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"Justice Holmes Influences Business of Judging"

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The emergence of Justice Oliver Wendell Holmes as a dominant influence in the work of the Supreme Court began in 1905, just three years after his appointment to the High Bench, in a dissenting opinion in *Lochner v. New York* that many scholars hail as the most famous dissent ever written.

The majority opinion in *Lochner* has been widely rebuked for the past century as an exercise in judicial activism, a notorious example of the imposition by judges of their own preferences and biases, in this case, the heavy-handed infliction of a laissez-faire economic theory, neither grounded nor articulated in the Constitution.

In *Lochner*, the Court struck down a New York state law that imposed a ceiling on the number of hours per week that an employee could work in a bakery. The law was vigorously championed by the medical community, which warned of a variety of illnesses, including lung disease, if employees worked more than 60 hours per week. The state legislature viewed the measure as a legitimate exercise of the state's police power, enacted in the name of securing the general welfare.

Justice Rufus Peckham, writing for a 5-4 majority, struck down the law as a violation of the 14th Amendment's Due Process Clause, on the grounds of the judiciary's newly invented Liberty of Contract Doctrine, according to which, employers and employees should be guided only by their interests in determining

the length of a workweek. Justice Peckham argued that the law violated the doctrine of laissez-faire capitalism.

In his dissenting opinion, Justice Holmes allowed that if the question before the Court were one of policy or philosophy, he might be persuaded to disagree with the legislature's rationale for passing the law. However, he did not believe that deciding the question based on economic theory was consistent with his conception of the judicial function. In this dissent, Holmes set forth two fundamental conceptions that would influence judges in their approach to interpretation: the reliance on economic theories and the scope of judicial review.

In a passage that would influence courts for decades to come, Holmes declared that it is irrelevant whether judges share the "convictions or prejudices" embodied in the law.

He wrote: "A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of finding certain opinions natural and familiar and novel or even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution."

Justice Holmes's dissent emphasized a fundamental lesson of judging: courts should not substitute their economic judgments for those of the legislature. There is no constitutional justification, he wrote, for judges to believe that their economic beliefs are embodied in the supreme law of the land. If it were so, cases would turn on the economic wishes of the judge.

Justice Holmes's second great lesson for the business of judging was his advocacy of the principle of judicial restraint, a view that would enjoy tremendous influence to this very day. Thus, with respect to the *Lochner* case, Holmes wrote that judges should defer to the economic choices of legislators, even if they think the choices are "mistaken," so long as they have a rational basis.

Holmes's emphasis on judicial restraint marked a degree of judicial humility, leaving public policy choices to the judgments of elected representatives. In a democracy, the people have a right to choose their representatives who, in turn, will shape policies and laws that they believe serve the public welfare. The judgements of legislators, when they are enacted into laws, should stand when tested in the courts unless they lack a rational basis.

In this context, Holmes believed that statutes should be upheld so long as judges can believe that a "reasonable man" would find the statute reasonable. As he wrote in *Lochner*, a reasonable man might think the maximum working hour law served the public welfare, particularly after medical experts testified before the legislature on the "reasonableness" of the measure in promoting public health.

Employment of this approach to judicial review would guard against the arbitrary tendencies of judges to impose their own economic, as well as political, cultural, and religious beliefs. Holmes recognized the capacity of legislators to make poor judgments but did not believe that the judicial function empowered him to "save my country from going to Hell."

Judicial restraint has enjoyed a long line of advocates. In Holmes's early years, that approach to the exercise of judicial review did not dominate the Court's jurisprudence, since the controlling majority

continued to cling to the doctrine of unbridled laissez faire capitalism. Holmes's view, however, would win out.

Justice Holmes served on the Court until he was 90. He was slowing down when he informed President Franklin D. Roosevelt, cousin of Theodore Roosevelt, who appointed him to the Court thirty years before, in 1902, of his decision to retire.

Holmes remained youthful to his last days on the Court. Near his retirement, while taking his daily stroll with a law clerk around the capital, Holmes spied an attractive woman across the street and remarked to his clerk: "Oh, to be 75 again."