

*Cato's constitutional trilogy challenges conventional wisdom*

## Lochner: A Notorious Case Reconsidered

Two recent Cato Institute books touched on the major 1905 Supreme Court decision, *Lochner v. New York*, which held that a law setting maximum working hours for bakers violated the constitutional right to liberty of contract. In *The Right to Earn a Living*, Timothy Sandefur charted the history of that fundamental human right, and showed how it was eroded by Progressive Era judges. In *Liberty of Contract*, David Mayer identified the foundations and nature of the Court's *Lochner*-era legal theories and decisions and shattered the myths that scholars have created about both this era and subject.

Now, in a book co-published by the Cato Institute and the University of Chicago Press, David E. Bernstein adds a third part to this series, presenting a new way of thinking about the Constitution and the federal government's delegated, enumerated, and thus limited powers.

*Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* offers an exacting study of that notorious case and its impact on American law. Bernstein digs into the history of *Lochner* and the often surprising forces that lined up on the two sides of the case. In rehabilitating this much-maligned case, Bernstein overturns "the mythical morality tale invented during the Progressive Era for overtly ideological reasons."

Through a careful reconstruction of the events leading up to the case, an examination of the opinion—including its famous dissents, and analysis of the reaction among legal intellectuals, Bernstein has written, as he describes it, "the first comprehensive modern analysis of *Lochner* and its progeny, free from the baggage of the tendentious accounts of Progressives, New Dealers, and their successors on the left and, surprisingly, the right."

Bernstein then traces *Lochner's* impact on Progressive sociological jurisprudence, the popular ideological position at that time that "masked a political agenda that favored a significant increase in government involvement in American economic and social life." This movement, launched

by Roscoe Pound in a series of attacks on the Supreme Court's liberty of contract jurisprudence, held that "law's purpose is to achieve social aims" and that "legal rules, including constitutional rights, cannot be deduced from first principles." The Progressives' anger at the *Lochner* majority was not thus exclusively about its reasoning, but also to a great degree about its unwillingness to overlook constitutional controls that would limit the creation of a "union-led social democracy in place of a regime of general contractual freedom."

It was this desire to see *Lochner* as an unprincipled attack on Progressive utopian social engineering—engineering with the veneer of science—that led to the *Lochner* myth. The Court was not protecting the right of workers to contract freely for their wages and labor. Instead, it was, as Justice Holmes memorably wrote in his dissent, trying to force *laissez faire* upon the downtrodden to the benefit of big-business capitalists.

But, as Bernstein shows, as despised as it was, "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."

In chapters on sex discrimination and segregation laws, Bernstein maps this opposition. He shows how Progressive feminists sought to use laws like the one overturned in *Lochner* to keep women out of the workforce, so as to protect their perceived delicate sensibilities and motherly roles from the harm of freely chosen employment. And he traces the way unions and their Progressive intellectual allies used police power and the worker-protection laws to safeguard the

jobs of white men from the competitive threat of black workers.

The *Lochner* era is a good deal more complex than most legal scholarship suggests. "An accurate and nuanced view of the Supreme Court's pre-World War II due-process jurisprudence," Bernstein writes, "does not allow for blithe categorization of justices who lived in a very different era, replete with ideological and political disputes and assumptions that are foreign and often barely comprehensible to modern scholars, into prescient heroes and narrow-minded villains."

Bernstein concludes the book by arguing that, "when scholars distort history to serve an agreeable governing ideology or to rally opposition to existing precedents that they dislike, their work richly deserves correction." *Rehabilitating Lochner* offers just that. ■

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