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The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence

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THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE. By *Howard Gillman.* Durham: Duke University Press. 1993. Pp. x, 317. $34.95.

The by now almost mythical Supreme Court decision in *Lochner v. New York*[1] has long been the centerpiece of a series of debates over the evils of judicial activism, the abuse of judicial power, and the legitimacy of substantive due process — debates that are still very much alive today.[2] *Lochner*'s symbolic significance has greatly transcended whatever historical impact may have followed from the Court's decision to strike down a New York law that limited bakers' working hours to sixty hours a week and ten hours a day.[3] The *Lochner* era has come to represent a period in our constitutional history from roughly 1880 to 1937 when conservative Justices aggressively exceeded the proper boundaries of their authority to interfere with the political process.[4]

Many of those who have decried the abuses of this period have taken the position articulated by Justice Oliver Wendell Holmes in his famous *Lochner* dissent: that the majority decided the case "upon an economic theory which a large part of the country does not entertain" and that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[5] These critics have portrayed the Justices in the *Lochner* majority as being motivated by their own policy preferences favoring laissez-faire economics and social Darwinism.[6] By

1. 198 U.S. 45 (1905).

2. *See* Cass R. 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.").

3. Although commentators generally agree that the *Lochner* era continued at least until 1937, when the Supreme Court drastically altered its approach to minimum-wage legislation in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the specific holding in *Lochner* was at least implicitly overruled 20 years earlier in Bunting v. Oregon, 243 U.S. 426 (1917) (upholding a general law setting maximum work hours). For a detailed account of the factual background of the *Lochner* litigation, conditions in New York City's baking industry, and passage of the New York Bakeshop Act of 1895, see PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* (1990).

4. *See, e.g.,* ROBERT H. BORK, THE TEMPTING OF AMERICA 44 (1990) (stating that *Lochner* is "the symbol, indeed the quintessence, of judicial usurpation of power"); JOHN HART ELY, DEMOCRACY AND DISTRUST 14 (1980) (stating that the *Lochner* cases "are now universally acknowledged to have been constitutionally improper"); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921,* 5 LAW & HIST. REV. 249, 250 (1987) (stating that *Lochner* "is still shorthand in constitutional law for the worst sins of subjective judicial activism"). *But see* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 128 (1985) (defending the *Lochner* opinion).

5. *Lochner,* 198 U.S. at 75 (Holmes, J., dissenting).

6. *See, e.g.,* CARL B. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 520-22 (1943). For a recent statement to this effect, see FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 95 (1986) (stating that the "Justices of

reading a guarantee of liberty of contract into the Due Process Clause of the Fourteenth Amendment, the critics continue, the *Lochner* Court fraudulently interpreted the Constitution so as to protect the interests of private property and to provide cover for its own act of judicial legislation, as the Court substituted its policy preferences for those of the legislature. Countering this neo-Holmesian interpretation of the *Lochner* era, however, more recent scholars have proposed a more complex picture of the underlying ideology motivating the Justices during this part of our nation's history.[7]

In *The Constitution Besieged,* Howard Gillman[8] builds on this still-developing revisionist interpretation of the period to suggest an alternative image of *Lochner*-era jurisprudence. Gillman's account is more historically grounded and more faithful to the jurisprudential language employed by the state and federal courts of the time than either the traditional or the early revisionist accounts. Instead of explaining the *Lochner* era in terms of personal policy preferences, Gillman argues that the decisions and opinions of this period represented a "serious, principled effort" (p. 10) to maintain the coherence and integrity of a long-standing constitutional ideology that distinguished between valid economic regulation and invalid "class," or factional, legislation (pp. 10-11). Gillman premises his approach on the belief that judicial opinions are not masks of empty rhetoric and that the constitutional jurisprudence of this period — and legal ideology generally — offers a coherent means of explaining judicial behavior (pp. 15-18). The author attempts to demonstrate how federal and state judges shared a common method of evaluating state legislatures' exercise of police powers based on an understanding of political legitimacy and equality having its roots in the creation of the Constitution.

The Justices of the *Lochner* Court, Gillman contends, brought about a crisis in American constitutionalism by stubbornly adhering to this constitutional ideology — which was hyperantagonistic toward "class" politics and legislation — despite the rapid industrialization and transformation of American capitalist relations in this period. While legislatures were attempting to extend unprecedented protections to those groups that had become vulnerable to the coercive forces inherent in these new capitalist forms of production, the Supreme Court was struggling to maintain an increasingly anachronistic constitutional ideology. In essence, Gillman suggests that the Justices sim-

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the [*Lochner* Court], steeped in the economics of Adam Smith and the sociology of Herbert Spencer, unabashedly read their philosophy into the Constitution").

7. *See, e.g.,* Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897,* 61 J. AM. HIST. 970, 973 (1975) (arguing that Justice Field derived his jurisprudence not so much from social Darwinism as from the Jacksonian antislavery precept that an individual is free to pursue the fruits of her labor as she sees fit).

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ply failed to perceive or acknowledge that profound changes in American society had fatally undermined the theoretical underpinnings of their police powers jurisprudence.

Although Gillman offers *The Constitution Besieged* as a comprehensive account of the constitutional crisis that took place during the *Lochner* era, the author's greatest contribution to the reinterpretation of this period lies in his detailed account of the development of police powers jurisprudence in state courts prior to the *Lochner* decision in 1905 and the manner in which the language and reasoning of the Supreme Court opinions prior to and following *Lochner* reflect this development. In his effort to present "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" (p. 9), however, Gillman only rarely acknowledges that judges in this period did in fact believe in something they called "liberty of contract" (p. 6). Nevertheless, even though Gillman may be trying to prove too much, his history of American police powers jurisprudence skillfully highlights the doctrine's antagonism to "class" or "partial" legislation and corresponding emphasis on equal rights and the need for police regulations to provide general benefits.

Gillman's portrayal of the *Lochner* era is probably best understood, not as a complete refutation of the laissez-faire, liberty-of-contract model of the period, but rather as a deepening and broadening of our understanding of these terms by placing them in their particular American historical context.[9] After all, the key for any student of this period is not merely to reject or attach labels like *laissez-faire* or *liberty of contract* to judicial ideology but to understand *why* the courts at times upheld, and at other times struck down, legislation that interfered with the free market. To this end, Gillman's contextual approach has much to add to our understanding of *Lochner*-era constitutional jurisprudence.

Gillman begins his account by looking at the events and conditions surrounding the framing of the U.S. Constitution. He points to the familiar concern of the dominant social classes to prevent "factions" from gaining political control. Specifically, Gillman highlights the Framers' attempts to delegitimize certain kinds of "partial" laws passed by state legislatures in the 1780s to advance, the Framers suggested, purely "private" interests, such as debtor-relief legislation and wage and price controls, which only benefited a narrow segment or class of society (pp. 26-33). The Framers sought to delegitimize these

9. P. 189 ("Still, 'liberty of contract' had come to represent the Court's general attitude that market relationships should be free from government interference unless the legislature was promoting an acceptable public purpose . . . ."); p. 114 ("Market freedom, or 'liberty of contract,' was linked inextricably with the commitment to faction-free legislation.").

partial laws by stressing the need for government to remain neutral in the conflicts arising between social groups or classes competing in the economy (p. 32). Government neutrality, Gillman contends, followed from the Framers' underlying belief that "the market was essentially harmonious and liberty loving" (p. 21). Moreover, Gillman suggests that when the Framers first elaborated their principle of equality and governmental impartiality in the 1780s, "its legitimacy rested specifically on the assumption that a commercial republic would not create conditions of social dependency that could be used by vulnerable groups to justify requests for special government protection and assistance" (p. 21).

At the center of republican ideology stood the image of the self-reliant or autonomous individual. Although he notes differences between groups such as the Liberal Whigs and the Philadelphian artisans, Gillman stresses that the dominant vision of Thomas Jefferson and his followers held that America's expansive frontier would ensure this individual self-reliance and allow the government to remain "class-neutral" (p. 26). Gillman also indicates that he recognizes that this period's faith in the "natural society" was far from neutral in its long-term effects.[10] Yet he insists that those who opposed any interference with the common law obligations imposed on competing parties in the market economy predicated their sensibility on "the assumption that the social relations constructed by the common-law regime of contract and property were essentially fair and liberty loving — or at least would be in the United States, with its expansive frontier."[11] As Gillman acknowledges, however, despite the Framers' vision of social relations grounded in fairness and liberty, the "Constitution set up a political structure specifically designed to nurture and protect the social relations produced by capitalism by preventing the state from taking sides in the disputes arising among or between competing classes" (p. 33).

Unfortunately, Gillman never adequately follows up on the free-market implications of these statements or their affinity with views expressed by other commentators that the *Lochner*-era Justices' reliance on the common law and affirmance of the status quo was *in effect* a form of laissez-faire constitutionalism.[12] In tracing the transformation of the founders' ideology into constitutional police powers jurispru-

10. Pp. 26-27 ("The common law established a set of class identities and class interests linked to the ownership of different types of property (slaves, land, capital, the tools of one's trade, commodities) and the enjoyment of the rights and privileges associated with such ownership.").

11. P. 27. In other words, common law obligations, such as rights of contract and debtor-creditor laws, were considered just and natural even when enforced against certain groups in society because it was presumed that America's abundance would not result in any class suffering under conditions of dependency for long.

12. For a discussion along these lines, see Sunstein, *supra* note 2, at 876-83, 903 (suggesting that the *Lochner*-era approach was a failure precisely because the "*Lochner* Court chose the

dence during the period of Jacksonian democracy, Gillman chooses to ignore almost completely the judicial commitment to market liberty in order to focus more narrowly on the extent to which state courts developed the founders' aversion to factional and class-based politics. Curiously, having recognized that these two commitments are really two sides of the same coin, Gillman apparently felt it necessary to redress some perceived imbalance in the current scholarship by minimizing or ignoring any free market implications in his account of the history of police powers jurisprudence, to the point of largely omitting the expression *laissez-faire* itself from his discussion.

Gillman does, however, provide a partial definition of the Jacksonian ideology of "market freedom" when he stresses this political coalition's commitment to political equality and the removal of monopolies and chartered, or *artificial,* economic privileges (pp. 34-41). Gillman's focus, as always, is on how the judges understood and rationalized the choices they were making. The judges who adhered, however loosely, to Jacksonian ideology believed that governments should be limited to making laws of a general character — uniform and universal in their operation. Government action ought not favor one class over the other — for example, the farmer over the mechanic, or the manufacturer over both (p. 38). Although early Supreme Court scrutiny of the behavior of state legislatures rested uneasily on the notion of vested rights and the narrow protection of private property,[13] Gillman contends that by the midnineteenth century, courts more frequently defined the boundaries of the police powers by emphasizing "the illegitimacy of so-called unequal, partial, class, or special legislation; that is, legislation which advanced the interests of only a part of the community."[14] With the barrier of vested rights eroding and the greater acceptance in law of Jacksonian politics aimed at releasing market energies, Gillman suggests, courts had begun to demand that legislation be justified on the grounds that it contributed to the general welfare (pp. 48-49).

As an example, Gillman cites the Massachusetts Supreme Court decision in *Vandine's Case,*[15] in which the court upheld a Boston bylaw that prohibited all persons, except those with licenses, from removing "any house-dirt, refuse, offal, filth or animal or vegetable

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status quo, as reflected in market ordering under the common law system, as the baseline for measurement of departures from neutrality and of action and inaction").

13. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("[A] law that takes property from A. and gives it to B. . . . is against all reason and justice . . . .").

14. P. 49. Gillman suggests that the "Jacksonian conception of classlessness and commercial development was largely a reaction to the assumptions that drove Marshall's jurisprudence." P. 47. As an example of Justice Marshall's jurisprudence, Gillman offers Marshall's opinion in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), which protected established charters of incorporation from legislative interference.

15. 23 Mass. (6 Pick) 187 (1828).

substance from any of the dwellinghouses or other places occupied by the inhabitants."[16] The court agreed that the proper test in determining the validity of this ordinance was whether this restraint of trade "reasonably" advanced the general welfare, that is, whether it was "necessary for the good government of the society" (p. 51). In making this determination the court looked to both the object and the necessity of the bylaw. Gillman suggests that the court's concern was not the *extent* to which the bylaw impaired market freedom but rather whether it advanced the "general welfare of the community" and not the "particular welfare of private interests" (pp. 51-52).

Similarly, in *Bank of the State v. Cooper,*[17] the Tennessee Supreme Court invalidated an act that created a special court to handle all lawsuits brought against the Bank of the State of Tennessee. The court stressed that the "law of the land" meant a general public law and that

> this provision was intended to restrain the legislature from enacting any law affecting injuriously the rights of any citizen, unless at the same time the rights of all others in similar circumstances were equally affected by it. If the law be general in its operation, affecting all alike, the minority are safe . . . .[18]

Gillman contends that cases such as these contributed to the development in the nineteenth century of a constitutional jurisprudence "organized around the core value of *equality* under the law" and the requirement that legislatures demonstrate a legitimate "public purpose."[19] As a limit on government, Gillman argues, public purpose did not mean laissez-faire; instead it meant class-neutral legislation that did not impose special burdens or benefits on market competitors.

Gillman points out that judges in this period upheld inspection and public health laws, location restrictions for certain dangerous or unhealthy businesses, regulations of weights and measures, licensing schemes, and prohibition acts (p. 55). He contends that the issue for judges faced with a regulation was whether it was arguably neutral with regard to the various interests or groups competing in society. Thomas M. Cooley, Gillman suggests, was perhaps the most familiar, and most misunderstood, exponent of the conception of political legitimacy that underlies this standard of legal review (pp. 55-56). Though Cooley was a proponent of market liberty and the protection of contract and property rights, his treatise on constitutional limitations rec-

16. 23 Mass. (6 Pick) at 187-92.

17. 10 Tenn. (2 Yer.) 529 (1831).

18. 10 Tenn. (2 Yer.) at 535-36. In striking down the law, the court wrote, "This law only acts upon individual cases, and is the same in principle as if a law had been passed in favor of some one merchant, enabling him, by the method therein prescribed, to take judgment against his debtors without the right of appeal." 10 Tenn. (2 Yer.) at 536.

19. Pp. 54-56; *see also* Durkee v. City of Janesville, 28 Wis. 464, 465 (1871) (reflecting on "that principle of constitutional law which prohibits unequal and partial legislation upon general subjects").

ognized that property rights are " 'subject to those general regulations which are necessary to the common good and general welfare' "[20] and that the " 'dimensions of the government's police power are identical with the dimensions of the government's duty to protect and promote the public welfare.' "[21]

With the passage of the Fourteenth Amendment, federal courts for the first time began to scrutinize the day-to-day legislation that state judges had been ruling on prior to the Civil War. Gillman argues convincingly that the Supreme Court consistently drew upon the standards developed by the state courts when it attempted to elaborate on the limits of police powers legislation under the Fourteenth Amendment (pp. 62-75). In doing so, he looks to the language employed by the Court in opinions such as the *Slaughter-house Cases*[22] and *Loan Assn. v. City of Topeka.*[23] Gillman contends that the Court's insistence that laws be "reasonable" and its antagonism toward legislation identified as "arbitrary," meaning factional, together indicate the Court's adoption of a police powers jurisprudence that approved of class-neutral policies that advanced a public purpose (pp. 72-73, 104-31).

Gillman next presents an effective if brief survey of the history of industrialization and the social and economic revolution that took place in the latter half of the nineteenth century (pp. 76-86). He discusses how the rise of trade union activity and the proliferation of collective action raised the specter of factional or class politics for courts still captured by an ideology focusing on the general welfare and insisting on government neutrality with respect to private interests. State courts responded to the increase in labor legislation by steadfastly insisting that it have some relationship to a public purpose (pp. 86-99). Here, however, the author's discussion does not go far enough. Although Gillman may be correct that state courts in this period were motivated more by their aversion to what they believed

20. 2 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 1224 (8th ed. 1927) (quoting Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851)); *see* p. 57.

21. 2 COOLEY, *supra* note 20, at 1226 (quoting Leonard v. State, 127 N.E. 464, 465 (Ohio 1919)); *see* p. 57.

22. 83 U.S. (16 Wall.) 36 (1873). Gillman compares the language of the majority opinion, which upheld a state-created slaughterhouse monopoly as consistent with the state's police power to protect the health of the citizenry, *see* 83 U.S. (16 Wall.) at 62-66, with the language of the dissenting Justices, who objected to the monopoly as special privilege legislation. *See* 83 U.S. (16 Wall.) at 87 (Field, J., dissenting), 120 (Bradley, J., dissenting); *see* pp. 64-67.

23. 87 U.S. 655, 659, 664-65 (1874) (invalidating a state law authorizing municipalities to issue bonds or lend their credit to aid manufacturing enterprises on the grounds that such enterprises were not of a "public character" but were only "private interest[s]"); *see* pp. 67-68. Gillman also discusses Powell v. Pennsylvania, 127 U.S. 678 (1888), in which the Court upheld a prohibition on the sale of oleomargarine because the prohibition was a good faith effort "to protect the public health and to prevent the adulteration of dairy products," 127 U.S. at 683-84, and because it applied equally to everyone engaged in the business. 127 U.S. at 687; *see* pp. 73-75.

was class politics than by any particular adherence to strict laissez-faire constitutionalism, he does not adequately explain why judges continued to maintain an ideology that was becoming so obviously anachronistic. Gillman's only suggestion appears to be that they were dominated by an "ideological barrier" and that they were "institutionally obligated to preserve the dominant vision" (p. 99).

Gillman suggests that it was only over time and because of the onslaught of a "new realism" regarding the conditions and realities of American economic life that the Supreme Court began to reevaluate its commitment to the tradition of neutrality (pp. 132-93). Until that point, Gillman claims, the Court was only willing to uphold protective or special legislation because of the particularly dangerous health conditions of a specific group of workers,[24] or because the class of workers lacked the capacity to fend for themselves, as for example, young children, insane persons, and women.[25] As Gillman puts it, the issue for the Court was not whether a labor statute interfered with market freedom per se but whether it could be justified as something other than class legislation.[26]

The author suggests that precisely this "heightened sense of class conflict and careful scrutiny of exercises of the police powers" (p. 125) led a majority of the Court to strike down the maximum hours law for bakers in *Lochner v. New York*.[27] Gillman takes seriously the debate between the majority and the Harlan-led dissenters[28] in *Lochner* as to whether the law could be justified on health grounds, suggesting that it reflected their commitment to a well-defined police powers jurisprudence. In this regard, Gillman contends that Justice Holmes's lone dissent was "somewhat beside the point" in that it failed to address the central terms of the debate among the other Justices (p. 131).

Gillman's account offers convincing evidence that the *Lochner* era should not be understood as being dominated by some "ill-defined commitment to laissez-faire in the abstract" (p. 174) and that the opinions in this period flowed from "an overarching set of well-established legal doctrines and principles governing the legitimate exercise of police powers" that distinguished between valid health laws and illegiti-

24. *See, e.g.*, Holden v. Hardy, 169 U.S. 366 (1897) (upholding a Utah labor law restricting miners to an eight-hour day); *see* p. 125 ("*Holden* stood for the proposition that the police powers could be used not only to promote the general well-being of the community but also the specific physical well-being of a class of workers who were not in a position to make contracts favorable to their health and safety.").

25. *See* pp. 120-21, 137-38.

26. *See* pp. 97, 174-75, 199.

27. 198 U.S. 45 (1905). For a defense of *Lochner* on this point, see Richard A. Epstein, *Self-Interest and the Constitution*, 37 J. LEGAL EDUC. 153, 157 (1987), suggesting that "[d]ecisions such as *Lochner v. New York* were correct because New York's maximum-hour legislation was vintage special-interest legislation."

28. Justices White and Day concurred in Justice Harlan's dissenting opinion. 198 U.S. at 65. Justice Holmes dissented alone. 198 U.S. at 74.

mate class legislation (p. 177). On a theoretical level, however, Gillman's treatment of the debate surrounding *Lochner* is not as sophisticated or as subtle as it needs to be. His failure to define exactly what he means by "laissez-faire economics" or to pursue the underlying free-market implications of the ideology he traces is particularly troublesome. Only occasionally does the reader become aware that Gillman is arguing against a rather absolute definition of laissez-faire ideology[29] that makes no allowances for differences among the Justices of the period.[30] This failure is disappointing because Gillman is in fact engaging in an important redefinition of *Lochner*-era laissez-faire constitutionalism, even though he has chosen to posit his account against the straw man embodied by the Holmesian paradigm.[31]

These theoretical weaknesses should not obscure the important contribution that *The Constitution Besieged* makes to our understanding of the historical development of police powers jurisprudence, including its roots in the framing of the Constitution, its refinement in the state courts, and its eventual adoption by the Supreme Court after the Civil War. Although he does not address the theoretical and analytic implications of the *Lochner* era for modern constitutionalism,[32] Gillman does provide a compelling account of the way state judges and the Supreme Court in this period understood and portrayed their antagonism to the class legislation that threatened government neutrality, and of how the sweep of industrialism and social realism finally convinced the Court of just how anachronistic its police powers jurisprudence had become.

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29. For example, Gillman at one point suggests that the "central distinction" of this period's jurisprudence was

> based not on judgments about *whether laws burdened free enterprise a lot or a little,* but on judgments about whether interventions in market relations were related to a historically defined conception of the public purpose or instead were better understood as corrupt attempts by particular classes to gain unfair and unnatural advantages over their market adversaries.

P. 193 (emphasis added).

30. *Cf.* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition,* 70 N.C. L. REV. 1, 6-23 (1991) (discussing three approaches to *Lochner*-era substantive due process in terms of Justices who were either *strict* laissez-faire constitutionalists, *moderate* laissez-faire constitutionalists, or *liberal* constitutionalists).

31. For example, while some commentators continue to attribute the *Lochner* decision to the influence of social Darwinism, as reflected by laissez-faire economics, *see, e.g.,* KENS, *supra* note 3, at 165, others argue today that this view greatly exaggerates the influence of such concepts on the Supreme Court. *See, e.g.,* Herbert Hovenkamp, *The Political Economy of Substantive Due Process,* 40 STAN. L. REV. 379, 418 (1988) ("There is painfully little evidence that any members of the Supreme Court were Social Darwinists, or for that matter even Darwinian.").

32. For a discussion of *Lochner*'s modern implications, see generally Sunstein, *supra* note 2.