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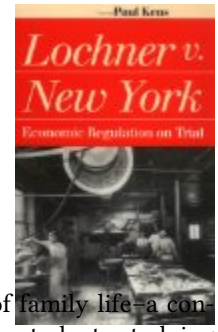
Paul Kens. *Lochner v. New York: Economic Regulation on Trial.* Lawrence, Kan: University Press of Kansas, 1998. ix + 216 pp. $12.95 (paper), ISBN 978-0-7006-0919-2.



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The case of *Lochner v. New York* (1905), in which the U.S. Supreme Court invalidated a New York law regulating maximum hours for bakers as violating the liberty to contract, remains among the most significant decisions of the twentieth century. Although long a subject of scholarly debate, not until the appearance of Paul Kens's *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York* in 1990 had any scholar produced a comprehensive book-length study of the case. By issuing this updated and revised paperback version of his original book, Kens and the University of Kansas Press make his work accessible to a wider audience. Kens's fluid writing, as well as his careful attention to constitutional issues and historical context, make this book especially suitable for use in American constitutional and legal history courses.

Kens sets the stage for *Lochner* by examining the baking industry and the effort to regulate maximum hours in the early twentieth century. Unlike many industries at that time, small independently owned businesses still dominated the baking trade, and bakeshop owners usually looked for the least expensive space they could find in which to practice their trade. The cellars of tenement houses–cheap, available, and with sturdy enough floors to support heavy baking ovens–housed the vast majority of New York City's bakeshops. Bakers labored excruciatingly long hours in these dimly lit and poorly ventilated bread factories. Kens claims that the average baker worked seventy-four hours a week, although he notes that some worked well over a hundred hours weekly. Reformers sought to alleviate the number of hours bakers worked largely because of fears that this environment contributed to the development of "consumption," the nineteenth-century term for a disease of the lungs that in most cases could be equated with tuberculosis. The long hours, moreover, made it nearly impossible for bakers to maintain any semblance of family life–a concern of progressives. Undergraduate students studying *Lochner*, often unaware of the nature of early twentieth century baking practices, usually fail to grasp why any state would enact a law regulating bakers' hours. For this reason, Kens's description of the baking trade and the push for reform is one of the most valuable sections of the book.

Kens digs even deeper into the historical background in his detailed description of New York politics and the passage of the 1895 Bakeshop Act. Here the author describes Henry Weismann's reform efforts as head of the Journeymen Bakers' and Confectioners' International Union, as well as Edward Marshall's investigative report as a member of the state's Tenement House Committee. The work of these men, as well as the endorsement of New York's "mainstream elite," combined to make bakeshop reform a popular cause. The measure to limit employees in bakeries to ten hours a day and sixty hours a week posed no threat to Thomas Collier Platt's New York Republican political machine, and Boss Platt believed that supporting reform would help him maintain the support of the city's German American population, the ethnic group most affected by the bill. Bakeshop reform thus swept through the state legislature unopposed, as both houses supported the legislation by unanimous votes.

Despite the popularity of the law at its passage, constitutional debates converged with individual personalities to bring the Bakeshop Act before the U.S. Supreme Court. Connecting the constitutional issues arising out of such late nineteenth century cases as *Munn v. Illinois* (1877) and *In re Jacobs* (1885) with the broader ideologies of laissez-faire and social Darwinism, Kens skill-

fully shows how the New York law contradicted widely held contemporary assumptions about the proper role of government in the marketplace. It is here that the author's talents are on full display, as he gracefully guides the reader through court cases, social science treatises, and works of literature, before outlining the facts of the *Lochner* case. Kens's narrative, moreover, brings out the important role individuals played in shaping the political and judicial process. Readers unfamiliar with the details of the case, for example, will be surprised to learn that the same Henry Weismann who had initiated the reform–after later becoming a master baker and studying law–argued the case against the act before the Supreme Court. And through careful research, Kens offers a convincing explanation as to why New York Attorney General Julius M. Mayer mounted a half-hearted defense of the Bakeshop Act in his brief: the newly-elected Attorney General was probably preoccupied with preparing his state's argument before the Supreme Court in *The Franchise Tax Cases*. Scheduled to be heard less than two months after arguments in *Lochner*, *The Franchise Tax Cases* were "far more sensational and far more important to [Mayer's] political career" (p. 128). It is just this sort of interpretative detail that makes Kens's study so incisive.

Somewhat less insightful is Kens's discussion of the Supreme Court's decision. In general, he reasserts the traditional interpretation: that *Lochner* symbolized the Court's preoccupation with defending conservative propertied interests, and that in formulating their opinion the justices relied more upon laissez-faire economic theory than legitimate constitutional principles. More specifically, Kens finds the roots of the Court's devotion to the liberty of contract in the opinions of Justice Stephen Field, noting that one of Field's opinions looked "as if he had laid a page of the *United States Supreme Court Reports* over *Social Statics* and traced Herbert Spencer's first principle" (p. 119). The Court adopted Field's narrow definition of the police power in *Lochner*, Kens argues, and subsequently applied it in other cases involving state regulation. "[I]n every case in which the liberty of contract came into play, state law was matched against a test of whether it protected public health, safety, moral, or peace and good order," he writes. (p. 174). Kens refers to this view of state regulatory power as "a laissez-faire-social Darwinian interpretation of the Constitution" (p. 140).

Kens carefully deals with recent literature that takes a more measured view of *Lochner* and the Progressive Era Court. He concedes, for example, that the decision neither represented a struggle between labor and concentrated wealth, nor demonstrated a conspiracy on the part of "an organized bar" to infuse laissez faire ideas into the Constitution (p. 153). Moreover, he acknowledges that studies by John E. Semonche and Melvin Urofsky show that the Court in general during this period upheld state regulatory measures much more often than they invalidated them.[1] Still, Kens clings to the idea of a laissez faire Court, largely because Semonche's and Urofsky's work "fail to explain why the judiciary, and the Supreme Court in particular, was the target of reformers' barbs from the late nineteenth century through the 1940s" (p. 155). Rather than examining the record of the Court as a whole during this era, Kens takes his cues from the Court's contemporary critics–arguing, as they did, that the justices shunned constitutional reasoning and embraced social Darwinism. On this point, Kens takes issue with Howard Gillman, who has convincingly demonstrated the connections between Jacksonian rhetoric, free labor ideology, and the Court's formulation of the ideas of substantive due process and the liberty to contract. According to Gillman, during the *Lochner* era the Court applied constitutional principles that had roots in the early nineteenth century.[2] In the book's final pages, Kens attempts to answer Gillman by arguing that laissez-faire constitutionalism represented a perversion of, rather than an adherence to, Jacksonian ideals. Jacksonians, Kens points out, stressed opposition to special privilege and elitism, rather than the protection of property rights, as was evident in *Lochner*.

Kens's neo-traditional interpretation poses a challenge to historians and legal scholars to revisit this significant twentieth century case. Now that University Press of Kansas has published this study in its Landmark Law Cases Series of paperbacks–complete with a useful chronology and extensive bibliographical essay (instead of full citations)–Kens's rich and provocative restatement of the traditional interpretation can become fodder for debate in undergraduate and graduate constitutional history courses.

Notes

[1]. Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," *Yearbook of the Supreme Court Historical Society*, (1983); Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," *Journal of American History*, 72 (1985), 63-91; John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920*, (Westport, Conn.: Greenwood Press, 1978).

[2]. Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*, (Durham, N.C.: Duke University Press, 1993).

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