**Michigan Law Review**

Volume 89 | Issue 6

1991

# Judicial Power and Reform Politics: The Anatomy of *Lochner v. New York*

Charles A. Beineman
*University of Michigan Law School*

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

The turn-of-the-century baking industry was both cruel to its workers and a public health hazard. Bakers worked twelve-hour days, seven days a week, in cramped, dusty tenement cellars (pp. 9-12). They enjoyed little leisure time, often living in their kitchens and sleeping on workbenches. Bakers died young; tuberculosis was a common affliction (pp. 9-11). Thus, New York's law[1] limiting bakers' working hours to ten hours a day and six days a week seems reasonable by today's standards. The United States Supreme Court did not find it so in 1905, however, striking down the law in the celebrated case of *Lochner v. New York.*[2]

*Lochner* is frequently cited as the most prominent symbol of the era of substantive due process that lasted from 1905 to 1937.[3] The case poses two great constitutional problems. The first, which has hovered over the Court since *Marbury v. Madison*[4] and *Dred Scott v. Sandford,*[5] is the proper role of the judiciary in the review of legislation.[6] The second problem concerns the validity and scope of substantive due process doctrine. *Lochner* casts a long shadow over modern cases in which the Court has revived the doctrine, such as *Roe v. Wade.*[7]

---

1. 1895 N.Y. Laws 518.

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

3. *See, e.g.,* R. BORK, THE TEMPTING OF AMERICA 44-46 (1990); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 567 (2d ed. 1988). Commentators agree that the *Lochner* era came to a close when the Supreme Court upheld minumim wage legislation in West Coast Hotel v. Parrish, 300 U.S. 379 (1937). *See, e.g.,* L. TRIBE, *supra,* at 581. The Court explicitly repudiated *Lochner* in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949) ("[T]he due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.").

4. 5 U.S. (1 Cranch) 137 (1803).

5. 60 U.S. (19 How.) 393 (1857) (striking down the Missouri Compromise).

6. *See* Sunstein, *Lochner's Legacy,* 87 COLUM. L. REV. 873, 873 (1987) ("The spectre of *Lochner* has loomed over most important constitutional decisions, whether they uphold or invalidate governmental practices.").

7. 410 U.S. 113 (1973). For articles dealing with the problem of condemning *Lochner*'s economic substantive due process while endorsing *Roe*'s personal liberty substantive due process, see Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293 (1986); Schopp, *Education and Contraception Make Strange Bedfellows:* Brown, Griswold, Lochner *and the Putative Dilemma of Liberalism,* 32 ARIZ. L. REV. 335 (1990); Sunstein, *supra* note 6.

Paul Kens[8] has written *Lochner*'s biography. The first half of *Judicial Power and Reform Politics* recounts the history of the Bakeshop Act. This part of the book helps the reader understand *Lochner* by describing the social conditions justifying the law, and by explaining the philosophical and political debate surrounding economic liberties. The second half of the book attempts to trace substantive due process from the dissents in *The Slaughter-House Cases*[9] to its seeming revival in *Griswold v. Connecticut*[10] and *Roe v. Wade*.[11] These chapters fail to offer an analysis that furthers the reader's understanding of *Lochner*.

Kens' account of *Lochner*'s history in the first half of the book lacks detail, yet it adequately enhances the reader's understanding of the reasons for the Bakeshop Act's passage, and of why the Supreme Court later struck it down. Particularly interesting are Chapters Four and Five. Chapter Four describes New York state politics in the late nineteenth century, focusing on the political machine of Republican Party boss Thomas Collier Platt. Kens convincingly claims that the Bakeshop Act might not have been enacted had Platt opposed the measure (p. 26), although Platt's precise role in the Act's passage is never explained.

In Chapter Five, which discusses the passage of the Act, Kens introduces Henry Weismann, perhaps the book's most fascinating character. Weismann, though not a baker himself, was the ambitious leader of the bakers' union. He later betrayed his cause and represented Joseph Lochner, the bakery owner who challenged the Act's constitutionality. Skilled at writing, speaking, and public relations, Weismann, who published the union's newspaper, was one of the chief agitators for reform in the 1890s. Above all an opportunist, Weismann never was able to explain adequately his act of treason (p. 99).

The book's lack of historical detail is at times troubling. Kens sometimes fails to present a clear connection between the Bakeshop Act and the interesting history he relates. For example, he provides scant detail as to how the reform movement influenced the legislature to pass the Act, or exactly how it originated; he writes only that the New York legislature's unanimous passage of the Act shows that the Republican leadership approved the bill (p. 57). Having read about Boss Platt in some detail, the reader is curious about the role he or his machine played in the legislation. Kens merely speculates that members of both houses supported the law because they were "beholden to Boss Platt" (p. 57).

In fairness to the author, more detail than this may not be discov-

8. Paul Kens, J.D., Ph.D., is Assistant Professor of Political Science at Southwest Texas State University.

9. 83 U.S. (16 Wall.) 36 (1873).

10. 381 U.S. 479 (1965).

11. 410 U.S. 113 (1973).

erable by research. And Kens does achieve his goal of helping the reader understand the social and political climate which produced the Bakeshop Act. The reader gains an understanding of the conditions justifying the law, the interests it protected and those it threatened, as well as a general notion of the political process from which the Act resulted.[12] Kens' history thus sheds light on the *Lochner* decision, showing, for example, that the Bakeshop Act was justified by contemporary conditions.

Just as later eras may need help in understanding the current abortion controversy, the modern student will appreciate Kens' discussion of Herbert Spencer, whose *Social Statics* the fourteenth amendment does not enact.[13] Kens is probably right that *Lochner* cannot be understood without realizing how pervasively late nineteenth-century thought applied Darwinism to social, political, and economic institutions. As Professor Frank Strong explains, "[t]he Justices of the [*Lochner* Court], steeped in the economics of Adam Smith and the sociology of Herbert Spencer, unabashedly read their philosophy into the Constitution."[14] This is evidenced by the Justices' solicitude toward laissez-faire economic theory, which posits that the state should let economic markets function free from state regulation, allowing stronger entities to flourish while the weaker languish.

Kens paints Herbert Spencer as the foremost advocate of the negative state. Puzzled law students reading Justice Holmes' dissent will be interested to learn that Spencer was as well known in his time as he is obscure in ours. Spencer espoused the popular view that the proper role of the state is to interfere as little as possible in the lives of its citizens.[15] *Lochner* rested on a view that brooked little interference in private business. Thus, Kens' account of Spencer and his contemporaries places *Lochner* in proper context.

The theories of Spencer and his ilk directly contributed to the development of substantive due process, discussed in the second half of *Judicial Power and Reform Politics.* By Kens' account, the doctrine sprang into being from the pen of Judge Thomas Cooley in his *Consti-*

12. In addition, Kens does offer one interesting detail about the political process which produced the act. The act as first passed said that no "person" could work in a bakeshop over the hours limitations; the provision was changed to read "employee." Kens explains how this change allayed fears of unconstitutionality: "Now the limitation on hours would not apply to individuals working in their own bakeries." P. 58.

13. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."). Regarding laissez-faire, Holmes wrote, "[t]his case is decided upon an economic theory which a large part of the country does not entertain." 198 U.S. at 75.

14. F. STRONG, SUBSTANTIVE DUE PROCESS OF LAW 95 (1986).

15. Pp. 67-68. *See, e.g.,* H. SPENCER, *Over-Legislation,* in THE MAN VERSUS THE STATE 81 (T. Beale ed. 1916).

*tutional Limitations.*[16] This oversimplifies the birth of the doctrine. Kens fails to mention the sporadic application of the doctrine in pre-Civil War cases,[17] and he barely acknowledges any of the long history of due process from the Magna Carta[18] to the fourteenth amendment.[19]

Given the prevalence of "negative state" social and economic theories, one would expect the Supreme Court to have struck down much state regulation both before and after *Lochner* was decided. In early fourteenth amendment cases, notably *The Slaughter-House Cases,*[20] the Court deferred to state legislatures. By the time *Lochner* was decided, however, the Court had come around to the view espoused by, among others, Justice Stephen Field. Field thought that the due process clause required the Court to undertake a substantive review of state legislation (pp. 92-93). State legislatures would be accorded little leeway in making policy judgments.

Kens' analysis of the growth of substantive due process seems skewed insofar as he suggests that Joseph Lochner could not have had much hope for his ultimately successful appeal to the Supreme Court (pp. 107, 115). The Court undeniably allowed some state regulation of private property; liberty of contract was never absolute, and the Court often found a way to uphold state legislation.[21] This is not the whole story, however. Prior to *Lochner,* two Supreme Court cases upheld eight-hour day legislation: *Holden v. Hardy*[22] and *Atkin v. Kansas.*[23] As Kens himself notes, *Holden* made no general statement about shorter-hours laws and "the *Atkin* case still did not represent an expansion of [*Holden*]" (p. 109). Furthermore, Kens focuses on the important case of *Munn v. Illinois,*[24] in which, despite upholding an

16. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION (1868).

17. *See* B. SIEGAN, *supra* note 3, at 40-45 (discussing federal and state substantive due process cases prior to the Civil War). *See generally* Corwin, *The Doctrine of Due Process of Law Before the Civil War* (pts. 1 & 2), 24 HARV. L. REV. 366, 460 (1911).

18. He merely notes that the Magna Carta is the first legal document in history to contain anything resembling a due process clause. P. 87.

19. Professor Frank Strong argues that substantive due process has roots going back well before the fourteenth amendment, claiming it is wrong to say "that Due Process had only procedural meaning prior to the Civil War." F. STRONG, *supra* note 14, at 29. Professor Siegan says it is a "difficult question" whether, by the time the Bill of Rights was framed in 1789, due process clauses contained a substantive component. B. SIEGAN, *supra* note 3, at 24. Still, Kens is right that the doctrine grew explosively after the Civil War; he points out that Cooley's chapter on protection of property doubled in length in later editions, "most of the growth being footnotes to court cases that had applied his theory." P. 89.

20. 83 U.S. (16 Wall.) 36 (1873).

21. Professor Tribe cites research stating that between 1899 and 1937 the Supreme Court struck down state or federal regulations 197 times under the due process clause, "while an even larger number of regulations survived scrutiny." L. TRIBE, *supra* note 3, at 567 n.2.

22. 169 U.S. 366 (1898).

23. 191 U.S. 207 (1903).

24. 94 U.S. 113 (1877).

Illinois law regulating grain storage rates, the Court made no statement suggesting it would not use the due process clause to protect property from state regulation (p. 94).

Most troublesome is that Kens all but ignores "the pivotal case"[25] of *Allgeyer v. Lousiana,*[26] described by Professor Laurence Tribe as having a "landmark holding" which opened "[t]he floodgates of substantive due process review."[27] In *Allgeyer,* the Court held that the state of Lousiana violated "liberty of contract" by regulating insurance contracts made between its citizens and out-of-state companies.[28] Kens discusses *Allgeyer* only in a short paragraph, noting it was a case in which the Court used liberty of contract to invalidate a state law; he dismisses the case from further discussion on the grounds that its facts were easily distinguishable from *Lochner's* (pp. 106-07).

Yet it cannot have been accidental that *Allgeyer* was the first case cited by Justice Peckham in his *Lochner* opinion.[29] *Allgeyer* did indeed represent a significant broadening of substantive due process doctrine; before that case the doctrine as espoused, for example, by Justice Field "stood for opposition to monopoly."[30] Professor Strong argues that "[i]n severing this right [to freely contract] from its tie with anti-monopoly the Court . . . catapulted into an uncharted domain in which substantive due process could become the obstacle to endless instances of legal, economic and social reform."[31] As Kens claims, *Lochner* did come to represent just such an obstacle (p. 2). Kens' failure to pay more attention to *Allgeyer* is thus strange, and certainly represents a substantial omission from his account.

In his summary of the *Lochner* era, which is really no more than a brief roadmap of substantive due process cases from 1905 to 1937, Kens explains that *Lochner* did not create an absolute prohibition

25. F. STRONG, *supra* note 14, at 90.

26. 165 U.S. 578 (1897).

27. L. TRIBE, *supra* note 3, at 567. By Tribe's account, the *Lochner* era arguably began with *Allgeyer;* Professor Siegan says that the era of substantive due process bearing *Lochner's* name "formally commenced" with that case. B. SIEGAN, *supra* note 3, at 54. Others have written that in *Allgeyer* "the Court took the final step toward *Lochner.*" G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 728 (1986).

28. *Allgeyer,* 165 U.S. at 592-93. Justice Peckham, who authored the *Lochner* opinion, wrote for a unanimous Court in *Allgeyer.* One reason why *Allgeyer* does not carry the impact of *Lochner* may lie in the fact that its lengthy substantive due process language is dictum. At issue in *Allgeyer* was not the substance of the Louisiana legislation, but its jurisidictional reach. Still, *Allgeyer* was the direct precursor of *Lochner:* its "gratuitous dictum . . . solidified into [*Lochner's*] holding." F. STRONG, *supra* note 14, at 95.

29. Lochner v. New York, 198 U.S. 45, 53 (1905) (stating that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution" and citing *Allgeyer*).

30. F. STRONG, *supra* note 14, at 91. For example, Field's position in *The Slaughter-House Cases* was based on the ground that the fourteenth amendment prevented states from protecting monopolies. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 101-02 (1873) (Field, J., dissenting).

31. F. STRONG, *supra* note 14, at 91.

against state exercise of the police power. He discusses several cases in which the Supreme Court deferred to legislative regulation in the economic sphere. Still, economic substantive due process doctrine remained in force; Kens relates in detail the example of workmen's compensation laws. Ironically, while these laws were generally upheld, the cases in this area took an even more narrow view of the scope of police power than did *Lochner.* Even near the end of the *Lochner* era, states still felt they were limited to certain dangerous trades when enacting compensation laws (pp. 150-51). The Court staunchly defended the liberty of contract, unless matters of health and safety were unmistakably implicated.[32]

Kens offers a brief epilogue about substantive due process following the demise of *Lochner.* The *Lochner* era ended with *West Coast Hotel v. Parrish,*[33] a case in which the Court upheld minimium wage legislation. Even so, shortly after the decision in *West Coast Hotel,* the Court hinted in *United States v. Carolene Products*[34] that it had not absolutely repudiated judicial activism (p. 159). Further, Kens mentions cases such as *Griswold v. Connecticut,*[35] and *Roe v. Wade*[36] to show that *Lochner* remains relevant to constitutional jurisprudence.[37]

Kens speculates as to why *Lochner* is viewed as an important case. Although the case is now celebrated, the initial public reaction to *Lochner* was muted (p. 128). The labor movement denounced the decision, as did some legal scholars, who castigated the Court for ignoring the wealth of sociological data justifying the bakeshop law. It was only later that legal scholars (such as Roscoe Pound, who Kens discusses at some length) saw the significance of *Lochner:* "[T]he Supreme Court did more than reject an economic and social policy. It tabled consideration of the lines of moral reasoning advanced by reformers" (p. 136). Kens raises a complaint against *Lochner* that is frequently made about judicial activism: "it . . . insulated certain issues from the impact of raw political power" (p. 136).

In sum, the first part of *Judicial Power and Reform Politics* is a useful aid to the study of an important case and its place in constitutional law; it provides a relevant political, social, and theoretical history to the decision in *Lochner.* The second part of the book is less

32. P. 153. For example, in Muller v. Oregon, 208 U.S. 412 (1908), the Court, having received the first ever Brandeis Brief (described by Kens (p. 152) as "Brandeis's novel brief, which emphasized sociological and scientific data"), upheld a state shorter-hours law. An example on the other side of the coin is Adair v. United States, 208 U.S. 161 (1908), in which the Court struck down a statute prohibiting "yellow dog" contracts (contracts which prohibited an employee from joining a union).

33. 300 U.S. 379 (1937). *See supra* note 3.

34. 304 U.S. 144, 152 & n.4 (1938).

35. 381 U.S. 479 (1965).

36. 410 U.S. 113 (1973).

37. *See supra* note 7 and accompanying text.

useful. Kens gives a purely descriptive account of substantive due process, making no new arguments about the doctrine. Furthermore, the book fails to provide a complete, accurate description of the growth and development of substantive due process between the enactment of the fourteenth amendment and the *Lochner* decision, a task which has been fulfilled by other authors.[38]

— *Charles A. Bieneman*

38. *See, e.g.*, F. STRONG, *supra* note 14; L. TRIBE, *supra* note 3, at 562-74.