

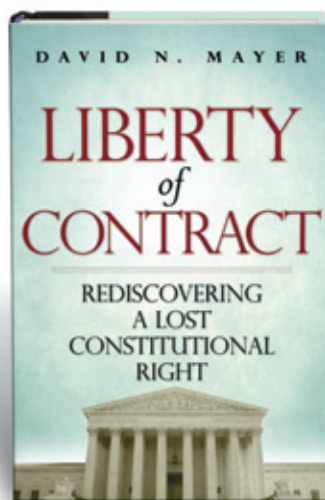
Correcting the Narrative of Liberty

Every young lawyer studies the reviled *Lochner v. New York* decision in his first class in constitutional law. In 1905, the professor teaches, the Supreme Court overturned a maximum-hours law intended to protect poor bakers from employer predation and, in so doing, forced hated laissez faire economics upon a market-broken people. Justice Oliver Wendell Holmes, Jr., offered perhaps the most famous dissent in constitutional jurisprudence, fulminating that “a constitution is not intended to embody a particular economic theory.” It wasn’t until 1937 and the New Deal that the Court righted its course.

All of which is hogwash, argues David N. Mayer in *Liberty of Contract: Rediscovering a Lost Constitutional Right*. Mayer, a professor of law and history at Capital University, places *Lochner*, which he notes is “commonly regarded by legal scholars as the archetypical activist decision of the Supreme Court,” within the extended history of the broader liberty of contract.

“For a period of exactly 40 years, from 1897 to 1937, the Supreme Court protected liberty of contract as a fundamental right, one aspect of the basic right to liberty safeguarded under the Constitution’s due process clauses,” Mayer writes. He shows how this protection, far from being about promoting a given take on economics, was only part of a larger judicial mandate to maintain general liberty. Thus decisions like *Lochner*, which halted government meddling in the labor market, were not about protecting the market at all. Rather, Mayer argues, they saw the courts upholding the right of every individual to freely make choices about how to lead his or her own life.

Mayer finds this liberty of contract embedded deep in the common-law tradition inherited from England. And this tradition places the *Lochner* Court squarely at odds with the epithet commonly hurled at it by progressive scholars. “Contrary to the orthodox, Holmesian view,” Mayer writes, “the Court was not engaged in judicial activism when it protected liberty of contract as a fundamental right during the 40-year period prior to 1937. Rather, the Court was simply enforcing the law of the Constitution, specifically the right to liberty as protected substantively under the Fifth Amendment’s or the Fourteenth Amendment’s due process clause.”



The other half of the story told in law schools is wrong, too, Mayer argues. Progressive legal scholars who see the *Lochner* decision as the high-water mark of judicial activism subsequently point to *Lochner*’s overturning as a return to neutral principles of constitutional adjudication. But the judges who overturned *Lochner*-era jurisprudence, far from being principled, were ignoring principles. “They were judicial activists who abdicated their twin duties of enforcing constitutional limits on government power and protecting the fundamental rights of individuals—all in order to advance the New Deal policy agenda.”

Mayer traces the fall of *Lochner* and, with it, the liberty of contract, to three factors: the Court’s changing membership, the standard of review, and shifts in popular theories of jurisprudence. Regarding this last, Mayer argues that “the rise of legal realism and sociological jurisprudence” crowded out “the old jurisprudence of natural law and natural rights, which had informed America’s founding generation and the original principles of liberty.”

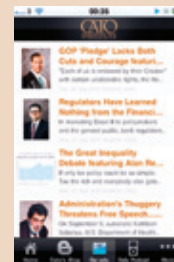
Mayer concludes by exposing the underlying ideology of *Lochner*’s critics. The view of that case and its era taught to every law student is a “folktale,” one “invented by early 20th-century Progressive movement scholars”—a folktale “perpetuated by modern-day apologists for the 20th-century welfare/regulatory state.”

Liberty of Contract sets the record straight. ■

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CATO AND MEXICO’S DRUG WAR

Former Mexican president Vicente Fox had kind words for “the prestigious Cato Institute” in a recent post on his blog. Fox, discussing the disastrous War on Drugs that continues to cause horrific violence within his country, quoted at length from Cato scholar Juan Carlos Hidalgo’s writing about the parallels between drug prohibition and alcohol prohibition 80 years earlier. Fox then turned to Glenn Greenwald’s *Salon* column about California’s Proposition 19 and Greenwald’s Cato study on drug decriminalization in Portugal. Cato president Edward H. Crane had raised the topic of drug legalization with Fox and his top advisers when the then-president hosted Crane and other Cato scholars at Los Pinos, the presidential residence, during a 2002 Cato conference in Mexico City.