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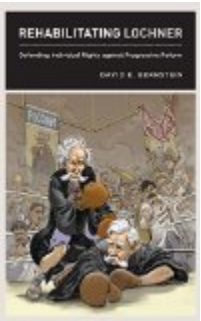
David E. Bernstein. *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform.* Chicago: University of Chicago Press, 2011. viii + 194 pages. $45.00 (cloth), ISBN 978-0-226-04353-1.



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In 1905, the Supreme Court of the United States declared a New York statute prohibiting bakers from working more than ten hours in a day to be an unconstitutional invasion upon the liberty of contract of employees guaranteed by the Due Process Clause of the Fourteenth Amendment. Labor activists and Progressive legal scholars railed against the Supreme Court for usurping the powers of state legislatures and distorting the Constitution to serve the interests of corporate America at the expense of the exploited working class. Generations later, jurists, legal scholars, and historians would use the name of that case, *Lochner v. New York*, to characterize an entire era of American constitutional jurisprudence: a period from 1897 to 1937, in which the Supreme Court allegedly ushered in a revolution in constitutional law through blatant judicial activism in the name of laissez-faire political economy.

In this slim but substantive and thought-provoking volume, law professor David E. Bernstein attempts, as the title states, to "rehabilitate" the *Lochner* decision and place it into its proper historical context. Bernstein analyzes not only the details of the case itself and the history of the liberty of contract doctrine, but also the way in which the history of *Lochner* has been used and, in his view, abused by legal scholars since the 1960s, when the very concept of a "*Lochner* era" was formulated. While legal scholars have been revising the standard interpretation of *Lochner* and the so-called *Lochner* Court for decades now, Bernstein argues that the Progressive-era narrative and the myths that surround it still dominate popular ideas about what the *Lochner* decision meant for the country in the early twentieth century and what it means today. Bernstein's ambitious agenda is to explain why the Court ruled as it did, refute the criticisms leveled at the Court's decision by legal scholars of the Progressive era, and reinstate the liberty of contract doctrine as a legitimate interpretation of the Constitution. In doing so, he seeks to tear down the firewall that jurists and scholars have created between *Lochner* and the Supreme Court's civil rights and privacy decisions of the postwar era.

Bernstein begins by arguing that the liberty of contract doctrine was not as radical as Progressive critics of *Lochner* contended. In chapter 1, Bernstein contends that the Court's check on the police power of the states–the inherent power of the states to regulate the health, safety, and morals of society in the name of the public good–was rooted in a complex web of nineteenth-century legal developments. First, he points out that state constitutions had long prohibited the taking of property without "due process of law" and that by the 1850s "significant judicial authority" (p. 10) recognized that it was the duty of state courts to scrutinize legislation to protect substantive property rights. He shows how some legal commentators and jurists in the 1870s and 1880s already believed that the Fourteenth Amendment to the Constitution placed in the hands of federal judges the authority to enforce limits on state police powers. He agrees that judicial reliance on a "general constitutional right to liberty of contract" (p. 18) as the basis for invalidating state legislation was somewhat novel, but traces its origins to "long-standing American intellectual traditions" (p. 9) of natural rights theory, free labor ideology, and judicial rejection of "class legislation" that arbitrarily singled out particular groups for regulation. Bernstein argues that these elements "gradually morphed" (p. 18) into the liberty of contract doctrine, which was spelled

out most directly by Justice Rufus Peckham in his majority opinion in the 1897 case of *Allgeyer v. Louisiana*, in which the Court struck down a Louisiana law regulating out-of-state life insurance companies. In that decision, Peckham declared that the Fourteenth Amendment protected "the right of a citizen to be free in the enjoyment of all his faculties ... to earn his livelihood by any lawful calling ... and for that purpose to enter into all contracts which may be proper."[1]

In chapter 2, Bernstein turns to the particulars of the *Lochner* case itself. He provides an overview of the baking industry in New York and how the state legislature came to adopt a statute establishing criminal penalties for anyone requiring bakers to work longer than ten hours in a day. The offending bakery owner, Joseph Lochner, was not a representative of what one would call "big business," but a proprietor of a small so-called cellar bakery. The ten-hour law, Bernstein shows, owed its passage to union bakers who were able to establish favorable working conditions in large commercial bread bakeries. Unionized bakers and their employers feared competition from the cellar bakeries that employed immigrant laborers at longer hours and lower wages to survive. Social reformers also backed the law as way to improve working conditions and the health of bakery employees. This issue of competition within the baking industry is key because, Bernstein argues, it gives support to the Supreme Court's contention that the limit on working hours was not really about protecting the health of workers or the community. In the Supreme Court's *Lochner* opinion, written for a 5-4 majority by Justice Peckham, the Court held that the ten-hour law was not a legitimate exercise of the state police power, but an infringement on the liberty of individuals to contract freely with their employer, a liberty that Peckham characterized as a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.

In chapter 3, Bernstein turns to the labor union activists and Progressive legal reformers who unleashed withering criticism of the Supreme Court in the wake of the decision and have shaped discussion of the case ever since. Progressives, latching onto Justice Oliver Wendell Holmes's now famous stinging dissent, railed against the Court for allegedly expanding judicial power in the name of Social Darwinist defense of corporate power and the status quo. Bernstein surveys the views of Progressives like Holmes, Roscoe Pound, and Felix Frankfurter, who argued for a brand of judicial deference that left to popular majorities in the legislative branch the power to adopt economic regulations based on the changing needs of industrial society.

Legal historians over the past decades have questioned the Progressive era denunciations of the *Lochner* decision and the *Lochner* Court, but Bernstein takes aim in this volume not at other law professors but at the Progressives themselves. Bernstein effectively agrees with the decision of the majority in *Lochner* and rejects the arguments leveled by union activists and Progressive reformers. He argues that, at the very least, the Court was justified in suspecting the public health motives behind the ten-hour law and that its decision to invalidate it was well rooted in American legal traditions. In addition, he points out that Progressives far overstated the actual influence of the decision and the application of liberty of contract in limiting state police powers (pp. 20-22). He argues, as scholars like Michael J. Philips have, that the Supreme Court upheld many more state regulatory laws than it ever invalidated and exercised a large amount of deference to the legislatures to regulate economic activity under the state police powers.[2] The Court majority in *Lochner* was not committed to some kind Social Darwinist ideology (if anything, he notes that, ironically, Holmes was probably the only justice who actually subscribed to Social Darwinism [p. 47]) but to a libertarian commitment to individual freedom. The justices hardly crippled state legislatures in the name of economic liberty, Bernstein argues, but the extent to which they did enforce due process property rights "was preferable to the ... Progressive alternative emphasizing almost judicial total deference to legislation" (p. 127).

If anything, Bernstein sees the liberty of contract doctrine as a lost opportunity–a doctrine that, when it was mobilized by the Court, did much good in the name of individual rights and has much to offer current jurists. While most historians tend to criticize the liberty of contract rationale of the Court and defend Progressive economic regulation, Bernstein reminds us that Progressives were not modern liberals and were not interested in individual civil rights. In chapters 4 and 5, he shows how liberty of contract reasoning could and, in some cases did, protect not just economic liberties but the civil rights of women and African Americans. He stresses that when the Supreme Court struck down a Washington DC minimum-wage law based partially on liberty of contract reasoning (*Adkins v. Children's Hospital*, 1923), Justice George Sutherland did so based on the rationale that women should not be treated as a special, weak class in need of special protection from the state (p. 67). Where some historians have linked *Plessy v. Ferguson* (1896) with *Lochner* as two decisions that both upheld the status

quo at the expense of exploited classes, Bernstein points out that *Plessy* and *Lochner* are actually quite opposed based on their divergent views on the limits of the police power. The validation of state segregation in *Plessy* represented a broad judicial deference to the state police powers, while the individual rights articulated in *Lochner* offered an important check on the state to discriminate based on race (p. 76). For example, Bernstein shows how the Supreme Court used liberty of contract ideals to defeat state residential segregation laws in Kentucky (*Buchanan v. Worley*, 1917). Liberty of contract reasoning led the Court to preserve the right of immigrants to establish private schools (*Pierce v. Society of Sisters*, 1925) and teach in foreign languages (*Meyer v. Nebraska*, 1923) against state laws rooted in anti-immigrant xenophobia.

In chapter 6, Bernstein traces the decline of liberty of contract and the Supreme Court's protection of economic property rights in favor of a narrower focus on civil liberties. The 1937 decision in the case of *West Coast Hotel v. Parrish*–in which the majority upheld a Washington state minimum-wage law–effectively ended the so-called *Lochner* era. Bernstein shows that when the Supreme Court began to defend civil liberties in the 1940s and 1950s, it did not do so based on liberty of contract principles laid out in *Lochner*. In the famous (at least in legal historian circles) footnote 4 in *U.S. v. Carolene Products* (1938), the Court articulated the kind of deference to state economic regulation of property rights that Progressive legal activists had dreamed of, while stating that civil liberties would be subject to much closer scrutiny (p. 104).

The story of *Lochner* might have ended with seeming demise of the liberty of contract doctrine in the 1930s, but Bernstein tells the fascinating story in chapter 7 of how legal scholars in the late 1960s and 1970s, on both the left and the right, brought the case to a new level of prominence–or more accurately, infamy. He describes how modern liberals embraced a new era of judicial activism in the post-*Brown v. Board of Education* era, culminating in the right to privacy cases of *Griswold v. Connecticut* and *Roe v. Wade*, in which the Supreme Court upheld the rights to contraceptives and abortion, respectively, under the Due Process Clause of the Fourteenth Amendment. Bernstein recounts how liberals, wary of reviving challenges to the economic regulations that they supported, went out of their way to declare that this kind of activism was not the unwarranted exercise of judicial power of the *Lochner* era, however. He also shows that conservatives took their shots at *Lochner* for their own ends. Conservatives who railed against this new judicial interference with state regulations that they supported revived and redirected the Progressive hostility to the Supreme Court and decried the return of *Lochner*-style overreach. Suddenly, Bernstein argues, what had been a notable but not overly influential case in the history of the Supreme Court gave its name to an entire era, and one that both liberals and conservatives agreed should be abandoned, if for different political reasons.

Bernstein contends, though, that the liberty of contract doctrine articulated in *Lochner* had important resonance in the right to privacy cases of the 1960s and 1970s and should not have been scorned by liberals or conservatives (p. 123). Like in *Lochner*, the Supreme Court in *Griswold* and *Roe* identified individual rights not specifically enumerated in the Constitution but which were arguably justified by the natural rights theories that he argues are so essential to American political tradition. *Lochner* and the small line of cases that relied on liberty of contract, in short, were the "true progenitors" (p. 116) of civil liberties as defined in *Griswold* and *Roe*. Bernstein shows, however, that the Supreme Court would not embrace the precedent of liberty of contract, instead crafting increasingly complicated legal rationales (namely, the "selective incorporation" of the Bill of Rights under the Fourteenth Amendment) to justify protection of individual rights while still keeping the ghost of *Lochner* under wraps.

Bernstein writes that he hopes his book fulfills "the intrinsic value of having correct information in the history books" through a narrative of the case that is "not misconstrued for political ends" (p. 128). His aims are admirable, but they of course cannot hide the fact that this is a very political book, rooted in a particular political ideology, whose historical conclusions have important political consequences. Bernstein is clearly no fan of the Progressives. He writes that Progressives were "hostile" to the Constitution, had "disdain" for the courts, and "contempt for America's individualist natural rights tradition" (p. 92). Bernstein's analysis evinces his own commitment to libertarianism (along with the fact that the book is published under the imprint of the Cato Institute, a libertarian think-tank) and he is highly critical of Progressives' failure to recognize the "inherent limits" on government in the American political system. He wants to prove to his audience that Progressives are not the real source of modern liberal constitutional law; those heretofore reviled judges of the *Lochner* majority are.

This attack on the Progressives, in addition to not being particular shocking to historians of Progressivism

(see Michael McGerr's synthesis for a discussion of the Progressives' support for segregation, eugenics, and immigration restrictions)[3] overlooks the extent to which the question of the source and character of the rights protected by the Fourteenth Amendment was a historical one that played out over the course of the late nineteenth and early twentieth centuries. Bernstein's rehabilitation of *Lochner* depends heavily on his ability to deradicalize the liberty of contract doctrine and place it into a broader sweep of American history. His case would have been helped greatly, however, if his treatment of this deeper history in his short chapter 1–probably his most important chapter–had been more fully developed and explored in more detail. Bernstein could have done more to explore the definitions of liberty espoused by the Progressives and described by historians like James Kloppenberg and Barbara Fried.[4] Bernstein's emphasis on natural rights theory in the nineteenth century is well taken, but it was always in tension with competing ideologies that stressed the sovereignty of the state governments and their expansive police powers. William E. Nelson's close analysis of the passage of the Fourteenth Amendment and the evolution of the way the courts interpreted it in the late nineteenth century emphasizes that the Supreme Court's natural rights-based liberty of contract doctrine, while having a clear lineage, was still a major departure from the more modest limitations on state police powers it had adopted in the decades before.[5]

Bernstein has nevertheless produced an important contribution to the history of constitutional law and the Progressive era. The book is a valuable corrective to the work of historians who might reflexively sympathize with the Progressives and the criticisms of the *Lochner* decision. Another book-length treatment of the case by Paul Kens, for example, continued not that long ago to accuse the *Lochner* Court of injecting a Social Darwinist ideology into the Constitution, a contention which Bernstein definitively refutes.[6] He also makes a strong case that *Lochner* and its reasoning should be part of the discussion when trying to understand the Supreme Court's defense of civil rights later in the twentieth century. Bernstein approaches this material with a fresh perspective and a cogent analysis that questions both the received wisdom about the *Lochner* era and the categories that legal scholars have established to create distance between that era and our own, between judicial defense of civil rights and the judicial defense of economic liberties.

The views expressed in this review represent those of the author and do not represent the views of the Federal Judicial Center or any other entity in the judicial branch.

Notes

[1]. 165 U.S. 578, 589.

[2]. Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Westport, CT: Praeger, 2001).

[3]. Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (Oxford: Oxford University Press, 2005).

[4]. James Kloppenberg,*Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (Oxford: Oxford University Press, 1988); and Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Cambridge: Harvard University Press, 2001).

[5]. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988).

[6]. Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University of Kansas Press, 1991).

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