

Bernstein, David E. *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform*. Chicago: The University of Chicago Press, 2011.

David E. Bernstein, Foundation Professor at the George Mason University School of Law, has long been regarded as the nation's leading authority on the much-maligned 1905 U.S. Supreme Court decision, *Lochner v. New York*. His new book, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform*, is the culmination of his years of scholarship on the case. I give Bernstein's book the highest compliment one scholar can pay to the work of another: I learned a lot from reading it. Indeed, after finishing Bernstein's book I will no longer think of *Lochner* the way I used to—as the apogee of the Supreme Court's activist defense of the capital class—and I will certainly teach the case differently than I have in the past.

*Rehabilitating Lochner* is intellectual history in its highest form. Bernstein, a prolific libertarian legal scholar, states in the Introduction that "*Lochner* is likely the most disreputable case in modern constitutional law discourse" (p. 1). He adds that "What history can tell us is that the standard account of the rise, fall, and influence of the liberty of contract doctrine is inaccurate, unfair, and anachronistic" (p. 6). He devotes the remainder of his book to substantiating this remarkable claim, and he succeeds marvelously.

Chapter One explores the rise of liberty of contract, a constitutional law doctrine that guarantees individuals and corporations the right to enter into formal agreements without government interference. The doctrine is widely understood as the linchpin of laissez-faire economics and free market libertarianism. Bernstein demonstrates in the chapter that the doctrine was not created from whole cloth by an activist, politically motivated Supreme Court, but rather traces to the foundational principle of American constitutionalism: that, above all else, the purpose of government is to protect—not infringe upon—every individual's natural rights. Bernstein documents his claim by detailing the development of a "substantive" interpretation of due process of law both before and after the U.S. Civil War. He credits state courts, not the U.S. Supreme Court, with pioneering the notion that legislation can sometimes be so arbitrary and oppressive as to be inconsistent with due process. Bernstein's original insight in the chapter, however, is that the liberty of contract doctrine was not first and foremost a judicial attack on class legislation. Bernstein writes: "When *Lochner* reached the Supreme Court in 1905, class legislation challenges had ceased to be a significant threat to labor legislation. *Lochner* itself explicitly focused on the right to liberty of contract, and relegated the more egalitarian concerns raised by the ban on class legislation to an oblique aside" (p. 16).

Chapter Two is devoted to the *Lochner* litigation itself, a decision in which the nation's highest court invalidated, on Fourteenth Amendment due process grounds, a New York law that limited the number of hours bakers could work to ten per day and sixty per week. Bernstein chronicles how those who have pilloried *Lochner* over the years do not understand what the litigation was actually about. He points out, for example, that the bakers' union that championed the lawsuit was at least as interested in driving small bakeshops that employed recent immigrants out of business as it was in protecting the health of bakery workers. What impressed me most about the chapter, however, are the sources that Bernstein cites in support of his reading of the dispute: the *Baker's Journal* and *The National Baker*, to mention two particularly relevant periodicals of the day that modern critics of the decision have overlooked. And while *Lochner* is frequently lampooned by these same modern critics as the epitome of legal "formalism," Bernstein shows that the opposite is true and that the Court based its decision on real-world data regarding the health of bakery workers rather than on legalistic dogma. He likewise illustrates that the decision was applauded by the newspapers and law journals of the day, which is again contrary to modern accounts that portray it as out of step with its times.

Chapter Three, a discourse on the sociological school of Progressive jurisprudence that mounted the initial attack on *Lochner*, finds Bernstein excoriating several luminaries of American law. Roscoe Pound, the dean of Harvard Law School, and Oliver Wendell Holmes Jr., the most strident dissenter on the Court that decided *Lochner*, come off particularly poorly. For example, Bernstein includes Pound in a group of legal elites whose support for sociological jurisprudence "often masked a political agenda that favored a significant increase in government involvement in American economic and social life" (p. 41), while Holmes is revealed to be an egomaniac with an "obvious and self-proclaimed disdain for facts" (p. 46).

Bernstein's decision to include a separate chapter on sociological jurisprudence makes perfect sense because, as he puts it, "To fairly assess the liberty of contract doctrine in historical context ... one must consider the contemporary practical alternative: the constitutional ideology of liberty of contract's Progressive opponents" (p. 40). That "practical alternative" could not be more unappealing to anyone committed to American individualism—the libertarian ideal of a legal and political system dedicated to protecting individual rights. As Bernstein makes clear in this chapter, proponents of sociological jurisprudence such as Pound and Holmes cared little about individuals, committed as they were to so-called majoritarian solutions to what they perceived as the shortcomings of private decision-making.

Chapter Four, "Sex Discrimination and Liberty of Contract," and Chapter Five, "Liberty of Contract and Segregation Laws," are, in my judgment, the two strongest chapters of a consistently strong book. Bernstein demonstrates in those chapters that the supporters of *Lochner* were far more protective of the rights of women and minorities than were *Lochner*'s Progressive critics. With respect to women's rights, Bernstein documents

how the Progressive defense of legislative restrictions on women's place in the workforce turned on "paternalistic" arguments that "appealed to contemporary sexism" (pp. 60, 64). Famed Progressive Attorney Louis Brandeis, Holmes's future collaborator on the Supreme Court, was a particularly aggressive practitioner of paternalistic and sexist attitudes, including in what came to be known as the "Brandeis Brief," a memorandum submitted to the Court that insisted, via sociological "evidence," that women were not physically capable of working the same number of hours as men. Those opposed to the Progressive program, in contrast, invoked *Lochner's* conception of liberty of contract as the legal justification for permitting women to compete in the workplace on an equal footing with men.

Turning to the rights of African Americans, Bernstein illustrates in Chapter Five that it was the Progressive opponents of *Lochner*, rather than the conservative proponents of the decision, who consistently practiced racial discrimination. Of course, modern critics of *Lochner* claim otherwise. Yale Law School's Bruce Ackerman, for one, insists that the majority opinion in *Plessy v. Ferguson*, the infamous 1896 Supreme Court decision upholding racial segregation on railroad carriages, had a "deep intellectual indebtedness to the laissez-faire theories expressed one decade later in cases like *Lochner*" (p. 73). Bernstein demonstrates that this view is incorrect because it rests on a flawed reading of both *Plessy* and *Lochner*, and also neglects the 1917 case of *Buchanan v. Warley*—a decision that *invalidated* the residential segregation law of Louisville, Kentucky as inconsistent with the due process clause of the Fourteenth Amendment. Bernstein writes:

In short, the conventional story that the Court's pro-liberty of contract decisions are somehow linked to the toleration of segregation in *Plessy* and other cases cannot withstand historical scrutiny. Indeed, the opposite is the case. When the Court deferred to "sociological" concerns and gave a broad scope to the police power, as in *Plessy*, it upheld segregation. When, however, the Court adopted more libertarian, *Lochner*-like presumptions, as in *Buchanan*, it placed significant limits on race discrimination. (p. 86)

Chapter Six is devoted to a topic that has received a lot of attention from constitutional law scholars over the past decade or so: the Supreme Court precedents that served as the foundation for the explosion of civil liberties decisions in the modern era. Bernstein reveals that here, too, the conventional wisdom is incorrect—that conventional wisdom being that Progressive opponents of *Lochner* had an expansive view of civil liberties and proponents of *Lochner* were hostile to them. Bernstein focuses in this chapter on the decisions the Court issued in the first third of the twentieth century regarding education, eugenics, and freedom of expression in order to substantiate his reading of constitutional history. His discussion of the pro-private education opinions of perhaps the most notorious bigot ever to sit on the Court, Justice James McReynolds, is particularly striking. By voting to

declare unconstitutional on substantive due process grounds the Progressive attempts to hamstring private education, Bernstein insists, McReynolds was protecting racial and ethnic minorities, despite his personal animus for them. Bernstein characterizes McReynolds's jurisprudence in these cases as nothing less than a rebuke against statist Progressive ideas about educational reform. As McReynolds himself put it in one of the cases, "the child is not the mere creature of the state" (p. 96).

Holmes, the darling of the Progressive movement, is made to look like a monster in the eugenics cases. In *Buck v. Bell* (1927), for example, he infamously quipped, "Three generations of imbeciles are enough" (p. 97), an opinion about which he later boasted to a friend, "One decision that I wrote gave me pleasure, establishing the constitutionality of a law permitting the sterilization of imbeciles" (p. 98). Bernstein makes plain that Holmes was not alone in his outrageous views. Professor Fowler V. Harper, for one, included *Buck v. Bell* on a list of encouraging "progressive trends" in the law (p. 98). With regard to freedom of expression, the area of constitutional law with which Progressives are most closely associated, Bernstein describes how "Progressive defenses of freedom of expression relied on utilitarian considerations, and not on freedom of expression as a fundamental individual right" (p. 99). In short, they were majoritarians, not libertarians, and they turned to the Court only because they thought free speech served the interests of the majority at the time.

Chapter Seven addresses *Lochner* in the modern era. By definition, this chapter covers material with which most readers are familiar, in particular the Warren Court's landmark privacy decision, *Griswold v. Connecticut* (1965), and the Burger Court's 1973 abortion rights case, *Roe v. Wade*. Bernstein reminds readers that, Justice William O. Douglas's protestations for the *Griswold* majority notwithstanding, both *Griswold* and *Roe*, not to mention the Court's recent pro-gay rights decision in *Lawrence v. Texas* (2003), all trace to *Lochner*. Bernstein also explains how modern conservative opponents of the *Griswold-Roe-Lawrence* line of cases, such as Robert Bork, are the intellectual offspring of the Progressives who preceded them—and hence hostile to a strong judicial role in protecting individual rights—while modern liberal supporters of that line of cases, such as Laurence Tribe, owe much to prior judges and scholars who embraced *Lochner* (although they try very hard to deny it). Bernstein once again turns the conventional wisdom on its head. He is correct, however. Indeed, I always mention to my constitutional theory students that modern libertarians such as Randy Barnett, Richard Epstein, and Bernstein himself have more in common with modern liberals than they do with modern conservatives in viewing the Constitution as requiring aggressive judicial protection of individual rights from overreaching by the majoritarian political process.

Bernstein concludes *Rehabilitating Lochner* with a summary of what he calls the "modest" conclusions of his book (p. 126). Those conclusions are found on pages 126-27, and they are in reality far from modest. Bernstein has done nothing less than explode the myth of *Lochner*, a decision that any pro-

liberty student of American constitutional law should embrace. This is a book that should reshape the way constitutional law is understood for years to come. Whether it will or not depends on how sincere the liberal professoriate that dominates American legal education is about getting constitutional history right. The “blurbs” on the dust jacket to Bernstein’s book are an encouraging sign that at least several luminaries are sincere. Jack M. Balkin of Yale Law School, William E. Nelson of New York University School of Law, and Mark V. Tushnet of Harvard Law School—liberals all—commend Bernstein for authoring a transformative book about a much maligned Supreme Court decision. They should be applauded for doing so, and Bernstein should be applauded for writing the book.

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