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Economic Due Process Revisited

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BOOK REVIEW

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JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK. By Paul Kens.* Lawrence, Kansas: University Press of Kansas, 1990. Pp. 232. $29.95 cloth.

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In many constitutional histories the presentation of economic issues between 1880 and 1937 resembles a Victorian melodrama. A dastardly Supreme Court is pictured as frustrating noble reformers who sought to impose beneficent regulations on giant business enterprises.[1] The centerpiece in this tale of wickedness is *Lochner v. New York*.[2] Few Supreme Court decisions have been vilified more than *Lochner*. For years liberal commentators ritualistically denounced the Court's decision.[3] The laissez-faire assumptions behind *Lochner* naturally were an anathema to scholars and judges favoring government intervention in the economy and redistribution of wealth. Worse yet, this example of judicial activism reflected an exaggerated concern for the rights of property owners. Only the arrival of the New Deal broke the monstrous *Lochner* spell, relegating property rights to a secondary constitutional status and saving the public from a fate worse than death. To liberal

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1. *See* A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960); Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249 (1987).

2. 198 U.S. 45 (1905).

3. *See, e.g.*, M. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 553-55 (1988) (attributing the *Lochner* decision to anti-union bias by the Supreme Court).

commentators *Lochner* became a term of reproach, an emotionally charged symbol of everything they disliked about a property-conscious Supreme Court.[4] Even today the slightest indication of judicial interest in reviewing economic legislation produces dire warnings of a return to the *Lochner* era.[5]

Perhaps more surprising, some prominent conservatives also have criticized *Lochner* as inappropriate judicial activism. Anxious to curtail the scope of judicial authority over wide areas of American life, these apostles of judicial self-restraint view *Lochner* as an invitation for courts to govern matters best left to the political process. Chief Justice William H. Rehnquist, for instance, has characterized *Lochner* as "one of the most ill-starred decisions that [the Supreme Court] ever rendered."[6] Similarly, Robert H. Bork sees *Lochner* "as the symbol, indeed the quintessence, of judicial usurpation of power."[7] According to Bork, *Lochner* "gave judges free rein to decide what were and were not proper legislative purposes."[8] This school of thought favors judicial deference to decisions by the political majority. Consequently, little room exists for judicial review of legislation.

Despite this legacy of controversy, *Lochner* has not been banished from our constitutional tradition. Indeed, in recent years a group of revisionist scholars has endeavored to rehabilitate *Lochner* and the underlying doctrine of laissez-faire constitutionalism. Bernard Siegan, for example, has argued that the framers of the Constitution expected the federal courts to safeguard economic liberty.[9] He defends *Lochner* on

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4. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980) (describing *Lochner* as "now universally acknowledged to have been constitutionally improper"); W. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 123 (1988) (stating that "*Lochner* has become in modern times a sort of negative touchstone"); Soifer, *supra* note 1, at 250 (declaring that *Lochner* "is still shorthand in constitutional law for the worst sins of subjective judicial activism").

5. A good example is Seawall Assocs. v. City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 100 S. Ct. 500 (1989), in which the New York Court of Appeals invalidated a municipal ordinance prohibiting conversion or demolition of single-room occupancy housing as both a physical and regulatory taking of private property without compensation. Although the court's opinion rested upon the takings clause of the fifth amendment, Judge Bellacosa's dissent confused the taking issue with economic due process. Erroneously comparing the majority decision to *Lochner*, he charged: "Eighty-five years after *Lochner*, we observe property rights, like the contract rights of that bygone era, being exalted over the Legislature's assessment of social policy." *Id.* at 118, 542 N.E.2d at 1072, 544 N.Y.S.2d at 555 (Bellacosa, J., dissenting); *see also* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 460 (1985) (Marshall, J., concurring in the judgment and dissenting in part) (arguing that the Supreme Court's invalidation of a zoning ordinance represented "a small and regrettable step back toward the days of *Lochner v. New York*").

6. W. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 205 (1987).

7. R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990).

8. *Id.* at 45.

9. B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 318 (1980).

the ground that the imposition of maximum-working-hours laws on bakeries would drive small immigrant entrepreneurs out of business and diminish competition.[10] Likewise, Richard A. Epstein stresses the libertarian basis of *Lochner*. "Decisions such as *Lochner v. New York* were correct," he has observed, "because New York's maximum-hour legislation was vintage special-interest legislation."[11] Epstein even has lamented that *Lochner* was not applied consistently and did not establish a sufficient limit on governmental power to intervene in the economy.[12]

Virtually all observers, however, agree that *Lochner* is one of the most important decisions ever rendered by the Supreme Court. Why has *Lochner* occupied such a central place in American constitutional history? What accounts for the continued fascination with this old case? At first blush the issue raised in *Lochner*—the validity of a statute limiting work in the New York baking industry to ten hours a day and sixty hours a week—hardly would appear to warrant such sustained attention. On a deeper level, however, *Lochner* poses certain fundamental questions in sharp relief. To what extent can the government constitutionally redress hardships created by the operation of the free market economy? What protection should property rights receive under the Constitution? What is the appropriate role of federal judicial review in American life? The *Lochner* decision speaks forcefully to these inquiries, but observers have drawn widely diverse conclusions from the case. In short, *Lochner* can serve more than one constitutional theory.

Considering the vitality of the *Lochner* debate, a careful scholarly account of this case has been needed for some time. With the welcome publication of *Judicial Power and Reform Politics*, Paul Kens provides a balanced and judicious treatment of *Lochner*. In the process he effectively destroys some myths associated with this case and poses some challenging questions.

Kens examines in detail the factual background of the *Lochner* litigation. In the late nineteenth century New York City's baking industry was highly decentralized and competitive. Many small bakeries operated in tenement basements, where employees toiled long hours, often in unsanitary environments. Initially proposed by a local bakery union, the New York Bakeshop Act of 1895 can be viewed best in the broader context of tenement and workplace reforms that characterized the Pro-

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10. *Id.* at 115-18.

11. Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL EDUC. 153, 157 (1987).

12. Epstein, *The Mistakes of 1937*, 11 GEO. MASON U.L. REV., Winter 1988, at 5, 13-20 [hereinafter Epstein, *The Mistakes of 1937*]; *see also* Epstein, *Race and the Police Power: 1890 to 1937*, 46 WASH. & LEE L. REV. 741 (1989) (contrasting the libertarian basis of *Lochner* with the police power basis of Plessy v. Ferguson, 163 U.S. 536 (1897)).

gressive Era. A reformist desire to clean up the baking industry by protecting the working conditions of bakery employees primarily motivated the enactment of the Bakeshop Act. The measure restricted working hours and made violation a criminal offense. As Kens notes, resistance to governmental interference in the economy was a widely shared attitude in the late nineteenth century. Indeed, earlier legislative attempts to establish and enforce shorter working hours had proven unsuccessful. The Bakeshop Act received little support from the American Federation of Labor, which distrusted legislative solutions and preferred to rely on collective bargaining arrangements. Nonetheless, the Act stirred little debate in the Republican-controlled New York legislature and passed unanimously.

Joseph Lochner owned a small bakery in Utica. Arrested for violation of the Bakeshop Act, he offered no defense at the trial stage. On appeal, however, Lochner argued that the statute interfered with his right to pursue a lawful trade. Lochner relied on the liberty of contract doctrine, a mainstay of laissez-faire jurisprudence. According to this doctrine, competent persons generally were free to make their own economic decisions without legislative interference.[13] Under its police power, a state could curtail the exercise of the freedom to make contracts only to safeguard health, safety, and morals. Thus, the doctrine required a state to justify the imposition of economic regulation. The effect of the liberty of contract doctrine was to leave economic ordering in private hands and defend the operations of the free market from regulation.

The New York Court of Appeals upheld Lochner's conviction by a narrow four-to-three vote.[14] The three dissenting judges denied that the statute was a health regulation and asserted that its real objective was to control the hours of employment.[15] Characterizing the Bakeshop Act as "one of those paternal laws . . . which in its operation must inevitably put enmity and strife between master and servant,"[16] the dissent argued that the act unconstitutionally impaired the liberty of the parties to enter contracts.[17] Lochner then petitioned the Supreme Court for a writ of error.

Speaking for a five-to-four majority of the Supreme Court, Justice Rufus W. Peckham held that the Bakeshop Act violated the liberty of

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13. A. KELLY, W. HARBISON & H. BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 414-15 (6th ed. 1983).

14. People v. Lochner, 177 N.Y. 145, 69 N.E. 373 (1904).

15. *See id.* at 183, 69 N.E. at 387 (O'Brien, J., dissenting). Judges Bartlett and Martin joined Judge O'Brien in dissent.

16. *Id.* at 177-78, 69 N.E. at 385 (O'Brien, J., dissenting).

17. *Id.* at 183-87, 69 N.E. at 387-89 (O'Brien, J., dissenting).

contract as protected by the due process clause of the fourteenth amendment.[18] Although he recognized that a state could enact laws to protect the health of workers,[19] Peckham was not persuaded that the baking trade caused health problems. He could find no direct relationship between the number of hours worked and the bakers' health.[20] Peckham reasoned that "the real object and purpose" of the statute was to regulate labor relations rather than the purported goal of safeguarding health.[21] Peckham also expressed broad disapproval of labor-protective legislation. "It is impossible for us to shut our eyes," he wrote, "to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."[22]

Two dissenting opinions attacked the majority's position from different perspectives. Justice John M. Harlan accepted the legitimacy of the liberty of contract doctrine, but argued that the Court misapplied the doctrine in this case. Emphasizing that contracts were subject to health and safety regulations,[23] he maintained that working long hours in bakeries endangered the health of employees.[24] Justice Oliver Wendell Holmes went further and rejected the laissez-faire interpretation of the Constitution. "This case," he charged, "is decided upon an economic theory which a large part of the country does not entertain."[25] Holmes articulated a philosophy of judicial restraint under which the Supreme Court should defer to "the right of a majority to embody their opinions in law."[26]

The question remains: What accounts for the sustained controversy over the *Lochner* decision? Not all contemporaries were impressed by the case. As Kens observes, the Attorney General of New York only halfheartedly tried to defend the Bakeshop Act.[27] Moreover, the ruling initially aroused little public interest.[28] Reformers, however, gradually realized that *Lochner* was a serious setback to their hopes for legislative improvement of working and social conditions.[29] The decision established laissez-faire constitutionalism as the standard against which eco-

18. Lochner v. New York, 198 U.S. 45 (1905).
19. *Id.* at 53.
20. *Id.* at 58.
21. *Id.* at 64.
22. *Id.*
23. *Id.* at 67-68 (Harlan, J., dissenting).
24. *Id.* at 68-72 (Harlan, J., dissenting).
25. *Id.* at 75 (Holmes, J., dissenting).
26. *Id.* (Holmes, J., dissenting).
27. P. KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER v. NEW YORK 112-13 (1990).
28. *Id.* at 128.
29. Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

nomic legislation was measured. Kens rightly stresses the highly symbolic nature of *Lochner*. "For more than thirty years," the author states, "it served reformers as evidence of the conservative nature of the judiciary and as a striking example of its usurpation of political power."[30] In actuality, the symbolic importance of *Lochner* arguably exceeded its actual impact on later judicial decisions.

Lochner continues to cast a long shadow over constitutional thought despite the political triumph of the New Deal and the rejection of the liberty of contract doctrine in the late 1930s.[31] Kens skillfully highlights the quandary that *Lochner* poses for advocates of modern judicial activism. Although the Progressive critics of laissez-faire constitutionalism urged judicial deference to legislative policymaking, the Warren Court in the 1950s and 1960s embraced judicial activism to achieve liberal and egalitarian goals. It soon became apparent that judicial deference pertained only to economic and social regulations. Indeed, in *United States v. Carolene Products Co.*[32] the Supreme Court adopted a double standard of constitutional review and held economic legislation to a lower level of judicial scrutiny. As a result, property rights and economic liberty no longer received meaningful judicial protection.[33]

Thus, the central dilemma of judicial activists has been to differentiate "bad" judicial meddling as in *Lochner* from "good" liberal activism. Does a principled basis for this distinction exist, or does the distinction rest in the subjective value preferences of individual Justices? Kens questions whether constitutional history supports any persuasive distinction between economic rights and personal liberties. His point is well made. Reconciling second-class status for economic rights with either the history or text of the Constitution is difficult.[34] The framers of the Constitution regarded security of private property as essential for the enjoyment of political liberty,[35] and several provisions of

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30. P. KENS, *supra* note 27, at 126-27.

31. *See* Porter, Lochner *and Company: Revisionism Revisited*, in LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 11, 27 (E. Paul & H. Dickman eds. 1989) (arguing that "the more its memory is castigated, the more the Court disavows Lochnerizing, the more *Lochner* dominates the judicial decision-making processes"); *see also* Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987).

32. 304 U.S. 144 (1938).

33. *See* Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397.

34. *See* S. MACEDO, THE NEW RIGHT V. THE CONSTITUTION 47-48 (1986); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1367-77 (1990).

35. *See* Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (noting that "[p]erhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights"); Erler, *The Great Fence to Liberty: The Right*

the Constitution and Bill of Rights protect property rights.[36]

The concerns raised by Kens are particularly appropriate today. He reminds us that judicial activism can be a two-edged sword. In the future it may serve a conservative agenda. Significantly, as noted above, a group of scholars has urged a return to economic due process and judicial protection of property rights.[37] Kens pointedly concludes:

> [M]odern reformers, who have gamboled through several decades of liberal judicial activism, certainly must now be wary of having left the door open for a revival of some variation on the earlier activism as the makeup of the Court changes—just as many conservatives must be pleased at the prospect that *Lochner* is not dead.[38]

Notwithstanding the strengths of *Judicial Power and Reform Politics*, several of the author's contentions are debatable. He follows Justice Holmes's famous dissenting opinion and attributes the *Lochner* outcome to the then prevalent doctrine of Social Darwinism.[39] The influence of Social Darwinism on the Supreme Court has been exaggerated. One scholar recently has observed: "There is painfully little evidence that any members of the Supreme Court were Social Darwinists, or for that matter even Darwinian."[40] Put bluntly, Holmes inaccurately characterized the majority opinion.[41] A better explanation is that *Lochner* reflected the Court's long-standing interest in safeguarding economic liberty and the rights of property owners from undue legislative infringement.[42]

Kens repeats the conventional wisdom that the due process clause of the fifth and fourteenth amendments originally was understood as merely a procedural guarantee against the arbitrary deprivation of life, liberty, or property. The requirement of due process, Kens declares, "had nothing to do with the content of legislation."[43] The evolution of due process, however, actually is more complex than the author suggests. Before the Civil War, state courts wrestled with a substantive in-

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to Property in the American Founding, in LIBERTY, PROPERTY AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 43-63 (E. Paul & H. Dickman eds. 1989).

36. *See, e.g.*, U.S. CONST. art. I, § 10; U.S. CONST. amend. V.

37. *See* Epstein, *The Mistakes of 1937*, *supra* note 12, at 13-20; Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U.L. REV. 627 (1988); Note, *supra* note 34, at 1377-83.

38. P. KENS, *supra* note 27, at 165.

39. *Id.* at 67-71, 121; *see* Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Hohnes, J., dissenting).

40. Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 418 (1988). For a sharp criticism of the suhstance of the Hohnes dissent in *Lochner* see R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 281-87 (1988) (noting that Holmes asserted but never demonstrated that the majority decided *Lochner* based upon a particular economic theory).

41. Hovenkamp, *supra* note 40, at 417-20.

42. *See generally* Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985).

43. P. KENS, *supra* note 27, at 87.

terpretation of due process.[44] Several antebellum decisions employed due process as a device to safeguard economic interests.[45] Moreover, the framers of the fourteenth amendment defined civil rights at least partly in economic terms. They expected the amendment to protect the rights of blacks to make contracts and own property.[46] "Thus," Herbert Hovenkamp has emphasized, "the fourteenth amendment was economic by design."[47] Given this background, it is not surprising that the fourteenth amendment due process clause was identified early with economic rights.[48]

Lastly, Kens does not address squarely the argument, advanced by defenders of *Lochner*, that the Bakeshop Act was special interest legislation designed to have an anticompetitive impact on the baking trade.[49] These commentators offer a radically different account of the Bakeshop Act, picturing the law as a boost to large bakeries "at the expense of politically unorganized consumers and small bakeries, which were often run by politically powerless immigrants."[50] Kens implicitly rejects this analysis, but a more fulsome discussion is warranted. The factual context of decisions is crucial in assessing their place in history. Should the Bakeshop Act be pictured as an effort to ease the burden of the economic underclass, or as a blatant restriction on business competitors? For decades liberal critics successfully have presented *Lochner* as an antilabor ruling. It is perhaps appropriate to ponder whether this characterization is unfairly one-sided.

Although certain of the author's interpretations are subject to debate, this is a thoughtful volume that deserves a wide audience. Kens asks probing questions and invites reconsideration of a landmark decision. This work is an outstanding study of *Lochner* and its place in constitutional history. Moreover, *Judicial Power and Reform Politics* should contribute greatly to the current dialogue over economic due process and judicial protection of property rights. A paperback edition would facilitate its use in the classroom.

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44. *See generally* Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583 (1930).

45. *See, e.g.*, Wynehamer v. People, 13 N.Y. 378 (1856); University of North Carolina v. Foy, 5 N.C. (1 Mur.) 58 (1805).

46. Hovenkamp, *supra* note 40, at 396.

47. *Id.* at 395.

48. The first Supreme Court decision construing the fourteenth amendment, *Slaughter-House Cases*, 83 U.S. 36 (1872), involved economic rights. The powerful dissenting opinion by Justice Stephen J. Field is credited widely with setting the stage for substantive review of state economic regulations under the due process clause. *See* R. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE 113-17 (1951).

49. *See, e.g.*, B. SIEGAN, *supra* note 9, at 113-20.

50. Note, *supra* note 34, at 1373.