WHAT IS, AND ISN'T, CURRENTLY DISPUTED ABOUT *LOCHNER*-ERA POLICE-POWERS JURISPRUDENCE

Howard Gillman[*]

INTRODUCTION

While things are getting better, it is still the case that too many constitutional-law professors persist in perpetuating long-discredited myths about the so-called *Lochner*[1] era, and they should really cut it out. If they want to do better they would do well to read Professor David Bernstein's work.[2] If they did, they would learn a lot.

For starters, they would learn that there was no such thing as laissez-faire constitutionalism, either at the doctrinal level or as a description of the actual decision-making of judges who were evaluating economic regulation.[3] They would learn that the prevailing strands of late-nineteenth-century constitutional law had deep roots in constitutional history and were not inventions of unconstrained conservative ideologues.[4] They would learn about the unusual and controversial labor politics that led to the deeply divisive passage of the Bakeshop Act.[5] They would learn that the *Lochner* decision itself was not an especially controversial or important decision at the time it was handed down.[6] They would learn that there were strands of *Lochner*-era jurisprudence that had racially progressive implications.[7] They would learn that the mythology around the *Lochner* era was constructed by New Deal

---

[*] Chancellor and Professor of Law, Political Science, and History, University of California, Irvine. I am grateful to Professor David Bernstein for sharing a draft of the article to which I am responding and for his suggestion that I write a response.

[1] *See* Lochner v. New York, 198 U.S. 45 (1905). For an argument on the need to remove the mythology around this case and see it again as a relatively ordinary exercise of judicial power during this period, see Howard Gillman, *De-Lochnerizing* Lochner, 85 B.U. L. REV. 859, 865 (2005).

[2] Many authors have contributed to a more accurate understanding of *Lochner*-era jurisprudence, but in this essay, I am in conversation with Professor David Bernstein, responding to his article *Class Legislation, Fundamental Rights, and the Origins of* Lochner *and Liberty of Contract*, 26 GEO. MASON L. REV. 1023 (2019) [hereinafter Bernstein, *Origins of* Lochner].

[3] *See id.* at 1024–25 & n.10 and works cited therein.

[4] *See* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM ch.1 (2011) [hereinafter BERNSTEIN, REHABILITATING *LOCHNER*]; *Origins of* Lochner, *supra* note 2, at 1028.

[5] *See* BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 4, at 23–28; Bernstein, *Origins of* Lochner, *supra* note 2, at 1034–35.

[6] *See* BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 4, at 37–39.

[7] DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 5–7 (2001); David E. Bernstein, Lochner*, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 216–17, 289–90, 294 (1999).

constitutionalists eager to delegitimize the preexisting order (stated here as a fact and not a criticism).[8]

For more than thirty years, scores of constitutional historians have been debunking the myth that *Lochner* stands for lawless judges making decisions based merely on their personal policy preferences for laissez-faire economics or that it stands more generally for illegitimate judicial activism and thus should be cited any time law professors want to make that accusation against contemporary decisions they do not like.[9] It is understandable that old myths die hard, but thirty years is plenty of time for scholars to catch up with evidence. And constitutional-law professors who persist in ignoring the well-established historiography are engaging in malpractice. If they took the time to learn more about the period from Professor Bernstein they would correct a lot of their mistakes. They would get most things right about the *Lochner* era that you need to get right. But they would also get some things wrong, especially about the antecedents of modern civil liberties cases such as *Griswold v. Connecticut*.[10]

Professor Bernstein's latest effort, which revisits the so-called "class legislation v. fundamental rights debate," posits that there are serious disagreements among constitutional historians about (a) the nature of *Lochner*-era police-powers jurisprudence and (b) the origins of modern civil liberties jurisprudence.[11] The former claim is a largely manufactured and overstated disagreement among scholars who are saying almost precisely the same thing but not always in exactly the same way and is easily deconstructed back into a basic consensus. The latter disagreement is a bit more substantive. Part I of this Response focuses on the "class legislation" portion of Professor Bernstein's article and explains why, despite impressions to the contrary, there is still an overwhelming consensus among constitutional historians on the fundamental nature of *Lochner*-era police-powers jurisprudence. Part II then discusses the "fundamental rights" portion of his article and explains why, despite persistent efforts on his part, there are reasons to be skeptical about Professor Bernstein's claims that early-twentieth-century conservative jurists articulated jurisprudential antecedents to modern civil-liberties jurisprudence.

---

8 Bernstein, *Origins of* Lochner, *supra* note 2, at 1025 and works cited therein.

9 *See e.g.*, Randy E. Barnett, *After All These Years,* Lochner *Was Not Crazy—It Was Good*, 16 GEO. J.L. & PUB. POL'Y 437, 442–43 (2018); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874–75 (1987) (noting that *Lochner* can be understood as adhering to the Constitution's requirement of neutrality, with this principle having "little to do with an aggressive judicial role").

10 381 U.S. 479 (1965).

11 Professor Bernstein has been trying for some time to focus scholarly attention on what he considers to be the *Lochner*-era foundations of fundamental-rights jurisprudence. *See* BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 4, at 108–09, 123–24; David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12–13 (2003).

I. THE ONGOING CONSENSUS ABOUT THE NATURE OF *LOCHNER*-ERA POLICE-POWERS JURISPRUDENCE

The overstated disagreement is about whether the "class legislation" thesis, which Professor Bernstein associates primarily with my book *The Constitution Besieged*,[12] is the most accurate description of the jurisprudential focus of late-nineteenth- and early-twentieth-century judges who were assessing the validity of economic regulation under state police powers. While the title of Professor Bernstein's essay might lead a reader to conclude that historians are divided about whether *Lochner*-era judges were concerned about prohibiting "class legislation" or protecting "fundamental rights," the actual essay correctly conveys that there is widespread agreement about the major jurisprudential categories driving judicial decision-making.[13]

For the uninitiated, the consensus can be summarized this way. In the nineteenth century, judges believed that the legislative authority to promote the health, safety, and morality of the community—the "police power"—was not limited by theories and doctrines that attempted to identify a discrete set of inviolable "fundamental rights" or "preferred freedoms." Instead the police power was limited by assuming that a person's presumptive rights to liberty and property were nevertheless subordinate to the laws of the land that actually advanced the general welfare of the community as a whole instead of just the partial or special interests of favored groups or classes.[14] This invited judicial scrutiny on the question of whether a law actually advanced the public welfare or instead was merely arbitrary or partial. In a nutshell, in the nineteenth century we had a police-powers jurisprudence that focused on the question of what constituted the interests of the public as a whole, rather than one that focused on the question of what rights are fundamental.[15]

The details are complicated, and there were different strands over time. Still, by the antebellum period, there was an extraordinary consensus among state judges, treatise writers, and Supreme Court Justices after passage of the Fourteenth Amendment that state laws affecting people's liberty or property rights could only be sustained if a judge believed the laws advanced the interests of the community as a whole and not the special or partial interests of particular classes.[16] Moreover, there is essentially no disagreement—between Professor Bernstein and I, nor among *Lochner*-focused constitutional

---

12 HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993) [hereinafter GILLMAN, CONSTITUTION BESIEGED].

13 Bernstein, *Origins of* Lochner, *supra* note 2, at 1045, 1047 (noting that the battle lines between class legislation and fundamental-rights proponents "are not that sharp, and there has been some convergence in these viewpoints" and that both sides agree that the Court was not enforcing laissez-faire economics, that fundamental-rights jurisprudence predated the New Deal, and that the Court was sincere in its attempt to protect liberty via the Due Process Clause).

14 GILLMAN, CONSTITUTION BESIEGED, *supra* note 12, at 49–50.

15 *See* Bernstein, *Origins of* Lochner, *supra* note 2, at 1028 n.34 and works cited therein.

16 *Id.* at 1029.

historians—that this was the jurisprudential framing of state regulations in the late nineteenth century. More specifically: Professor Bernstein and I do not disagree about the frame of mind of judges up to the actual *Lochner* decision.

It is true that my book emphasizes the "no class legislation" aspect of this jurisprudence, albeit while also using the language of "a jurisprudence of public interest" and "aversions to special or unequal legislation" and "the neutral state" and the other formulations that were essentially synonymous with the argument.[17] In part this emphasis was the easiest way to convey how rising "class conflict" associated with American industrialization sowed the seeds for the destruction of this jurisprudential tradition, which gave rise to (among other things) a vision of "interest-group liberalism."[18] Still, it would make too much of the "class-legislation thesis" to claim that my book argued that the aversion to class legislation was the be-all-and-end-all of the jurisprudence. *Lochner*-era police-powers jurisprudence was a jurisprudence of public purpose, the boundaries of which were mostly defined in opposition to so-called class, partial, special, or unequal legislation, as that generation of jurists and scholars defined those terms.

Professor Bernstein picks some nits around the book's argument (e.g., perhaps we should clarify more whether class legislation was really different than nonarbitrary special-interest legislation, or perhaps we should make it clearer that the Supreme Court was often more forgiving in its application than state judiciaries). People can judge for themselves, but in my judgment, this is small beer relative to the larger consensus among historians. More to the point: Professor Bernstein agrees that class legislation was the Supreme Court's primary due-process consideration before *Lochner* and that it remained a concern after *Lochner*, even if the explicit language of "class legislation" was used less often than "public purpose," "common good," and other synonyms.[19] It is possible for those who maintain a truly Talmudic fascination with every single case to argue endlessly over some of these details. Professor Barry Cushman reads all of these decisions as generally consistent with my overall framing;[20] Professor Bernstein has a few semantic disagreements but agrees that Professor Cushman's approach is useful and edifying and agrees that this framing was the key to many of the Court's most controversial holdings.[21] Professor Bernstein thinks the book could have talked

---

17 I should note that it is not the case that I advocated for the primacy of the "no class legislation" concept to the exclusion of other formulations of the same idea. Even in my introduction I note that "[t]here is room, then, for more evidence of the late-nineteenth-century legal community's obsession with drawing distinctions between legitimate promotions of the public interest and illegitimate efforts to impose special burdens and benefits." GILLMAN, CONSTITUTION BESIEGED, *supra* note 12, at 9.

18 *See* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 50–51 (1969).

19 Bernstein, *Origins of* Lochner, *supra* note 2, at 1030, 1046.

20 Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 1000 (2005).

21 Bernstein, *Origins of* Lochner, *supra* note 2, at 1043–45.

more about the principle of neutrality rather than class legislation;[22] then again, most of the key section headers in my book use this language (e.g., "Industrialization, Class Conflict, and the Neutral State," "The Tradition of the Neutral Polity and the Regulation of Business," "Labor Legislation, the Neutral Polity, and the Bumpy Road to *Lochner*," "The Assault on Government Neutrality and Traditional Police Powers Jurisprudence"),[23] so maybe the problem is that Professor Bernstein overstates how much the book's argument depends exclusively on the class-legislation emphasis.

Still, these disputes within the family of revisionists are not very consequential in the grand scheme of things. Professor Bernstein writes that "[t]here has not been any serious historical challenge to Gillman's contention that judicial concern with class legislation drove the development of Fourteenth Amendment police-powers jurisprudence in the late nineteenth century."[24] One might think if he was "revisiting" a big debate among historians that he would be offering such a challenge, but in fact, we don't disagree on this at all.

II. THE LACK OF CONSENSUS ON POST-*LOCHNER* ANTECEDENTS TO MODERN CIVIL-LIBERTIES JURISPRUDENCE

But then we come to an actual disagreement. Professor Bernstein claims that "[a]fter *Lochner*, the Court increasingly relied on the Due Process Clauses as the basis for the protection of fundamental rights such as liberty of contract against arbitrary legislation,"[25] and that this "represented an important shift from the Court's previous focus on due process's limits on class legislation to a new focus on the protection of liberty interests."[26] He acknowledges that I attempted to provide an account of the rise of modern civil-liberties jurisprudence in an article published the year after the publication of *The Constitution Besieged*.[27] But (in his view), to the extent that the argument highlighted the role of progressives in creating a new template for assessing the constitutionality of legislation, it erred by "not recognizing that the more conservative Justices were also beginning to develop precedents that contributed to the rise of modern fundamental-rights jurisprudence."[28]

While resolving this disagreement in a short response is impossible, it is possible to convey what still needs to be assessed and debated.

---

22 *Id.* at 1030, 1042–43.

23 GILLMAN, CONSTITUTION BESIEGED, *supra* note 12, at vii–viii.

24 Bernstein, *Origins of* Lochner, *supra* note 2, at 1029.

25 *Id.* at 1032.

26 *Id.* at 1034.

27 *Id.* at 1040; *see also* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 623–26 (1994) [hereinafter Gillman, *Preferred Freedoms*].

28 Bernstein, *Origins of* Lochner, *supra* note 2, at 1040.

In my essay on the rise of modern civil-liberties jurisprudence, the argument was that the collapse of the "public welfare" limit on state legislative activity would have resulted in unfettered legislation unless some other limiting principles were constructed.[29] Because progressives were the ones advocating for the abandonment of the traditional model, I argued that it was progressives who forged an alternative model that replaced what they considered to be an anachronistic "limited powers–residual freedoms" vision with a new "general powers–preferred freedoms" vision.[30] This meant moving from a jurisprudence preoccupied with limiting state legislative power to a set of judicially approved "public purposes" to a jurisprudence that assumed broad legislative authority but offered special protections to a handful of particularly important liberties.[31]

What makes modern civil-liberties jurisprudence fundamentally different than *Lochner*-era jurisprudence are new areas of definitional focus and new tests that must be satisfied—for example, which rights are preferred or fundamental, what state interests are sufficiently compelling to allow for an infringement of a special right, and so on. In other words, the jurisprudence has gone from "public purpose as trump" (against rights claims) to "rights as trumps" (against conventional public policy claims). The argument was that there was nothing like the "preferred freedoms/compelling state interest" mindset among conservative jurists of the period (with the exception of Justice Harlan's dissent in *Patterson v. Colorado*[32]), which Holmes and Brandeis first articulated one version of such an approach in their post-*Debs* free speech dissents and Brandeis articulated a second version in his *Olmstead* dissent, and that it took many decades before these alternative approaches attracted consistent judicial majorities.[33]

---

29 *See* Gillman, *Preferred Freedoms*, *supra* note 27, at 642–43.

30 *See id.* at 625.

31 *Id.* Thomas Cooley summarized the older view by writing that constitutions "measure the powers of the rulers, but they do not measure the rights of the governed." 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 95 (8th ed., 1927).

32 205 U.S. 454, 465 (1907) (Harlan, J., dissenting) ("The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any State since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge them.").

33 *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (declaring that because "[m]arriage and procreation are fundamental to the very existence and survival of the race . . . strict scrutiny of the classification which a State makes in a sterilization law is essential"); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that some rights might deserve "more exacting judicial scrutiny"); Palko v. Connecticut, 302 U.S. 319, 323 (1937) (committing the Court to identifying which of the Bill of Rights was so especially important to be deserving of special protection); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (advocating a "right to be let alone"); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (emphasizing that only a true emergency—what we might later call a compelling state interest—can justify repression); Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (emphasizing the importance of freedom of speech and

Professor Bernstein believes there are decisions by conservative majorities during the *Lochner* era that should be viewed as antecedents of modern fundamental-rights jurisprudence.[34] One example is *Meyer v. Nebraska*,[35] invalidating a law banning the teaching of foreign languages.[36] Professor Bernstein quotes language that refers to fundamental rights,[37] but as argued in my original essay, the key question in *Meyer* was whether there was a legitimate public interest in preventing knowledge of foreign languages. To this, Justice McReynolds concluded that "[m]ere knowledge of the German language cannot reasonably be regarded as harmful," which meant that the law was "without reasonable relation to any end within the competency of the State."[38] Precisely the same analysis was used two years later in *Pierce v. Society of Sisters*,[39] wherein Justice McReynolds concluded that running a private school is "a kind of undertaking not inherently harmful, but long regarded as useful and meritorious."[40] In his recent essay, Professor Bernstein adds *Farrington v. Tokushige*,[41] which struck down a ban on foreign language schools in Hawaii.[42] However, writing for the Court, Justice McReynolds made it clear that the decision was based on a conclusion that the effected schools provide instruction deemed valuable by parents in a way that was "not obviously in conflict with any public interest," and that "the record disclose[d] no adequate reason" for the law's many provisions, which made it impossible for the Court to determine whether "its enforcement would violate respondents' constitutional rights."[43] He ended by noting that "when petitioners present their answer the issues may become more specific and permit the

---

explaining that "we should be eternally vigilant against attempts to check the expression of opinions we loathe" and suppression of speech is warranted only in an "emergency that makes it immediately dangerous to leave the correction of evil counsels to time").

34 Bernstein, *Origins of* Lochner, *supra* note 2, at 1040.

35 262 U.S. 390 (1923).

36 *See id.* at 403.

37 Bernstein, *Origins of* Lochner, *supra* note 2, at 1039.

38 *Meyer*, 262 U.S. at 400, 403.

39 268 U.S. 510 (1925).

40 *Id.* at 534; *see also* 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, 772 n.117 (2009) ("Cases like *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, decided in the 1920s, are sometimes thought to have begun the move toward a strong rights jurisprudence. This, however, is a misreading of both cases, each of which follows the same rule that a right or liberty may be trumped by the public welfare. *Meyer* unquestionably enumerates a long list of 'liberties,' but these were 'reserved rights' of the day, all of which could be subject to the police power. Without a claim of public harm, no reason to invoke the police power existed. This is precisely what the *Meyer* Court held: 'Mere knowledge of the German language cannot reasonably be regarded as harmful.' So, too, *Pierce* relies upon *Meyer* and the fact that the law impairs the school's property rights without a showing, again, that the parochial schools harm the 'common welfare'" (citations omitted) (citing *Pierce*, 268 U.S. at 510; and quoting *Meyer*, 262 U.S. at 400)).

41 273 U.S. 284 (1927).

42 *See id.* at 291, 298–99.

43 *Id.* at 298.

cause to be dealt with in greater detail."[44] As with *Lochner* itself, the Court assumed that regulated activity was not especially harmful and that the regulations did not actually promote the health, safety, or morality of the community.[45] But unlike *Lochner*, the government did not even attempt to provide a justification for how the regulation advanced a public purpose, and that was a fatal flaw during this era.[46]

When Professor Bernstein wrote previously about how the *Lochner* era originated some fundamental-rights jurisprudence, he was challenged on the grounds that he was anachronistically suggesting that some early-twentieth-century conservatives were forging a modern "right-as-trump" approach.[47] He uses the occasion of his recent essay to make it clear that this is a misunderstanding of his view.[48] He acknowledges that the *Lochner*-era conservative justices took a very different approach to protecting rights as compared to their modern counterparts.[49] This admission is sufficient to conclude that, once again, we are not really disagreeing that much.

CONCLUSION

Still, perhaps more people need to weigh in, if there is to be a proper account of the rise of modern civil-liberties jurisprudence.[50] Professor Bernstein might say that it is significant that some of the justices used language in their opinions referencing the protection of fundamental rights. I would respond that this was commonplace within the traditional jurisprudence, but it has no bearing on whether they nevertheless were focusing on a jurisprudence of public purpose. He argues that sometimes in the years after *Lochner*, language about rights was used more frequently than language about "class

---

44 *Id.* at 299.

45 *See id.* at 298–99.

46 *See id.*

47 Nourse, *supra* note 40, at 789.

48 Bernstein, *Origins of* Lochner, *supra* note 2, at 1034.

49 *Id.* at 1034, 1038–39.

50 Professor Victoria F. Nourse has offered her own view, and her view is closer to mine than to Bernstein's. For example, she explains:

> Today, fundamental rights invoked under the Due Process Clause are presumed "fatal in fact," but in 1905 when *Lochner* was decided, rights claims were common but rarely fatal. Today, fundamental rights trump the general welfare, whereas in 1905, under the police power of the state, the general welfare trumped rights. Today, courts define unenumerated rights in positive terms; they struggle to define the "right to die" or the "right to reject life-saving" treatment. Then, courts assumed rights existed prior to any written constitution, and enumeration was no grand ideal—rights were defined negatively by drawing limits on federal and state power. . . . Thus, *Lochner* has nothing to say about the rights aspects of *Roe* or *Griswold* . . . .

Nourse, *supra* note 40, at 752, 757 (footnotes omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 703 (1997)). Given my tip-of-the-hat to Nourse's summary, I would also like to say that I wish her "untold story" had engaged my account (I am sure I could have benefitted from her views of what I got right and what I got wrong). *See id.* at 758. Also, for what it's worth, I politely disagree with her claim that I am the type of historian "who suggest[s] that *Lochner* reflected a benign legal doctrine searching for equality and neutrality." *Id.* at 753 n.11.

legislation."[51] I would respond that the class-legislation rubric had many synonyms and that the key question is whether the main focus remained on assessing whether laws promoted the public welfare. Maybe he is making too much of irrelevant rhetorical bursts; maybe I am not appreciating the significance of these bursts even if we agree that the approach was different from the modern approach. Maybe we are having a semantic or philosophical argument about the meaning of "antecedents."

Still, we are likely to agree that there has not been enough attention paid to the rise of modern civil-liberties jurisprudence, and we should all welcome more scholarly attention to the question. There are extremely thorough accounts of the origins and nature of *Lochner*-era police-powers jurisprudence. It would be of great value to have as deep an understanding of the forces that gave rise to the modern civil-liberties jurisprudence that replaced it.

51 *See* Bernstein, *Origins of* Lochner, *supra* note 2, at 1037–39.