DYCHE | Rand Paul, Judicial Activist

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Speaking at the Heritage Action Conservative Policy Summit in Washington earlier this month, Kentucky's junior U.S. Senator and likely presidential candidate Rand Paul said, "I'm a judicial activist when it comes to Lochner. I'm a judicial activist when it comes to the New Deal."

In so doing, he joined a growing and impressive group of conservative and libertarian thinkers, including the influential columnist George Will, who embrace a concept long criticized by conservatives.

In the 1905 Lochner case, the Supreme Court struck down a state law limiting weekly hours of bakery employees. The high court held that the law violated "the liberty of the individual protected by the 14th Amendment of the Federal Constitution."

Lochner and its progeny limited the so-called "police powers" of states to interfere "with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

For the following three decades, this doctrine, referred to as "substantive due process," blocked not only lots of state laws regulating economic matters, but also federal laws proposed by Franklin D. Roosevelt as part of his New Deal response to the Great Depression.

Justice Oliver Wendell Holmes famously dissented in Lochner. He wrote that the "Constitution is not intended to embody a particular economic theory," but was "made for people of fundamentally differing views."

Holmes contended that "the word ‘liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion" unless "a rational and fair man" would find that the statute in question "would infringe fundamental principles as they have been understood by the traditions of our people and our law."

In its famous "Switch in Time That Saved Nine," the Supreme Court adopted the Holmes position, perhaps to prevent Roosevelt from "packing" that tribunal with new justices to end its obstruction of his progressive proposals. Even most conservative judges eventually came around to that way of thinking and repudiated Lochner and substantive due process as judicial activism.

Indeed, when this columnist was in law school in the 1980s, he had the opportunity to ask

conservative Chief Justice William Rehnquist if Lochner-style substantive due process was fully, finally, and forever dead. Rehnquist replied that he thought it was.

So for about three-quarters of a century, courts have approved almost all economic regulations unless the laws somehow discriminated against particular protected groups or infringed on particular rights so as to prevent the democratic processes from operating properly.

Meanwhile, conservatives were also loudly criticizing judicial activism on other, non-economic issues. For example, they did not like it when the Supreme Court in the 1960s and 1970s broadly construed the constitutional rights of criminal suspects and defendants, disapproved of school prayer, and ruled that there was a constitutional right to abortion.

Republican politicians have routinely railed against "activist" judges for taking such matters out of the hands of the people. Now some conservatives and libertarians are trying to refine and rehabilitate the concept of judicial activism and restore the judiciary to what they argue as its proper role in protecting economic as well as personal liberty.

Many conservatives took notice earlier this year when respected columnist George Will praised Timothy Sandefur's slender but powerfully reasoned book "The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty."

Will chastised conservatives for their "indiscriminate denunciations of judicial activism." He said they were inadvertently promoting progressivism by arguing against a judiciary actively engaged in "making majority power respect individuals' rights."

Sandefur, an adjunct scholar at the Cato Institute and an attorney for the Pacific Legal Foundation, and Georgetown law professor Randy Barnett, the author of "Restoring the Lost Constitution: The Presumption of Liberty," are the most prominent scholarly proponents of reevaluating contemporary constitutional interpretation.

They argue that the Constitution's principal purpose is the protection of liberty and natural, albeit sometimes unenumerated, rights, not the promotion of democracy. The Ninth Amendment's command that the enumeration of certain rights "shall not be construed to deny or disparage others retained by the people" certainly supports their position.

Some see Supreme Court Justice Anthony Kennedy as a judicial kindred spirit. He has, after all, recently been against state sodomy laws, Obamacare, and the Defense of Marriage Act. Kennedy does not seem ready to go all the way on a substantive due process renaissance that would radically limit government intrusions on economic liberties, however.

Justice Clarence Thomas appears open to a reinvigoration of the long emasculated "privileges and immunities" clause of the Fourteenth Amendment, which would provide another potential avenue for protecting personal liberty.

Paul may be the most prominent national electoral politician to venture into this territory. His foray is indicative of his intellectual curiosity and political courage.

It is also earning him some criticism from traditional conservatives who think the lack of a limiting principle for judicial activism and substantive due process poses a risk of judicial tyranny as bad as or worse than the tyranny of a democratic majority.

For example, respected conservative legal scholar John Yoo says, "Paul's claims about judicial activism raise fundamental doubts about his positions on social issues." Yoo asks if Paul supports Roe v. Wade, which declared a constitutional abortion right, and U.S. v. Windsor, which struck down the Defense of Marriage Act. Paul will have to respond if he runs for president.

With Paul's entry into it, this important debate is now renewed and fully joined. That is a good thing since it goes to the heart of our constitutional system.