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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.

Reviewed by Paul Kens Published on H-Law (June, 2013) Commissioned by Ethan Zadoff



The History and Implications of Lochner v. New York

This well-written book by David E. Bernstein, Foundation Professor at the George Mason University School of Law, is destined to be influential and controversial. Published by the University of Chicago Press with the Cato Institute, *Rehabilitating Lochner* examines *Lochner* v. *New York*, a 1905 decision by the U.S. Supreme Court overruling a state law limiting hours of work in the baking industry to ten hours a day and sixty hours a week.

Lochner is important primarily because it has become one of the most glaring symbols of judicial overreaching, what some might call unbridled judicial activism. Among the factors lifting *Lochner* to this symbolic level is the complaint that the Court based its decision to overrule the bakeshop law on "liberty of contract": a right that not expressly recognized by the Constitution. Furthermore, Lochner's critics argue that, in concluding that there could be actual freedom of contract between employer and employee, the justices in the majority applied a formalistic legal interpretation clashing with the realities of industrial society. Another complaint is that the Court wrongly assigned the burden of proof by requiring the state to show that economic regulation fell within its legitimate powers and by narrowly defining that power. The upshot, according to critics, was that, by a five-to-four decision, an unelected court usurped the authority granted to the state legislature as the people's elected representatives. For these reasons, many judges, lawyers, legal scholars, and politicians rank Lochner with Dred Scott v. Sandford (1857) as one of the worst Court decisions in American history.

Bernstein maintains that the standard story has evolved into a morality tale, a simplified myth of good versus evil. This myth places on the evil side the United States Supreme Court, dominated by judges sympathetic to business interests who used their position to write a dogmatic version of laissez-faire economic theory into the Constitution. Bernstein maintains that, because of this myth's persistence, "Lochner and liberty of contract jurisprudence more generally have been unfairly maligned, and their contribution to modern American law neglected" (p. 125). His purpose, he says, is to rehabilitate Lochner by supplanting the mythical narrative with something closer to reality.

The book's first two chapters, covering legal doctrine and the facts leading up to the case, sets out to rehabilitate *Lochner* itself. Chapter 1 contends that the myth of *Lochner* is wrong in claiming that the Court's majority manufactured liberty of contract doctrine out of the blue. Chapter 2 contends that the myth is wrong in depicting the *Lochner* story as a clash between powerful corporate industry and defenseless workers. I have significant disagreements with these chapters. But let me first address Bernstein's second goal—rehabilitating liberty of contract jurisprudence more generally, because this is where he is at his best.

The bulk of Bernstein's book, and of his effort to rehabilitate liberty of contract jurisprudence, examines how

the doctrine and Lochner were treated in the years after the Supreme Court decided the case. Pointing out that initial reaction to the decision was mild, Bernstein describes how a coalition of Progressive intellectuals, Progressive judges, and powerful labor unions later spun the myth of Lochner. According to Bernstein, the myth became an integral part of "sociological jurisprudence," a constitutional doctrine developed and honed by such Progressive justices as Oliver Wendell Holmes, Louis Brandeis, and Benjamin Cardozo. Sociological jurisprudence, Bernstein writes, "emphasized opposition to constitutional protection of natural rights and support for judicial deference to legislation"(p. 42). Bernstein maintains that the ascendancy of sociological jurisprudence, and its principle of deference to legislation, ultimately had what he deems the negative impact of paving the way for increased government involvement in Americans' lives.

The more interesting aspect of Bernstein's post-Lochner narrative, however, is his account of how the proponents of sociological jurisprudence, supposedly champions of the common people against an entrenched and powerful economic elite, wrote other opinions that are embarrassments to their supposed heirs: modern liberals. The existence of this dilemma for modern liberals is nothing new. Most legal scholars and historians of the Progressive Era know that Brandeis's brief in Muller v. Oregon helped achieve a maximum-hours law for women, but did so by emphasizing women's traditional role and presumed physical inferiority.[1] They know that, with an offhanded, insensitive remark that "three generations of imbeciles is enough," Holmes wrote a decision upholding a law permitting the forced sterilization of individuals whom the state deemed mentally defective.[2] They are aware that the Progressive Era was also the era of Jim Crow, and that the Progressives' concern for the common person did not include minorities.

What makes Bernstein's account unique is that, where many modern scholars tend to address these ironies with embarrassment, he doesn't see them as ironic. Rather, he sees them as predictable outcomes of a theory championed by elite intellectuals and entrenched labor unions. He goes even further, adding that the fundamental ideals driving the *Lochner* majority to adopt liberty of contract not only provided greater protections for individual liberty, but would have been more effective in ameliorating problems of race and gender inequality as well.

I sense that Bernstein may have gone overboard in

blaming Progressives for the era's ills and in speculating that advocates of liberty of contract would have done better. Even so, Bernstein's post-*Lochner* narrative makes his point that, whereas many tend to see Progressive judges and scholars as forebears of modern liberalism, modern liberals also owe a debt to the judges who embraced liberty of contract.

Bernstein hopes to use this post-*Lochner* history to reassess the contributions that *Lochner* and liberty of contract doctrine have made to American constitutional law. In many ways he has succeeded on that count. But his success raises a key question: what are the implications of rethinking those contributions? Bernstein's *Lochner* is a story of a Supreme Court majority applying a theory of law steeped in constitutional tradition to protect small business from the clutches of a powerful labor union. Further, it is a story in which this theory (and the ideals driving it) incorporated protections for women, racial minorities, and other disadvantaged groups.

One lesson that a thoughtful reader might derive from this story is that anyone interested in liberty should favor judicial protection of the sort that *Lochner* represents. Bernstein disavows any intent to defend or restore *Lochner* or to become involved in a debate over the extent of the Supreme Court's authority (p. 125). We can take him at his word. Nevertheless, by implication, his work forms the basis of a call for a return to judicial activismespecially a call for the judiciary once again to assume the roles of overseer of state economic regulation and protector of entrepreneurial liberty.

Though Bernstein may not recognize this implication, his admirers do. For example, in a review of *Rehabilitating Lochner* entitled "A New Birth of Economic Freedom," Richard A. Epstein concludes: "In these times of economic stress and turmoil, it would be indeed welcome if the Supreme Court acknowledged the power of the classical liberal paradigm, in order to confess, and undo, its prior errors." [3] The validity of Epstein's conclusion that Bernstein demonstrates that the Court should revive liberty of contract depends in part on how successful Bernstein has been in rehabilitating the reasoning and precedent that are the majority opinion's foundation, and the facts of *Lochner* itself. To assess these points, we must return to chapters 1 and 2. These first chapters are where I believe Bernstein's project falters.

Chapter 1 takes on the myth that, with the intent of attaching laissez-faire economic theory to the Constitution, the *Lochner* majority manufactured liberty of contract doctrine out of thin air. To the contrary, Bernstein

argues, a long tradition in Anglo-American law supports the doctrine. That tradition, which he traces from Magna Carta through the Fourteenth Amendment, includes the concept of due process as a limit on government authority to deprive individuals arbitrarily of liberty or property rights. It also includes courts' use of the due process clause to enforce natural rights against the states. Finally, it includes traditions, growing out of Jacksonian democracy, of limited government and opposition to class legislation.]

As Bernstein notes out, this is not a new thesis. He synthesizes the work of many historians and legal scholars often described as revisionists. He emphasizes that nonetheless the "myth" of *Lochner* has persisted among lawyers, judges, politicians, and historians. That may be so, but among people who study the history of liberty of contract, the revisionist version has virtually replaced the so-called mythical version as the dominant narrative. It has so much replaced the mythical version that one reviewer of *Rehabilitating Lochner* complained, "Even constitutional scholars, who by now should know better, cannot seem to resist staid criticisms of the opinion that are, more often than not, wide of the mark."[4]

Perhaps scholars who should know better cannot shake the myth because the criticisms of Lochner are not that far off the mark. Consider chapter 1's claim that Lochner-era doctrine is the natural outcome of longstanding constitutional traditions. Bernstein begins by invoking the concept of due process of law as a source of the tradition. The Constitution guarantees in the Fifth and Fourteenth Amendments that no person shall be denied life, liberty, or property without due process of law. Bernstein and revisionist historians maintain that, in addition to guaranteeing proper procedure, the due process clause traditionally has placed broad limits on government authority. Courts, they maintain, have traditionally turned to due process and natural law as means of restricting government's ability to deprive individuals of liberty or property rights.

It is true that a lawyer or scholar who looks hard enough can find in our constitutional tradition examples of courts' use of due process in this manner. With respect to business regulations, however, this was not the tradition dominating early American constitutional doctrine, nor, for that matter, American political, economic, and social life. Revisionists and Bernstein can point only to a limited set of examples before the Civil War. Most challenges to state regulation at that time invoked the contract clause. There, the dominant precedent empha-

sized that the use of one's property is limited by the community's rights. Furthermore, the federal courts, at least, applied a presumption in favor of the legislature.

Ratification of the Fourteenth Amendment in 1868 at first changed this situation only by shifting tests of the legitimacy of business regulation from the contract clause to the Fourteenth Amendment's due process clause. For at least two decades after ratification, the Court's majority continued to emphasis rights of the community, popular sovereignty, and presumptions in favor of legislative enactment.[5]

Even conceding that the concept of due process gives the Court authority to protect the constitutional rights of individuals, in Lochner the question was what right. This is where liberty of contract doctrine came into play. Liberty of contract is not expressly found in the Constitution, but, again, Bernstein claims that long-standing American traditions support the doctrine. As with his treatment of due process, his claim is accurate to an extent. Again, lawyers and historians can find in early nineteenth-century American thinking a distrust of government and an aversion to class legislation. These are especially evident in tenets of Jacksonian democracy, but that does not make liberty of contract a direct descendant of Jacksonian democracy. To the contrary, liberty of contract doctrine as it developed in the nineteenth century's last decade turned Jacksonian democracy on its head. Whereas Jacksonians advocated limited government as a means to reduce the influence of wealth and privilege and to preserve democracy, what drove liberty of contract doctrine was a fear that the workings of democracy might undermine the economic and social system that had created wealth and privilege.[6]

Bernstein can find links to earlier American traditions supporting the notion of due process as a limit on government authority. He also can find links to a traditional distrust of government. But his own work shows that the theory combining due process of law and liberty of contract, as the *Lochner* majority opinion used it in 1905, did not take hold until the late 1880s, and even then primarily in state courts. Yet, Bernstein interprets the journey to *Lochner* as evidence of the Court following long-standing tradition. He thus seems to join other revisionists in implying that liberty of contract doctrine represented the culmination of a gradual, vague, but inevitable evolution in constitutional interpretation.

I interpret the trajectory of constitutional history quite differently. To me, the reasoning guiding the *Lochner* majority represented a revolutionary break from

traditional constitutional doctrine. Revisionists may have shown that that break was neither as sudden nor as unsubstantiated as charged by the myth of *Lochner*. Nevertheless, by giving entrepreneurial liberty a level of constitutional protection rare before the Fourteenth Amendment's ratification, and a minority theory until the late 1880s, *Lochner* does represent a radical departure from standard constitutional doctrine.

Chapter 2 attacks the other part of the myth of *Lochner*. The bakeshop regulation at issue in *Lochner* did not represent a victory for disadvantaged laborers over a powerful corporate elite, he says. Rather, it was a case of big business and powerful labor unions using regulations to put small bakers out of business. His narration of the facts behind the case has had a significant impact. Many reviewers adopt his account of the facts as definitive. Glenn Harlan Reynolds, for example, writes, "The false narrative of *Lochner* has controlled the past for decades, but Bernstein's clear and incisive work may wrest that control away and move us back to the truth."[7] Bernstein is more modest and honest, stating that his goal is to move us closer to historical truth, but the question remains how close he has come.

I too have extensively researched the facts behind *Lochner*. And, whereas I agree with Bernstein that the bakeshop regulation did not entail a dispute between labor and big business, the history I uncovered is quite different from his. The law in question was not promoted by powerful labor unions and big business. It was the work of a politically powerless labor union, aided by a muckraking journalist who had the good fortune to attach their cause to the tenement reform movement playing a significant role in New York politics.[8]

The difference between these stories is important because libertarian legal scholars have been intent on depicting the regulation challenged in *Lochner* as an example of wrongful "rent seeking." In other words, libertarian scholars deem the bakeshop law to be unjust because, rather than relying on the market, labor unions and big bakeries used their political power to manipulate the economic environment to their advantage. On this reasoning, the majority decision in *Lochner* was good because it corrected this injustice. The problem with this theory is that it is based on a false assumption. In reading everything I could find on the statute's enactment, I found no evidence that "powerful unions" or "big bakeries" took part in passing the bakeshop law.

Unlike other libertarian scholars, Bernstein never claims that large bakeries were behind the bakeshop law.

Instead, he argues, the support of owners of large bakeries for the law was mostly tacit; they did not actively lobby, but "were happy to have new rules and associated costs and inconveniences imposed on their competitors" (p. 27). Nevertheless, Bernstein concludes that the maximum-hours law condemned in *Lochner* "favored entrenched special interests at the expense of competitors with less political power" (p. 3). Though he may not claim it as an instance of rent seeking, he has provided the fodder for others to do so.[9]

I believe that the route from Bernstein's own statement of facts to what seems to be an inconsistent conclusion results from several oversights. First, Bernstein fails to place the bakeshop act in political context. He gives no information about the history of its enactment and no understanding of New York politics in the 1890s. Second, he presumes that the Journeymen Baker's Union was an entrenched interest that wielded political muscle when it actually was disorganized and politically impotent. Third, he molds his evidence that the owners of large bakeries tacitly supported or acquiesced to the law to imply that they were involved in its adoption.

Along the way, Bernstein ignores another factor playing into the degree to which the maximum-hours legislation was unjust or unfair. Although critics claim that the ten-hour limit kept bakers from entering into a contract to work as long as they might want, there was no advantage in agreeing to work longer hours. Most factory workers of the era were not paid by the hour. They were paid by the day or the week. The number of hours constituting a day's work was at the option of the employer. The bakeshop law was one small episode in a long effort on the part of laborers and factory workers to define a standard workday.

Like Bernstein, I never would presume to be the keeper of historical truth. But I am confident of my version of *Lochner*, with respect to both the constitutional doctrine and the facts surrounding the case. I urge any interested reader to lay the two versions side by side, follow the references, and discover a version of the story that is closer to historical truth.

Despite my disagreement, I believe that *Rehabilitating Lochner* is a book well worth reading. It is concise, lively, and one of the best examples of libertarian thinking about the Supreme Court's role in limiting economic regulation. As one reviewer observes, the deep ideological currents pushing Bernstein's project give it an edge and a vitality that it otherwise might lack.[10] But deep ideological currents can form a two-edged sword. They

guided Bernstein on a journey to destroy a myth, but in my estimation he ended by replacing one myth with another.

Notes

- [1]. Muller v. Oregon. 208 U.S. 412 (1908).
- [2]. Buck v. Bell, 274 U.S. 584 (1927).
- [3]. Richard A. Epstein, "A New Birth of Economic Freedom," October 21, 2011, Claremont Review of Books, The Claremont Institute for the Study of Statesmanship and Political Philosophy website, available at http://www.claremont.org/publications/crb/id.1881/article_detail.asp.
- [4]. George Thomas, "When Legend Becomes Fact," in *Rehabilitating Lochner: A Law and Liberty Symposium*, March 1, 2012, Online Library of Law and Liberty website, available at libertylawsite.org/2012/03/01/rehabilitating-lochner-a-law-and-liberty-symposium/.
- [5]. I have previously treated the subjects of this and the preceding paragraph in more detail and with references. Paul Kens, *The Supreme Court under Morrison R. Waite 1874-1888* (Columbia: University of South Carolina Press, 2010), 78-90, 110-126; Paul Kens, "Property, Lib-

- erty, and the Rights of the Community: Lessons from Munn v. Illinois," Buffalo Public Interest Law Journal 30 (2012): 157-195.
- [6]. I have also treated the material in this and the above paragraph in more detail and with references. Paul Kens, "Lochner v. New York: Tradition or Change in Constitutional Law?," 1 NYU Journal of Law and Liberty 404-31 (2005).
- [7]. Glenn Harlan Reynolds, "The Lochner Ness Monster," *Commentary*, June 2011, available at http://www.commentarymagazine.com/article/the-lochnerness-monster/.
- [8]. Paul Kens, Judicial Power and Reform Politics: The Anatomy of Lochner v. New York (Lawrence: University Press of Kansas, 1990); republished in paperback but without footnotes as Lochner v. New York: Economic Regulation on Trial (1998).
- [9]. George F. Will, "A High Court Ruling's Rehabilitation," *Washington Post*, September 8, 2011.
- [10]. Ted McAllister, "Don't Print the Legend," March 1, 2012, Online Library of Law and Liberty website, available at http://libertylawsite.org/2012/03/01/ted-mcallister-dont-print-the-legend/.

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Citation: Paul Kens. Review of Bernstein, David E., Rehabilitating Lochner: Defending Individual Rights against Progressive Reform. H-Law, H-Net Reviews. June, 2013.

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