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THE NEW REPUBLICANISM: GENEROSITY OF SPIRIT IN SEARCH OF SOMETHING TO SAY

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I have four kinds of comments on the Horwitz paper.¹ First, and briefly, I want to mention one problem with what I take to be Horwitz's historical thesis concerning the *Lochner* Court's place in constitutional jurisprudence or ideology. Second, and equally briefly, I want to suggest that the relevance of his historical analysis to the normative claim he appears to base on it is less than clear. Third, and at somewhat greater length, I want to suggest that insofar as we can find a definition of "liberalism" in the paper, this definition includes only the most conservative thinkers in what is usually deemed a much broader and more diverse tradition. Fourth, and again briefly, I want to question Professor Horwitz's aspiration for republicanism.

I.

First, I want to analyze only one part of Professor Horwitz's historical claim; namely, that the assumed misrepresentation of *Lochner v. New York*² as a historical aberration has contemporary importance because it has persisted. I know of no significant evidence to support this claim. In certain liberal quarters, *Lochner* is taken as the paradigm of what the Court should not do.³ So far as I am aware, however, this view has not taken a historical turn in the last twenty years. That is, contemporary constitutional scholars do not argue that the case was a departure from precedent in the doctrinal sense.

The *Lochner* line of cases undoubtedly was unprecedented both socially and politically. Never before in its history had the Court

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1. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

2. 198 U.S. 45 (1905).

3. See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

been faced with anything approaching such a deluge of state and later federal social reform legislation threatening traditional conceptions of property rights. Never before had the Court found itself in the position of vetoing a legislative program that had occupied center stage in the election platform of a popular President.

I am unsure whether or how the *Lochner* line's unprecedented social and political context affects Professor Horwitz's thesis concerning doctrinal/intellectual history. I would suggest only the peculiarity of basing a strong claim of ideological consistency on a scattering of early- and mid-nineteenth-century cases⁴ that raised questions which, in comparison with their importance in the *Lochner* era, would have been regarded as rather unimportant in the earlier time. Was any pre-existing issue regarding judicial restraint *really* the same as that issue as it arose in the *Lochner* era? Were the New Deal constitutional lawyers all that wrong when they maintained that the Court had never before assumed such an institutional role?⁵

What interests me more is that although most constitutional scholars seem to have found the doctrinal consistency question uninteresting, Professor Horwitz finds it important not just for the sake of historical accuracy, but also because, in his view, it affects contemporary normative issues. I turn now to this question.

II.

Professor Horwitz claims that a proper understanding of *Lochner*'s place in intellectual history is important to correct the misunderstanding that has contributed to a preoccupation among constitutional scholars with institutional and procedural issues, and has caused us to

los[e] touch with the reasons why the idea of a neutral state was incoherent and depended on unsupportable background assumptions about the relationship between state and society, public and private law, freedom and coercion, rights and duties.⁶

4. See Horwitz, *supra* note 1, at 59 & n.9.

5. *Id.* at 61-62.

6. *Id.* at 63.

I have two problems with this claim, one minor and the other major.

The minor criticism is that, assuming we have lost touch with certain truths, correcting the history of pre-*Lochner* doctrine may not be a very efficacious way of inducing us to regain them. Consider for example, John Ely, probably the best known among the contemporary constitutional theorists. His focus is on institutional issues, and his theories often are accused of being "procedural."⁷ Since nothing in Ely's theory or the motivation behind it stems from any mistaken belief about the doctrinal antecedents of *Lochner*, I find it unlikely that telling Ely about these things would cause him to reconsider his views.

My second and more important criticism is that as far as contemporary normative issues are concerned, I am quite unclear exactly what of importance we have lost touch with. For example, questions concerning the means and the extent to which markets should be regulated obviously are important today, but I do not see that the debate will be aided materially by a familiarity with the history, whether doctrinal or more broadly intellectual, that Professor Horwitz wants us to know.⁸

Recently, Professor Donald Herzog broadly and persuasively questioned the contemporary relevance of much of the recent historical work on civic humanism.⁹ I do not intend to repeat his analysis here. With respect to Professor Horwitz's thesis, I have difficulty seeing how intellectual history will alter the arguments in the economic, political, sociological, or philosophical debates about current normative issues.

If history actually provided, for example, a testing ground for empirical theories, that would be a different story. I do not read Horwitz, however, as making this point. Does he mean to say that New Deal economists knew more about contemporary issues than today's economists? If so, perhaps he might tell us in what respect. I suspect that many contemporary economists would answer that

7. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). For criticism of the procedural basis of Ely's theory, see Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

8. Horwitz, *supra* note 1, at 65-66.

9. Herzog, *Some Questions For Republicans*, 14 POL. THEORY 473 (1986).

what Horwitz considers New Deal wisdom is at least in part dated and mistaken. The argument over who is right strikes me as an argument in economics, not in history. I may be wrong. There may be answers to Herzog's more exhaustive analysis, but if so, they need to be supplied.

III.

Professor Herzog, in the paper I mentioned a moment ago, also accuses the new republicans of advancing "a remarkably hazy doctrine."¹⁰ Professor Horwitz's paper seems a confirmation of this accusation. I am unclear what he means by either "liberalism" or "republicanism." Horwitz states that "liberalism" as an ideal type stands for "a subjective theory of value, a conception of individual self-interest as the only legitimate animating force in society, . . . and [a denial of] any conception of an autonomous public interest independent of the sum of individual interests."¹¹ Each of these claims either defines liberalism in an extraordinarily limited way or is quite mistaken.

First, values may be "objective" and still be liberal so long as the ethical or moral judgments that are believed to be "true" happen to correspond to the tenets of what is usually taken to be liberalism. Horwitz's "subject value" criterion of liberalism would exclude, most notably, both John Locke and Immanuel Kant. Both scholars certainly believed, for different reasons, that their moral and political ideas could be grounded objectively,¹² but both probably would be identified as among the main intellectual sources of liberalism.¹³ Horwitz's criterion also would exclude contemporary

10. *Id.* at 473.

11. Horwitz, *supra* note 1, at 66-67.

12. For Locke, the basis of property was an assumed natural property right. Through this right each person was his/her own person, and labor the immediate extension of this person. J. LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* 15 (1948) (1689). See D. HERZOG, *WITHOUT FOUNDATIONS* 68-109 (1985).

Kant's philosophy rests notoriously on his alleged a priori deduction of man's autonomy. His rationalist foundationalism has been attacked recently. See, e.g., M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 54-70 (1985).

13. Locke's defense of property is, of course, legendary. J. LOCKE, *supra* note 12. Although much of his thought seems antiquated, some contemporary "liberals" still seem to subscribe to it. See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*

scholars, like my colleague Michael Moore, who regard themselves as both moral realists and liberals.¹⁴ I know of no reason to believe that people who hold objective value theories cannot be liberals, and Professor Horwitz has not given one.

Second, Horwitz's claim that liberalism regards "self-interest" as the only "legitimate animating force" in society is unclear. We might understand this claim in either of two ways. First, a self-interested action might be one that considers only what is good for oneself and not what is good for another person or persons. Alternatively, a self-interested action might be one that is tautologically so, in the irrefutable way that some economists and philosophers have in mind when they suggest that people do only what they want to do.¹⁵

If the first interpretation captures Horwitz's meaning, I think he is wrong for two reasons. First, not even economists believe that other-regarding reasons for action are impossible or "illegitimate."¹⁶ Second, empathetic heuristics are central to what I believe most people think of as one part of the liberal intellectual tradition.

Consider, for example, Kant's categorical imperative: act only on that maxim through which you can, at the same time, will that it should become a universal law.¹⁷ This prescription was the result of Kant's bizarre picture of persons as purely rational agencies with a mysterious capacity to stand outside or behind their selves.¹⁸ From this perspective, the "self" loses primacy, and one's potential victims become definitionally as important as oneself. Some apparently "liberal" utilitarians like John Harsanyi and R.M. Hare perpetuate this tradition, the former by arguing that "the moral point of view is essentially the point of view of a *sympathetic* but *impartial* observer,"¹⁹ and the latter by equating mo-

(1985). For one critical account of Kant's role in the development of liberal thought, see M. SANDEL, *supra* note 12.

14. Moore, *Moral Reality*, 1982 Wisc. L. Rev. 1061.

15. For a recent discussion of this set of issues, see Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. Rev. 1309 (1986).

16. *Id.* at 1320-21.

17. 4 THE ENCYCLOPEDIA OF PHILOSOPHY 317 (1967).

18. See M. SANDEL, *supra* note 12, at 7-14.

19. J. HARSANYI, RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SITUATIONS 48-49 (1977).

rality with universability.²⁰ The same view, in substance, seems to be held by John Rawls, since the parties in the original position, though "self-interested," are so completely bereft of self-identifying criteria that each is in effect "everybody" and thus is forced to take everyone's interests into account.²¹

With regard to the alternative interpretation of Horwitz's "self-interest" point, most liberals may believe that people do only what they want to, but what alternate description of the source of human action does Horwitz or republicanism propose? I suggest, for example, that correct descriptions of self-interested and altruistic actions are as follows. Some people accumulate wealth because they would rather do this than something else, and others help the poor because they would rather do that than something else. Does republicanism see something erroneous in these descriptions? If so, what alternate descriptions does it have to offer?

Horwitz's third claim, that liberals believe the public interest is the "sum of individual interests,"²² is misleading in two interrelated ways. First, although the concept of the public interest is a troublesome one for most liberals, the problem is not that liberals have the wrong definition, but rather that they have no satisfactory one.

The quest for criteria of the public interest that sacrifice no individual interests is one of the dominant themes in the liberal intellectual tradition. Unfortunately, Pareto's criterion that government action is in the public interest only when it makes at least one person better off and no one worse off, and the related thought that only unanimous consent proves that the action is in the public interest, are so restrictive of government action that they correspond to virtually no liberal's intuition about good government and are not very useful as policy guidelines. Arrow's impossibility theorem was the result of a powerful attempt to develop criteria that would define the public interest as a function of commitments to

20. Hare has developed his theory through several books and articles, the most well-known of which probably is *Freedom and Reason*. R.M. HARE, *FREEDOM AND REASON* (1963). His theory is discussed in several works. *E.g.*, D. HERZOG, *supra* note 12, at 150-55.

21. Simon, *The Authority of The Framers of The Constitution: Can Originalist Interpretation Be Justified?* 73 CAL. L. REV. 1482, 1512-16 (1985).

22. Horwitz, *supra* note 1, at 67.

both democracy and the Pareto principle.²³ Its proof that this reconciliation is impossible provides substantial reason to suppose, at a minimum, that the public interest, if taken to be a function of individual preferences, does not exist independently of the procedures used to discover it. In other words, "real" public interest is a fiction.

Horwitz's "sum of individual interests" claim seems to equate liberalism with the views and values of those in one tiny corner of what I think most people consider liberalism; namely, the views of some rather dated utilitarians and some quite controversial contemporary economists, and value measures like Posner's "wealth maximization" or the Kaldor-Hicks efficiency criteria.²⁴ Most people who identify themselves as liberals probably would be shocked to learn that they have taken a loyalty oath to any of these credos. Rather, liberals believe that although the peoples' wants are normatively relevant to public action, simply maximizing aggregate utility does not provide a satisfactory measure of the social good. Once again, what do the new republicans propose in place of this admittedly incomplete view?

A second and related problem with Horwitz's concept of liberalism is that it overlooks rights. Professor Horwitz does not discuss rights, so I am not clear how they relate to either his claim about liberalism or his own concept of the public interest. Consider, for example, the current constitutional protection afforded minority racial groups against discrimination. We might say that we protect minorities because it is in the public interest to do so. This seems a somewhat odd method of expression because protection of the minority group may defeat the interests of the majority. But we might say that racial discrimination is immoral, and that what is immoral cannot be in the public interest. Alternatively, we might equate the racist preferences of a majority with the "public inter-

23. Arrow's work is the subject of extensive scholarship and in fact is largely responsible for the rise of a new discipline, social choice theory. For a comprehensive discussion of Arrow and the mysteries of the concept of social choice, see Plott, *Axiomatic Social Choice Theory: An Overview and Interpretation*, 20 AM. J. POL. SCI. 511 (1976).

24. For a very helpful discussion of the relationships among utilitarianism, wealth maximization, and Kaldor-Hicks efficiency criteria, see Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

est," but say that we allow rights to trump the public interest nonetheless.

I am not concerned presently with which of these ways of talking is preferable, for whichever one we choose, it remains true that liberalism, in its protection of counterutilitarian constitutional rights, does not, as Horwitz suggests, propose to govern society solely under a standard of individual interest or preference maximization.²⁵

IV.

This brings me to a few brief concluding comments about "republicanism," which I gather from his paper Professor Horwitz believes may hold the prospect of an "autonomous" or "objective" public interest.²⁶ This viewpoint, although unclear, seems to imply a concept of the public interest that is independent of the wants of individual persons who comprise the public, and is perhaps "objectively true" as well.

I had always thought that the civic humanist tradition involved a concept of natural obligation ultimately thought to stem, much like that of natural right, from some foundational truth or reality that was grounded in either religion, reason, or some other supposed feature of human nature, such as virtue, or perhaps all three.²⁷ Professor Horwitz seems quite certain, however, that "the republican idea of law in American history"²⁸ does not rest on a natural law foundation, and toward the end of his paper he launches a campaign against "the formalistic distinction between natural law and positivism."²⁹ Why the distinction is formalistic he does not say, but let me speculate, on the basis of a few hints, where he might be headed. I rely on his dislike of both liberalism's alleged value subjectivity and the natural law-positivist distinction, his statement that "one issue in the republicanism-liberalism debate is the status of positivism, or the separation of facts and val-

25. Horwitz, *supra* note 1, at 66-67.

26. *Id.* at 67.

27. For a concise intellectual history of some of the major thinkers usually associated with civic humanism, see A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 137-89 (1981).

28. Horwitz, *supra* note 1, at 73.

29. *Id.* at 74.

ues,"³⁰ and his interpretation of Pocock, early Holmes, and others.³¹

Professor Horwitz appears to be looking for a non-natural law and also a nonsubjective foundation for political theory, and he hopes that republicanism will supply this foundation by eliminating the distinction between facts and values. His concept of an "autonomous public interest" anticipates the success of this enterprise. His aspiration reminds me of Bernard Williams' imaginary hypertraditional society, which is maximally homogeneous and and minimally reflective.³² The members of such a society have "thick" ethical concepts like "treachery," "courage," and "coward," by which they describe actions or persons, thus apparently collapsing the fact-value distinction.³³

The members of this society appear to have ethical knowledge, but only if one views knowledge as a kind of artifact; they have ethical knowledge like they have cooking tools. As the society becomes more reflective and its members begin more fully to appreciate the extensive implications of their ethical artifacts, the ethical concepts will become obsolete, just as new cooking technologies render the old tools obsolete. Increased social heterogeneity will have the same effect.

We live in an ultrareflective, heterogeneous society. I do not see much promise of converting to unreflectively held, "thick" ethical concepts, short of instituting massive indoctrination or enormous decentralization of government into homogeneous population units. To my mind, neither of these alternatives is particularly attractive.

If I am right, the new republicans will not undermine the fact-value distinction, and I suspect they also will discover that an "autonomous public interest" does not exist. Society is made up of a great many people with diverse interests and values. They have, and will continue to have, many disagreements. In my view, any political philosophy that provides hope of inducing people to take a more active role in civic life, to see clearly their many common

30. *Id.* at 65.

31. *Id.*

32. B. WILLIAMS, *supra* note 12, at 142-48.

33. *Id.*

interests, and to empathize and care more for each other deserves support. This seems to me a worthy aspiration for the new republicans, but I do not think the cause is helped by repeated insistence that the world is split into warring factions. More basically, I find troublesome the "haziness" of the normative aspects of the enterprise in which Professor Horwitz and the other new republicans are engaged. All Rousseau's good intentions do not obscure the basic similarity between his philosophy and Hitler's. More to the point, even good intentions must have an object in order to be *real* intentions.