taken to mean. But it can "prepare us finally to confront the ghost of *Lochner*."[72] Moving past the Repudiation will require the application of normative constitutional theory—taking account of intervening and current experience—to the issue that *Lochner* presents. Instead of attacking opposing points of view as *Lochner*ian, proponents of particular positions should be defending whatever conception of the Constitution their positions imply. This is the project of some of the theorists who are often clumped into a category called *Lochner* revisionists, but whose aim is not to revise the understanding of what happened in *Lochner* so much as to propose a rethinking of the issues and consequences of thinking about those issues in new ways.

Sunstein's early contribution to this debate, "*Lochner*'s Legacy", I take to be just such a piece. The argument, to paraphrase briefly, is that *Lochner* can profitably be read as an exemplar of a particular understanding of state neutrality that gives presumptive status to distributions of wealth and opportunity pre-existing the regulation at issue. This

[72] FISS, *supra* note 13, at 12.

conception of state neutrality, Sunstein argued, although worthy of repudiation, is still pervasive in constitutional law and should cause us to question other decisions that engage in the same questionable assumptions. Other constitutional theorists have argued, in examples of similar types of undertakings, that *Lochner*'s error lay in misunderstanding what liberty requires;[73] in suffering from "an impoverished and inflexible conception of what the common good" entails in an increasingly industrialized society;[74] in failing to see the special need for deference to states on matters of economic policy;[75] and in treating a complex tension between liberty of contract and regulation too simplistically.[76] All of these readings share the common theme of both acknowledging that something in *Lochner* was enough out of step with a strong and shared intuition to give rise to the Repudiation, and seeking to discern what can be salvaged going forward, in keeping with the nation's basic constitutional commitments. While history supplies context for these arguments, the projects sound primarily in constitutional law and theory.[77]

The art of reading *Lochner* to call attention to intuitions, themes, principles, and trends using unconventional interpretations does not deserve wholesale condemnation, but celebration as the beginning of redemption for a discipline badly in need of re-constituting its own relationship with *Lochner*. Legends, myths, and taboos are not the stuff of which constitutional discourse should be made. The great interest that scholars have demonstrated in contributing to the ill-defined discussion is strong evidence that the

[73] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 564 (1978).
[74] *See* Rebecca L. Brown, *Activism is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257, 1268 (2002).
[75] *See* Washington v. Glucksberg, 521 U.S. 702, 760–61 (1997) (Souter, J., concurring).
[76] *See* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 385 (2003).
[77] Thus, critiques based principally on lack of historical support do not fully join issue with these normative claims. *See, e.g.*, Bernstein, *supra* note 12, at 16 & passim (criticizing Lochner*'s Legacy* as unsupported by historical evidence); Friedman, *supra* note 12, at 1447 & passim (criticizing all *Lochner* revisionist theories as being historically wrong).

community of constitutional scholars is ready to have the more honest debate. No doubt some of the Realist-Progressive influence animating the Repudiation will survive, but there is no reason to give that particular movement the last word in this important, indeed core, aspect of our constitutional evolution.

D. Reconstructing Our Constitution

Bits of evidence from the Supreme Court suggest that, over time, it has come to reject some of the possible interpretations of the Repudiation. The continued vitality of some form of substantive protection for liberty under the Due Process Clause is one indication that at least Corwin's version of the anti-*Lochner* position has not prevailed. Moreover, the slow but definite change in the judicially-recognized textual source of individual liberty also shows a move away from the more extreme readings of the Repudiation. No longer is the right to individual liberty perched precariously on a thin branch growing only indirectly out of the Bill of Rights. In 1992, a majority of the Court recognized the Due Process Clause as the direct source of a person's substantive right to individual liberty,[78] and has confirmed that important holding since.[79] But the continued—even accelerating—use of the *Lochner* epithet as an utterly under-theorized criticism of constitutional interpretations shows us that we need to continue the discussion, unshrouded by ghosts of unspecified forebears wielding unstated commands, about the meaning of constitutional liberty.

The different readings of *Lochner* and its mistake have helped to reveal and amplify some of the deep commitments that led to the dispute about *Lochner*. After all, this case sets up a foundational issue for a constitutional democracy—what it means to be

[78] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846-50 (1992).
[79] Lawrence v. Texas, 539 U.S. 558, 573–7 (2003).

a free individual in a self-governing society. It is no wonder such an issue should take on iconic status. Looking at the revisionist *Lochner* scholarship as a whole, two principal groupings are apparent: those that see the problem symbolized by *Lochner* primarily as a question of equality, and those that emphasize our traditions of liberty.

In the first group, for example, I would place the revisionist theories that have tied *Lochner* to the idea of resistance in our constitutional traditions to class legislation, laws that benefit certain subsets of the community but not the community as a whole. Chief among these is Howard Gillman's book, *The Constitution Besieged*. In it, he challenges the aspect of the Repudiation that suggested that *Lochner* came out of nowhere, demonstrating the deep roots in our judicial history that could have led the Court to respond as it did without the attribution of unprincipled or self-interested motivation. This view accords a special palliative purpose to the "public good" requirement developed by the Court under the Due Process Clause. What this requirement does, he argues, is ensure that the legislative process is not hijacked for the benefit of a particular favored group, carrying forward commitments against factional politics and privilege traceable to the founding.[80] There is much language in Supreme Court cases to support this view.[81]

Also in this group is Cass Sunstein's theory about constitutional baselines and *Lochner*'s artificial definition of state neutrality.[82] Morton Horwitz, too, places state neutrality at the heart of the debate about *Lochner*, echoing Gillman's concern about a

---

[80] GILLMAN, *supra* note 70, at 49-50.
[81] *See* Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 WM. & MARY L. REV. 65, 67-81 (1999) (using cases to trace the connection between Gillman's idea of class legislation and evolving recognition of common good and reason-giving under Due Process Clause).
[82] *See* Sunstein, *supra* note 62, at 874-879; *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1717 (1984) (discussing *Lochner* Court's view that maximum-hours law was a naked wealth transfer).

state's favoring of a special interest at the expense of the public good. These ideas, while of course not reducible to a single theme, rest on a core notion of equality.

Others who seek to revisit the meaning of *Lochner* have focused on the idea of liberty as its animating principle. Owen Fiss's book pursues an examination of the social contract tradition, which, he argues, can endow the notion of liberty with coherent meaning in the face of criticism that it is amorphous.[83] Viewed from this perspective, the *Lochner* Court's decisions should be understood to have emphasized limitations on state power for the purpose of protecting liberty.[84] David Bernstein has argued that the *Lochner* justices were committed to preserving the rights they viewed as fundamental, a primarily liberty-based analysis.[85]

This quick review of some of the recent *Lochner* scholarship is a reminder that, whatever we threw out with *Lochner*, we are not ready to give up on longstanding commitments in our constitutional traditions. The error of *Lochner*, however depicted, should not be read to have uprooted our deepest principles of constitutional order. It is no coincidence that the two strains of argument we see represented in the *Lochner* scholarship are the themes of equality and liberty. The historical efforts of revisionist jurisprudence have made very clear how interdependent those two values are. Sometimes scholars appear to be offering competing theories, arguing about which is the stronger impulse. At the margins there can be a difference in emphasis, perhaps. But the *Lochner* issue is what it is because it profoundly implicates both.

---

[83] FISS, *supra* note 13, at 159-165.
[84] *Id.* at 159.
[85] David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 10–13 (2003).

Indeed, that is what makes the *Lochner* issue both so important and so enduring. In a representative democracy, where much power is placed in the hands of lawmakers answerable to many different constituencies, generality of law (an idea sounding in equality) is an essential safeguard for liberty. This explains why *Pierce v. Society of Sisters* and *Meyer v. Nebraska* survived the Repudiation, despite their otherwise discredited recognition of substantive content in due process, their own facts exemplifying better than any hypothetical how threats to equality are threats to liberty, and vice versa.[86] It explains why judicial review limited to representation-reinforcement alone, an effort to use courts in the protection of equality but not liberty, is doomed to under-enforce constitutional justice without some injection of substantive obligations in the duty to represent.[87] *Lochner* has provided a focal point for a discussion of liberty and equality.

Thus understood, the alliterative "*Lochner*," long linked to legacies,[88] lessons,[89] laissez-faire,[90] liberty,[91] and labor law, has a new comrade, propitiously entitled *Lawrence.*.[92] Although thirty years ago a leading scholar complained that "*Lochner* and *Roe* are twins,"[93] the distinction of a strong family resemblance to *Lochner* belongs to *Lawrence*. This observation is cause, not for complaint, but for celebration that the two strands of constitutional justice, liberty and equality, intertwined in *Lochner* and then rent

---

[86] *See* note 52 and accompanying text (noting that both liberty-impairing statutes arose from group prejudices).
[87] *See* Rebecca L. Brown, *Liberty, the New Equality*, *supra* note 55, at 1497-1498. (arguing for a substantive role of representation reinforcement for liberty).
[88] Sunstein, *supra* note 62; Bernstein, *supra* note 12.
[89] Friedman, *supra* note 12.
[90] Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293 (1985).
[91] Well, you get the idea.
[92] *Lawrence*, *supra* note 37. v. Texas. If only it had been Louisiana.
[93] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 940 (1973).

asunder by decades of constitutional angst at the hands of the Repudiation, have been permitted to come together again in the law of the land.

The Court's opinion in *Lawrence* explicitly confirmed the view that the constitutional principles of equality and liberty are "linked in important respects."[94] It even went so far as to affirm that, given a choice between deciding the case on equality grounds and deciding it on liberty grounds, it would opt for the latter approach in order to advance both interests, being concerned that, for doctrinal reasons having to do with the Equal Protection Clause, the former approach might not fully serve both ends. In seeking to advance both principles, the Court considered whether any rationale had been offered to justify the law. Like the *Lochner* Court, the *Lawrence* Court thus voiced (admittedly much less forthrightly) the traditional, equality-based concern that in the absence of a valid state interest, such liberty-impairing legislation could well be a product (as well as a cause[95]) of inappropriate, equality-impairing motivation.[96] As to these vestiges of *Lochner*, the Repudiation has now been well-repudiated.

* * *

Return to the mother-daughter parable that began this essay. Assume that late investigation reveals a startling new fact about the scene that mother and daughter witnessed together. The driver of the car turns out to have been the young woman's own brother, picking her up to go to a costume party, for which she was saucily dressed. Thus, not one of the possible meanings the daughter had been able to derive from her mother's command was based on an accurate assessment of the scene. Does that help? Perhaps, in an effort to escape the uncomfortable legacy of the command, the daughter

[94] Lawrence, *supra* note 37, at 575.
[95] *Id.* at 573-85.
[96] *Id.* at 578.

could now say to herself that, because the woman on the street was doing none of the acts that presumably formed the impetus for the admonition, her transgression, if any, could be interpreted differently, with less constraining effects on the daughter's future life. But that is a highly artificial endeavor. As long as the daughter remains committed to fulfilling her mother's literal command, it would seem strange to modify it to accommodate understandings of the night's events that the mother did not have.

What the daughter must do is reconceive the command as part of an ongoing process by which the mother sought to provide guidance for the daughter in developing and using judgment to construct a good life for herself. The daughter has been given the tools to develop, with the help of her advisors, the building blocks of such a life, freeing herself of the paralysis of self-doubt and reflexive caution.

* * *

The art of reading *Lochner* makes it possible for constitutional scholars to reopen what Owen Fiss has generously called "the settlement of 1937."[97] If the Repudiation ever was settled, it is no longer so. We have the opportunity and the interest to read in *Lochner* what was out of step with the best conception of ordered liberty, and what was not. No matter what we decide, those questions should not be ruled out of bounds by invocation of a specter with no authority over us. On the occasion of *Lochner*'s hundredth anniversary, it is time for the judiciary to absolve itself from any remaining conviction that it is obliged to lead an unfulfilled life in sensible shoes.

[97] FISS, *supra* note 13, at 9.