

BOOK REVIEW

REPAIRING *LOCHNER*'S REPUTATION: AN
ADVENTURE IN HISTORICAL REVISIONISM

REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM. By David E. Bernstein. Chicago and London: Univ. of Chi. Press. 2011. Pp. 208. \$45.00.

*Reviewed by Thomas A. Bowden**

This book challenges the orthodox view of *Lochner v. New York*¹ as a politically motivated judicial coup that ushered in an era of laissez-faire constitutionalism.² In *Rehabilitating Lochner*, Professor David E. Bernstein³ has produced a serious and significant work of historical revisionism, one intended to enrich our understanding of substantive due process analysis under the Fourteenth Amendment. Bernstein's special focus is constitutional protection for liberty of contract: whence it came, how it applied, and where it led. He does not, however, undertake the task of showing that *Lochner* was correctly decided or that its theory of judicial review was sound.

The background of the controversial 1905 case is easily summarized. Joseph Lochner was criminally convicted under the New York Bake Shop Act for allowing one of his employees to work more than sixty hours in a single week. New York's appellate courts upheld the conviction on grounds that the Bake Shop Act was a health-protection measure, validly enacted under the state's police power. In the United States Supreme Court, however, a five-justice majority struck down the maximum-hours provision, in an opinion authored by Justice Rufus Peckham. Unlike the Act's regulation of matters such as ventilation and plumbing, the maximum-hours clause was deemed a "labor law," designed to protect one economic class at the expense of another, not a health or safety measure authorized under the police power.⁴ As such, the sixty-hour maximum was adjudged a "mere meddling interference[]" with "liberty of contract," specifically "the right of

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¹ 198 U.S. 45 (1905).

² DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 3, 8 (2011).

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⁴ *Lochner*, 198 U.S. at 57; see also HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 19 (1993).

contract between the employer and employees” implicit in the Fourteenth Amendment’s ban on depriving citizens of liberty “without due process of law.”⁵ Three other Justices, joining Justice John Marshall Harlan’s dissent, would have upheld the Act on grounds that it was entirely aimed at protecting workers’ health.⁶ And in a lone dissent, Justice Oliver Wendell Holmes, Jr., rejected the very idea that the due process clause protects liberty of contract, punctuating his point with memorable mockery: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”⁷

“*Lochner* is likely the most disreputable case in modern constitutional discourse,” Bernstein writes, and it’s hard to disagree.⁸ For more than a century now, *Lochner*’s detractors have, with unique “ferocity and tenacity,” argued that the 1905 Supreme Court opinion was not merely erroneous, but an instance of “willful judicial malfeasance.”⁹ Indeed, “*Lochner* has . . . become shorthand for all manner of constitutional evils,” such as judicial activism, politicized judging, and outright favoritism of rich over poor, corporations over workers, and abstract legal concepts over practical realities.¹⁰ What’s more, *Lochner* is widely believed to have inaugurated a so-called *Lochner* era, during which a rock-ribbed conservative Court imposed laissez-faire constitutionalism on a nation whose desperate quest to install democratic social reforms would have to await vindication by the New Deal.¹¹

⁵ *Lochner*, 198 U.S. at 53, 61.

⁶ *Id.* at 69 (Harlan, J., dissenting).

⁷ *Id.* at 75 (Holmes, J., dissenting). The English author Herbert Spencer (1820–1903) was a prominent intellectual whose most important book, *Social Statics: Or, the Conditions Essential to Human Happiness Specified, and the First of Them Developed*, was originally published in 1851 and reissued continually thereafter. “In the three decades after the Civil War,” one historian has written, “it was impossible to be active in any field of intellectual work without mastering Spencer.” RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 33 (George Braziller, Inc. rev. ed. 1959). Central to Spencer’s thinking was a belief that emotions dictate moral values, which include an “instinct of personal rights.” HERBERT SPENCER, *SOCIAL STATICS: OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED* 30, 93 (1851). That “instinct” Spencer defined as “a feeling that leads him to claim as great a share of natural privilege as is claimed by others—a feeling that leads him to repel anything like an encroachment upon what he thinks his sphere of original freedom.” *Id.* at 93. This led Spencer to conclude: “Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man.” *Id.* at 103.

⁸ BERNSTEIN, *supra* note 2, at 1. Of course, Bernstein acknowledges that the *Dred Scott* case, with its holding that blacks “had no rights which the white man was bound to respect,” will always vie for the title of most ignominious decision. *Id.* (quoting *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857)) (internal quotation marks omitted).

⁹ BERNSTEIN, *supra* note 2, at 8.

¹⁰ *Id.* at 1-2.

¹¹ Bernstein notes that Professor Laurence Tribe’s 1978 treatise, *American Constitutional Law*, was most influential in persuading legal professionals that there actually existed a “*Lochner* era” and that *Lochner* was the paradigmatic example of substantive due process reasoning. *Id.* at 117-18 (internal quotation marks omitted).

Remarkably, both liberals and conservatives generally agree that *Lochner* deserves permanent banishment and disgrace. Bernstein traces this hostility to the decision's endorsement of substantive due process, the constitutional doctrine that interprets the Fourteenth Amendment's due process clause as guaranteeing substantive individual rights against legislative infringement.¹² Liberals fear that *Lochner*'s resurrection would imperil the elaborate edifice of economic legislation built up during the twentieth century. After all, if individual adults have a broad right to liberty of contract, protecting a baker's decision to work more than sixty hours a week, the implications for similar laws and regulations are obvious. As Bernstein shows, however—and as conservatives gleefully proclaim—these same liberals unashamedly smuggled in Lochnerian reasoning to carve out a “right of privacy,” which since the 1960s has given birth to decisions protecting individual choice in areas such as contraception, abortion, and homosexuality. Commenting on this phenomenon, failed Supreme Court nominee Robert Bork has written that substantive due process analysis permits judges to rule based on “new rights of their own invention” and is thus “without legitimacy.”¹³ According to Bernstein, “strong hostility to *Lochner* . . . remains bedrock conservative constitutional ideology.”¹⁴ In short, “*Lochner* has been treated as a unique example of constitutional pathology to serve the felt rhetorical needs of advocates for various theories of constitutional law.”¹⁵ As a result, legal professionals are wont to resist any suggestion that *Lochner* should be treated with respect.¹⁶

Bernstein deftly conveys this context by opening his book with a bit of wry humor: “If you want to raise eyebrows at a gathering of judges or legal scholars, try praising the Supreme Court's 1905 decision in *Lochner v. New York*.”¹⁷ Though this rueful scene suggests that the author has, perhaps, seen more than his share of raised eyebrows, Bernstein is savvy enough to realize that any attempt at an all-out defense of *Lochner* would require him to vindicate its interpretive approach against all comers. This is a burden he explicitly declines. Instead, he aims to right the historical record, explaining that “*Lochner* should be removed from the anticanon and treated like a normal, albeit controversial, case.”¹⁸ But history, Bernstein believes, is “inherently agnostic” on issues of proper constitutional interpretation: “History alone cannot tell us . . . whether *Lochner* was correctly decided; whether

¹² *Id.* at 8.

¹³ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 48-49 (1990).

¹⁴ BERNSTEIN, *supra* note 2, at 119.

¹⁵ *Id.* at 6-7.

¹⁶ *Id.* at 122. There are works representing exceptions to this rule. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 215, 223 (2004); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 118-19 (1980).

¹⁷ BERNSTEIN, *supra* note 2, at 1.

¹⁸ *Id.* at 7.

liberty of contract jurisprudence more generally was based on a sound theory of judicial review and constitutional interpretation; and whether *Lochner* or other cases protecting economic rights should be revived.”¹⁹ Readers, therefore, should “apply the history presented here to their own understandings of proper constitutional interpretation and construction.”²⁰

Hence the book’s title. Bernstein considered and rejected such options as “*Defending Lochner*” and “*Restoring Lochner*,” because they promised too much.²¹ He settled on “*Rehabilitating Lochner*” because his aim was more modest: “improving *Lochner*’s reputation.”²² Believing that the standard account is “inaccurate, unfair, and anachronistic,” he wanted to analyze the case and its effects “free from the baggage of the tendentious accounts of Progressives, New Dealers, and their successors on the left and, surprisingly, the right.”²³

The author of revisionist history has a difficult task compared to one who writes on a fresh slate. The revisionist must juggle two responsibilities: clearing away the accumulated debris of misinterpretation, while telling the true story that has been heretofore ignored. Bernstein ably dispatches both obligations. *Rehabilitating Lochner* functions like a time machine, whisking us back to 1905 before decades of distortion had crippled our ability to assess the case objectively and accurately trace its impact.

Bernstein’s myth-busting mission divides easily into two categories: myths about the decision itself and myths about its aftermath. Regarding the decision itself, Bernstein rejects two types of conventional wisdom—that the case was absurd as a textual interpretation of the Constitution’s Fourteenth Amendment and that the opinions masked extrajudicial motives. The first category is symbolized by John Hart Ely’s quip that “substantive due process” is as oxymoronic as “green pastel redness.”²⁴ This line of attack was anticipated by early legal Progressives such as Charles Shattuck, James Bradley Thayer, and John Chipman Gray. These pioneer Progressives all advanced some variant of the theme that the Fourteenth Amendment’s due process clause contains no guarantee of individual rights against legislative encroachment.²⁵ As for the decision’s alleged extrajudicial motives, aca-

¹⁹ *Id.* at 6.

²⁰ *Id.*

²¹ *Id.* at 125.

²² *Id.* The book’s subtitle, “Defending Individual Rights against Progressive Reform,” has a more normative tinge than Bernstein’s text. One may discount the subtitle, however, as the author disavowed the desire for one and indicated that he acceded to his publisher’s request for one. David E. Bernstein, Remarks at Cato Institute Book Forum (May 2, 2011) [hereinafter Remarks], available at <http://www.cato.org/event.php?eventid=8019>.

²³ BERNSTEIN, *supra* note 2, at 3, 6. Bernstein uses “Progressive” to denote early twentieth-century Progressives, not twenty-first century liberals/progressives.

²⁴ *Id.* at 8 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980)) (internal quotation marks omitted).

²⁵ *Id.* at 40-43.

demics have argued that liberty of contract doctrine “sprang ex nihilo out of Supreme Court justices’ minds” in order to boost big business and suppress the working class, consistent with a “pernicious Social Darwinist ideology” holding that “the strong could and *should* exploit the weak so that only the fittest survived.”²⁶

In reality, Bernstein writes, the *Lochner* decision’s reasoning was not absurd, but “well within the realm of plausible constitutional interpretation, given existing precedents and prevailing contemporary understandings of the meaning and scope of the Due Process Clause.”²⁷ Traditional Fourteenth Amendment analysis at the time asked three questions: Is there a right deserving protection? Was state government acting under the police power? And, did the government exceed the scope of the police power?²⁸ By answering the first of these questions in the affirmative, Bernstein writes, the *Lochner* Court was taking an approach “grounded in precedent and the venerable natural rights tradition.”²⁹

Natural rights theory means, in this context, the idea that individuals possess prepolitical rights that antedate positive law and that can be discovered through human reason. Courts took a historicist rather than purely rationalist approach to discerning the content of natural rights protected by the Due Process Clause. Historicists of the time believed that “societies, social norms, and institutions are the outgrowth of continuous change effected by secular causes,” but that they “evolve according to moral ordering principles that are discoverable through historical studies.” Courts used natural rights theory not as a source of novel constitutional norms, “but as confirmation of rights they thought were embedded” in the Anglo-American tradition.³⁰

However, Bernstein warns against confusing this historically rooted analysis with laissez-faire constitutionalism, the idea that the Supreme Court decided cases according to an abstract principle of individual liberty. Especially illuminating here is the contrast Bernstein draws between the actual course of Supreme Court jurisprudence and the more radical path staked out by American legal scholar and treatise author Christopher Tiedeman. In *The Unwritten Constitution of the United States*, published in 1890, Tiedeman argued that the states’ police power does not encompass the violation of individual rights, and that the Constitution’s “general declarations of rights” furnished authority for judges to “lay their interdict upon all legislative acts

²⁶ *Id.* at 8 (quoting LARRY YACKLE, *REGULATORY RIGHTS* 75 (2007)) (third internal quotation marks omitted).

²⁷ *Id.* at 126-27.

²⁸ *Id.* at 4.

²⁹ BERNSTEIN, *supra* note 2, at 3, 17-20.

³⁰ *Id.* at 17 (footnote omitted) (quoting Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1438 (1990), and Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 83 (1991)).

which interfere with the individual's natural rights."³¹ Thus, Tiedeman argued that laws forbidding racial intermarriage were unconstitutional, along with "the protective tariff, usury laws, antigambling laws, and laws banning narcotic drugs."³² But, as Bernstein points out, the Supreme Court never followed the Tiedeman line of thought, before or after *Lochner*. Holmes said as much in his *Lochner* dissent, noting the Court had recently approved laws prohibiting lotteries, doing business on Sunday, engaging in usury, selling stock on margin, and employing underground miners more than eight hours a day—each law a clear interference with contractual liberty.³³ Whatever influence Tiedeman may have had, "quickly faded" under the onslaught of Progressive sociological jurisprudence in the early twentieth century.³⁴

Bernstein also observes that Justice Harlan's dissent contradicts the *Lochner* Court's supposed outlier status. Often overshadowed by Holmes's pithier opinion, Harlan's dissent commanded three votes for the proposition that, although liberty of contract is indeed a right protected by the Fourteenth Amendment's due process clause, the Bake Shop Act was a health measure enacted under the state's police power and therefore valid upon constitutional review. Thus, Bernstein notes, eight of the nine Justices agreed that liberty of contract is a right protected by the Fourteenth Amendment, with Holmes the only true outlier.³⁵

Even if one finds this liberty of contract jurisprudence unconvincing, the historical evidence does not support the oft-repeated accusation that extrajudicial motives determined the outcome. Contrary to allegations that the decision favored large corporations over powerless workers, it was large corporate bakeries that tended to support bakeshop regulation, while opposition "came from small family-owned bakeries that were usually owned by former bakery workers."³⁶ Also, the Bake Shop Act originated with the bakers union's desire to "drive small bakeshops that employed recent immigrants out of the industry."³⁷ Thus, Bernstein exposes how conventional wisdom turns historical reality on its head. It was the *Lochner* dissenters, not the majority, who lent their support to legislative oppression of immigrants and small businesses at the behest of large corporations and unions.

³¹ *Id.* at 11-12, 21 (quoting CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 77-78, 81 (1890)) (internal quotation marks omitted).

³² *Id.* at 21.

³³ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

³⁴ BERNSTEIN, *supra* note 2, at 43.

³⁵ *Id.* at 35-37. The book's delightful dust jacket illustration depicts Justices Peckham and Holmes as prizefighters, with Holmes prone on the canvas, down for the count, while Peckham threatens to sock him again if he dares to rise. Peckham's career and economic liberty jurisprudence are surveyed in James W. Ely, Jr., *Rufus W. Peckham and Economic Liberty*, 62 *VAND. L. REV.* 591 (2009).

³⁶ BERNSTEIN, *supra* note 2, at 23.

³⁷ *Id.*

Social Darwinism, meanwhile, was widespread among *Lochner*'s Progressive critics but not among the Justices in 1905: "Holmes was likely the *Lochner* Court's only true Social Darwinist."³⁸ As to the idea that *Lochner* represented a "mechanical" application of legal concepts without attention to sociological facts, Bernstein notes that Peckham's majority opinion, like Harlan's dissent, was "not formalistic, but took explicit account of statistical data regarding the health of bakers."³⁹

In sum, the Justices of the *Lochner* Court, "faced with constitutional challenges to novel assertions of government power, sincerely tried to protect liberty as they understood it, consistent with longstanding constitutional doctrines that reflected the notion that governmental authority had inherent limits."⁴⁰ The eight Justices who endorsed liberty of contract as a constitutional value sincerely believed that the Fourteenth Amendment "set inherent limits on the government's authority to regulate the lives of its constituents" and opined accordingly.⁴¹

But since the 1930s, Bernstein writes, "a hostile perspective inherited from the Progressives has virtually monopolized scholarly discussion of the Court's liberty of contract decisions."⁴² This has given rise to the myth that *Lochner* was the centerpiece of a decades-long *Lochner* era, during which democratically enacted social reforms were struck down by a Supreme Court that was "extremely activist and ideologically committed to a strong version of economic libertarianism."⁴³ According to Bernstein, the facts say otherwise. The Court did not embrace laissez-faire constitutionalism, but neither did it follow Holmes in holding that the police power knows virtually no limits. Instead, the Court followed a traditional path, recognizing many exceptions to liberty of contract for laws regulating businesses "affected with a public interest," the performance of public work, procedures for paying wages, and conditions that affected workers' health and safety.⁴⁴ Moreover, the Court upheld many labor regulations that came before it, including minimum wages, maximum hours, and health standards.

Beyond the labor arena, the Court upheld "most laws challenged under the Due Process Clause," including new regulatory schemes such as comprehensive zoning.⁴⁵ Indeed, during the so-called *Lochner* era, the Supreme Court decided six cases imposing maximum working hours, only one of which—*Lochner* itself—struck down the statute in question.⁴⁶ Many post-

³⁸ *Id.* at 46-48.

³⁹ *Id.* at 23-24, 42.

⁴⁰ *Id.* at 3.

⁴¹ *Id.* at 4.

⁴² BERNSTEIN, *supra* note 2, at 2.

⁴³ *Id.* at 6, 20-22, 127.

⁴⁴ *Id.* at 49-50 (quoting *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923)) (internal quotation marks omitted).

⁴⁵ *Id.* at 50.

⁴⁶ Remarks, *supra* note 22, at 22.

Lochner decisions had “‘pro-poor’ distributive consequences” or took down entrenched special interests.⁴⁷ Bernstein observes that although *Lochner* may have mildly slowed the growth of government, “federal and state government power and authority nevertheless grew apace.”⁴⁸ “What later became known as the *Lochner* era,” he writes, “seemed more aptly described as the *Lochner* moment.”⁴⁹

Interestingly, Bernstein makes the case that *Lochner* not only failed to inaugurate an era of laissez-faire constitutionalism, it positively energized Progressive sociological jurisprudence.⁵⁰ “The rise of sociological jurisprudence,” Bernstein writes, “was spurred to a significant degree by the *Lochner* decision” because it “suggested to Progressives that the Supreme Court had joined the forces of reaction.”⁵¹ Bernstein points out that Progressives of the time wanted government to promote the “common good” and showed “impatience, at best, with competing claims of individual right.”⁵² They consistently displayed a general “hostility to individualism”⁵³ and to rights-based limits on government power.⁵⁴ These were politically-minded activists who held an “extreme pro-government ideology” and opposed “any robust constitutional protection of individual or minority rights.”⁵⁵ Such views extended beyond liberty of contract to encompass virtually all constitutional protection of individual or minority rights.⁵⁶ They “believed in strong interventionist government run by experts and responsive to developing social trends, and were hostile to countervailing claims of rights-based limits on government power.”⁵⁷

Progressives typically “thought that the very notion of inherent individual rights against the state was a regressive notion with roots in reactionary natural rights ideology.”⁵⁸ Progressives were also “extremely suspicious of the judiciary’s competence and integrity” in regulating the scope of government power.⁵⁹ Legislatures were thought superior to judges in their ability to gather and sift sociological data and then arrive at political compromises in the “public interest.” The “Brandeis Brief” was the Progressives’ way of correcting for—or rubbing judges’ noses in—this relative

⁴⁷ BERNSTEIN, *supra* note 2, at 3.

⁴⁸ *Id.* at 1 (citing Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 754 (2009)).

⁴⁹ *Id.* at 49.

⁵⁰ *Id.* at 33-34.

⁵¹ *Id.* at 42.

⁵² *Id.* at 44.

⁵³ BERNSTEIN, *supra* note 2, at 44.

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.*

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 40.

⁵⁹ BERNSTEIN, *supra* note 2, at 4.

lack of expertise. "The origin of today's widespread enmity to *Lochner*," Bernstein writes, "lies in Progressive-era legal reformers' hostility to liberty of contract."⁶⁰

In his quest to set the historical record straight, Bernstein spends the better part of three chapters discussing how "Lochnerian protection of liberty of contract was invoked to justify some of the most significant early decisions expanding constitutional protections for the rights of African Americans and women and for civil liberties, often over the strong opposition of Justice Holmes and his Progressive allies."⁶¹ Here, Bernstein's discussion of a path-breaking, anti-segregation case, *Buchanan v. Warley*,⁶² merits special attention.

Buchanan, decided in 1917, involved a Louisville, Kentucky, ordinance forbidding "any colored person" to occupy a residence on a block where the numerical majority of occupants are "white people."⁶³ This government-enforced segregation was challenged by the NAACP's Louisville chapter on grounds that the law violated the plaintiff's Fourteenth Amendment right not to be deprived of property without due process of law.⁶⁴ Kentucky's highest court upheld the law, explaining that "the advance of civilization" had strengthened the state's power and "resulted in a gradual lessening of the dominions of the individual over private property."⁶⁵ As a result of the court's decision, the plaintiffs were left without a cause of action.⁶⁶ In deciding whether to appeal this case, the plaintiff was swimming against a filthy tide of official racism. There was the Supreme Court's *Plessy v. Ferguson*⁶⁷ decision, which, notes Bernstein, "seemed to hold that segregation was a presumptively proper police-power objective."⁶⁸ The Court had also rejected challenges to land-use regulations that included a pattern of Jim Crow racial segregation, and "legal commentators were nearly unanimous in their belief that residential segregation laws were constitutional."⁶⁹

This trend was reinforced by the 1908 case of *Berea College v. Kentucky*.⁷⁰ Berea College, a private school in Kentucky, was racially integrated as a matter of educational policy.⁷¹ However, Kentucky enacted a segregation law mandating on-campus segregation of the races. In the Supreme

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 55.

⁶² 245 U.S. 60 (1917).

⁶³ BERNSTEIN, *supra* note 2, at 78 (quoting *Buchanan*, 245 U.S. at 70-71).

⁶⁴ *Id.* at 79.

⁶⁵ *Id.* (quoting *Harris v. City of Louisville*, 177 S.W. 472, 476 (Ky. 1915)).

⁶⁶ *Id.*

⁶⁷ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁶⁸ BERNSTEIN, *supra* note 2, at 79.

⁶⁹ *Id.*

⁷⁰ 211 U.S. 45 (1908).

⁷¹ BERNSTEIN, *supra* note 2, at 76.

Court, the college reminded the Justices that all contact on campus between whites and blacks was voluntary, while Kentucky pointed to studies purporting to show that racial intermarriage produced mentally inferior offspring and that the public welfare is “paramount to any right or privilege of the individual citizen.”⁷² Declining to rule on constitutional grounds, the Court instead based its decision on a state’s power to dictate terms to a corporation like Berea College, whose charter did not vest a property right in educating blacks and whites together in the same place.⁷³ “While *Berea College* was a blow to opponents of Jim Crow, the opinion left room for future constitutional attacks on segregation laws that applied to private parties.”⁷⁴

Through this narrow opening the appellant in *Buchanan* approached the Supreme Court, arguing that Louisville’s segregation ordinance deprived him of property without due process of law.⁷⁵ Kentucky, in response, filed a “Brandeis Brief” and argued that segregation was divinely ordained, that “negroes carry a blight with them wherever they go,” and that “social and economic imperatives of the most solemn and impressive character” justified the law.⁷⁶ The Supreme Court unanimously struck down the Kentucky law, concluding that “the law violated the Due Process Clause by depriving the plaintiffs of liberty and property without a valid police power justification.”⁷⁷ Justice William R. Day explained that “colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color.”⁷⁸ The Court rejected all proffered police-power rationales, as well as the argument that whites should be protected against property value depreciation.⁷⁹ Holmes drafted a dissent, the manuscript of which survives, asserting that the ordinance was well within the police power; however, he decided for unknown reasons not to file it, and therefore, the final vote was unanimous.⁸⁰

⁷² *Id.* (quoting Brief for Plaintiff in Error at 2, *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908)) (internal quotation marks omitted).

⁷³ See *Berea Coll.*, 211 U.S. at 61-62 (Harlan, J., dissenting).

⁷⁴ BERNSTEIN, *supra* note 2, at 77 (citing David Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 DUKE L.J. 1111, 1136 (1985)).

⁷⁵ *Id.* at 80. An equal protection argument was advanced but “essentially ignored” in the Supreme Court’s opinion, Bernstein notes. *Id.* at 81.

⁷⁶ *Id.* at 80 (quoting Brief for Defendant in Error at 13, 118-19, *Buchanan v. Warley*, 245 U.S. 60 (1917)) (internal quotation marks omitted).

⁷⁷ *Id.* at 81 (citing *Buchanan v. Warley*, 245 U.S. 60, 74 (1917)).

⁷⁸ *Id.* (quoting *Buchanan*, 245 U.S. at 78-79) (internal quotation marks omitted).

⁷⁹ BERNSTEIN, *supra* note 2, at 81-82.

⁸⁰ *Id.* at 82. Ten years later, in *Buck v. Bell*, 274 U.S. 200 (1927), Holmes gave voice to his characteristically broad view of the police power in a majority opinion that upheld a state’s authority to engage in compulsory sterilization of “feeble minded” women. *Id.* at 205. Observing that “[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes,”

Buchanan, writes Bernstein, was “an extremely significant case,” not only because it inhibited the spread of segregation laws and opened the door to black migration into the cities following World War I, but because it “marked a favorable turning point in the Supreme Court’s attitude toward the rights of African Americans.”⁸¹ Here, then, was a potentially powerful weapon in the ongoing struggle of African Americans for legal justice, based squarely on Lochnerian substantive due process analysis. Yet its potential was never fully realized, Bernstein writes, because liberty of contract arguments were repellent to Progressive legal elites, who also typically showed “indifference or hostility to the rights of African Americans.”⁸² Compounding the problem, those same legal elites compiled a “conventional story that the Court’s pro-liberty of contract decisions are somehow linked to its tolerance of segregation in *Plessy* and other cases.”⁸³ This story, however,

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.⁸⁴

Bernstein relates a similar story with respect to legally imposed sex discrimination. When the Court in 1923 relied on *Lochner* in striking down a women-only minimum wage law in *Adkins v. Children’s Hospital*,⁸⁵ the majority rejected arguments that women’s capacity to enter into employment contracts is inferior to that of men.⁸⁶ But the Court’s more typical treatment of women harked back to *Muller v. Oregon*,⁸⁷ a 1908 case that upheld a maximum hours law for women.⁸⁸ *Muller*’s precedential weight subsequently supported a ban on night work by women (*Radice v. New York*⁸⁹) based on “women’s presumed physical frailty.”⁹⁰ *Adkins* was finally overturned in 1937 by *West Coast Hotel Co. v. Parrish*,⁹¹ which upheld a women-only minimum wage law.⁹² “For the next three decades,” Bernstein

Holmes famously declared: “Three generations of imbeciles are enough.” *Id.* at 207; see also BERNSTEIN, *supra* note 2, at 96-98.

⁸¹ BERNSTEIN, *supra* note 2, at 82, 84.

⁸² *Id.* at 85.

⁸³ *Id.* at 86.

⁸⁴ *Id.*

⁸⁵ 261 U.S. 525 (1923), *overruled in part by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁸⁶ BERNSTEIN, *supra* note 2, at 67-70 (citing *Adkins*, 261 U.S. at 542-43).

⁸⁷ 208 U.S. 412 (1908).

⁸⁸ *Id.* at 417-18.

⁸⁹ 264 U.S. 292 (1924).

⁹⁰ BERNSTEIN, *supra* note 2, at 69.

⁹¹ 300 U.S. 379 (1937).

⁹² *Id.* at 400.

writes, until passage of the Civil Rights Act of 1964, “courts relied on [Justice Charles E.] Hughes’ dicta in *West Coast Hotel* that women had limited rights in the workplace to uphold the constitutionality of laws that excluded women from various occupations.”⁹³

Usefully, Bernstein points out that the beneficial influence of Lochnerian substantive due process analysis extended to educational liberty. Thus, *Meyer v. Nebraska*,⁹⁴ often cited in support of a parental “right of privacy” to control a child’s education, was actually a liberty of contract case. The *Meyer* plaintiff challenged a Nebraska law that forbade schools and tutors from teaching pre-high school students in any foreign language.⁹⁵ The Court found that the law unconstitutionally interferes with “the calling of modern language teachers,” an occupation that “always has been regarded as useful and honorable, essential, indeed to the public welfare.”⁹⁶ The Court’s holding, Bernstein points out, was “supported only by a long string of liberty of contract/due process decisions, including *Lochner* and *Adkins v. Children’s Hospital*.”⁹⁷ A seamless unity was seen between liberty of contract and the “non-economic right[]” to “acquire useful knowledge.”⁹⁸

In sum, Bernstein says, liberty of contract cases had salutary, “net positive” effects, not “drastic negative practical consequences,”⁹⁹ in a variety of contexts including educational liberty, freedom of expression, “right of privacy” cases involving contraception, abortion, homosexuality, and other civil liberties apart from labor law.¹⁰⁰ “History alone,” as Bernstein reminds us, “cannot tell us . . . whether *Lochner* was correctly decided”¹⁰¹—but history is surely relevant to an objective evaluation of this, or any, case that has been demonized for its alleged bad consequences.

Meanwhile, Bernstein makes clear that Progressives and liberals have engaged in brazen, agenda-driven adjudication (quite similar to that usually attributed to the *Lochner* Court) by employing *Lochner*’s substantive due process reasoning to advance their pet causes. In this endeavor, scholars and judges cynically disguised the Lochnerian influence so as to forestall any attempt to dismantle the economic controls they favored. As Bernstein describes it, “post-New Deal Supreme Court justices pretended to utterly

⁹³ BERNSTEIN, *supra* note 2, at 71.

⁹⁴ 262 U.S. 390 (1923).

⁹⁵ *Id.* at 400.

⁹⁶ *Id.* at 400-01.

⁹⁷ BERNSTEIN, *supra* note 2, at 93-94.

⁹⁸ *Id.* at 94 (internal quotation marks omitted).

⁹⁹ *Id.* at 127.

¹⁰⁰ In Bernstein’s view, the substantive due process approach, far from supplying a mask behind which judges could impose personal prejudices, actually encouraged them to subordinate their personal views. For example, Bernstein notes, Justice James McReynolds, a racist, voted to invalidate a racial segregation law and upheld “right[s] of Japanese parents in Hawaii to send their children to private Japanese-language schools.” *Id.* at 5.

¹⁰¹ *Id.* at 6.

reject the due process opinions of the 'conservative' justices of the pre-New Deal era while in fact absorbing many of these opinions, modifying them, reclassifying them, and ultimately using them to promote liberal ends."¹⁰²

An important method of distortion, Bernstein writes, was to divide individual rights into economic and personal realms. Prior to the 1930s, he notes, individual liberty was seen as a unity, with the same law of substantive due process protecting both equally under the same analysis.¹⁰³ The bifurcation got its start in 1937 with *Palko v. Connecticut*,¹⁰⁴ when liberal and Progressive justices endorsed the idea that the Fourteenth Amendment protects those liberties in the Bill of Rights that are "implicit in the concept of ordered liberty."¹⁰⁵ Then, in *United States v. Carolene Products Co.*,¹⁰⁶ "[t]he Court creatively reinterpreted—that is, intentionally misinterpreted—*Meyer* and *Pierce* as decisions invalidating laws because the laws discriminated against minorities."¹⁰⁷ Justice William O. Douglas was a later offender, resorting in *Griswold v. Connecticut*¹⁰⁸ to "penumbras, formed by emanations" from various parts of the Bill of Rights, to divert attention from the naked contradiction involved in using *Lochnerian* substantive due process analysis while simultaneously denigrating its analytical soundness in other contexts.¹⁰⁹ Today's liberals, faced with Bernstein's carefully assembled evidence of distortion, may find that their only escape from acute embarrassment lies in undertaking a candid reappraisal of their substantive due process jurisprudence.

Here, then, is the demythologized *Lochner*. It was a well-reasoned opinion based on strong precedent and time-honored judicial philosophy, not a textually absurd act of judicial malfeasance. It was a sincere attempt to uphold constitutionally protected liberty, not a cynical mask for prejudice. It resulted in the defense of individual liberty against power-wielding political pressure groups, not the surrender of defenseless individuals to a callous Social Darwinism. And it was a progenitor of decisions that would recognize constitutionally protected rights in a variety of contexts, not a doctrinal plague-carrier to be exterminated by right-thinking scholars and judges.

¹⁰² *Id.* at 107.

¹⁰³ BERNSTEIN, *supra* note 2, at 3-4.

¹⁰⁴ 302 U.S. 319 (1937).

¹⁰⁵ BERNSTEIN, *supra* note 2, at 104 (quoting *Palko*, 302 U.S. at 325) (internal quotation marks omitted).

¹⁰⁶ 304 U.S. 144 (1938).

¹⁰⁷ BERNSTEIN, *supra* note 2, at 104 (citing *Carolene Prods. Co.*, 304 U.S. at 152 n.4).

¹⁰⁸ 381 U.S. 479 (1965).

¹⁰⁹ BERNSTEIN, *supra* note 2, at 6, 115 (quoting *Griswold*, 381 U.S. at 484-85) (internal quotation marks omitted).

Rehabilitating Lochner belongs on the short list of works that effectively debunk myths clinging to important Supreme Court cases.¹¹⁰ The book succeeds on its own terms, furnishing historical evidence sufficient for any interested reader to check, and perhaps revise, his or her understanding and evaluation of substantive due process analysis and its practical effects. However, one may fairly ask what long-term effects on *Lochner*'s reputation can be expected from Bernstein's project. For what if the real reason *Lochner* continues to be reviled as an enduring symbol of judicial malfeasance is more fundamental than the historical myths Bernstein so ably exposes?

Here, it is important to note that Holmes's famous *Lochner* dissent is treated only in passing, consistent with Bernstein's determination not to "provide any significant normative lesson for modern constitutional law."¹¹¹ But that dissent's normative implications, as I have suggested elsewhere, are crucial to accounting for *Lochner*'s perpetual state of disgrace.¹¹² Holmes argued that the Supreme Court presides over an empty Constitution—empty of purpose, of moral content, of enduring meaning—bereft of any embedded principles defining the relationship between government and the individual. In a mere 617 words of sarcastic eloquence, Holmes single-handedly transformed *Lochner* into a universal symbol of bad constitutional reasoning, destined to remain eternally odious to those whose "hostility to individualism" leads them to reject "the very notion of inherent individual rights against the state."¹¹³ Can any amount of historical revisionism, however carefully executed, succeed in meaningfully improving *Lochner*'s reputation among scholars and judges who adhere to Holmesian orthodoxy? Bernstein wants *Lochner* "removed from the anticanon and treated like a normal, albeit controversial, case."¹¹⁴ But arguably, the more "normal" *Lochner* is shown to be—the more firmly rooted in American legal tradition, the more fiercely protective of individual rights in a variety of con-

¹¹⁰ See generally PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008) (exploding the myth that judicial review originated in the Supreme Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and recounting through an original, detailed, and extensive review of primary historical sources that the concept stemmed from the influence of natural law philosophy on the common law, long predating *Marbury* and even the American Revolution); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953 (2007) (debunking the myth of the "Jeffersonian story of patent law," created by the Supreme Court in *Graham v. John Deere Co.*, 383 U.S. 1 (1966), and subsequently adopted by academics in support of policy arguments limiting intellectual property rights).

¹¹¹ BERNSTEIN, *supra* note 2, at 127.

¹¹² See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 62-63 (2000). See generally Thomas A. Bowden, *Justice Holmes and the Empty Constitution*, THE OBJECTIVE STANDARD, Summer 2009, available at <http://www.theobjectivestandard.com/issues/2009-summer/justice-holmes-empty-constitution.asp>.

¹¹³ BERNSTEIN, *supra* note 2, at 40, 44.

¹¹⁴ *Id.* at 7.

texts—the more hatred and derision the case is likely to attract from those who see Bernstein as a clever haberdasher supplying sheep's clothing to a very dangerous wolf.

In any event, Bernstein's mission in this book was never to fully redeem *Lochner*, and the success of his enterprise cannot be measured by his impact on the quite difficult issues of proper constitutional interpretation and construction raised in Holmes's dissent.¹¹⁵ So let us simply climb aboard Bernstein's well-constructed time machine, travel with him back to 1905, and stand quietly at the crossroads of American jurisprudence. Off to the right, we can see Thomas Cooley and Christopher Tiedeman beckoning us down a path of individual liberty and natural rights, interpreting the Constitution's guarantees of rights in a substantive manner. Off to the left, we can see Holmes pointing down the path to pure majoritarianism, interpreting the Constitution as a value-free mechanism for adjusting power demands. And in between we can see Peckham, Harlan, and a host of others, gesticulating toward an array of middle paths. Thanks to *Rehabilitating Lochner*, we can now see each path more clearly and make our own choices more intelligently.

¹¹⁵ Promising new work has been published on objective judicial interpretation. See generally Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective*, 26 CONST. COMMENT. 1 (2009); Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347 (2010); Tara Smith, *Why Originalism Won't Die—Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL'Y 159 (2007).