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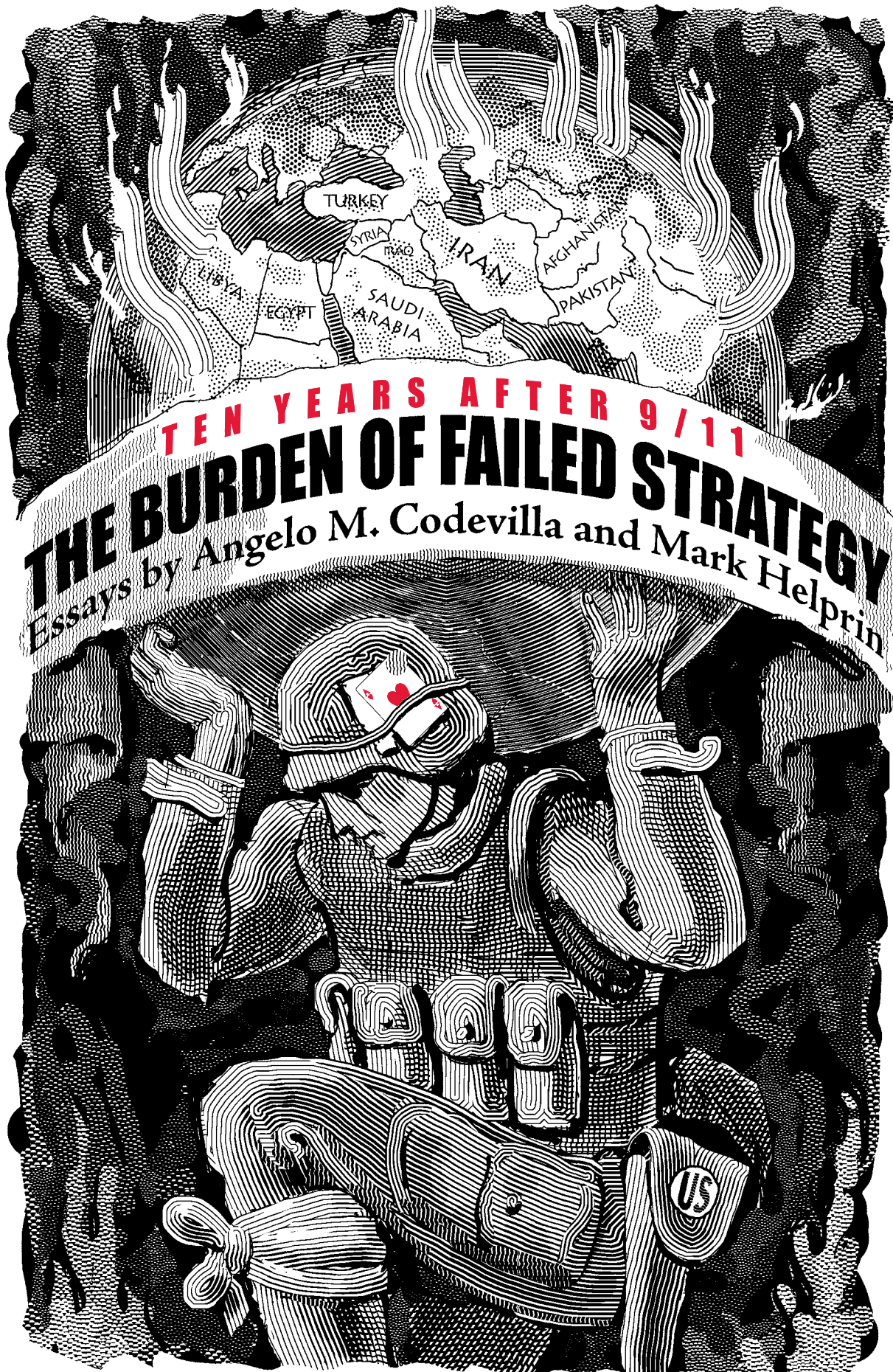
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## A NEW BIRTH OF ECONOMIC FREEDOM

*Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform,*  
by David E. Bernstein. University of Chicago Press, 208 pages, \$45



FOR MAINSTREAM SCHOLARS, JOURNALISTS, and intellectuals, the notorious *Dred Scott* decision of 1857 wins the gold medal in the Worst Supreme Court Decision Olympics. An equally broad and emphatic consensus awards the silver medal to the Supreme Court's 1905 decision in *Lochner v. New York*. The supposition that these two polar opposites are linked reveals the progressive worldview's boundless capacity to get important questions not merely wrong but exactly backwards. *Dred Scott* held that individuals who were born slaves could never become citizens of the United States, regardless of when and how they came to be free. By contrast, *Lochner* held that ordinary people, even foreign immigrants, were entitled, as autonomous human beings, to make their own decisions about how, why, and on what terms to exchange economic goods and services.

In *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform*, David Bernstein, a professor at the George Mason University Law School, takes on the task of demonstrating that the conventional denunciation of *Lochner* is both inaccurate and un-

fair. By dint of his hard work and meticulous research, we can say, Mission Accomplished!

At issue in *Lochner* was the constitutionality of a New York statute, the Bakeshop Act, which prohibited certain kinds of bakers from working more than 10 hours per day or 60 hours per week. Joseph Lochner, owner of a bakery in Utica, located in upstate New York, was convicted of a criminal offense and forced to pay a fine when he required his workers to work longer hours. Tellingly, the workers themselves never complained of ill-treatment.

*Lochner* offered two defenses against this prosecution, both based on the twin 14th Amendment's guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Lochner claimed, first, that the Bakeshop Act violated his rights under the Due Process Clause to enter freely into voluntary contracts with others. The police power exception meant that this liberty could be abridged only to protect the health, safety, morals, or general welfare of the public at large. Second, Lochner argued New York's

legislation denied him equal protection of the laws by imposing these restrictions only on some types of bakers, not all.

In theory, this equal protection claim is weaker than the liberty of contract claim. The state has two possible responses to successful equal protection challenges: either remove the restriction on the regulated bakers or extend it to all bakers. Each approach makes the difference between classes disappear. The Due Process Clause does not give the state that second out, since the maximum hour restrictions in the New York law, if held to be impermissible restrictions on the liberty of contract, would be unconstitutional whether they applied to all bakers or only some. The state can equalize only upward if there is a valid claim under the Due Process Clause.

IT'S NO WONDER, THEREFORE, THAT THE liberty of contract claim proved to be a major battleground in the early Progressive Era. Justice Rufus Peckham, writing for the five-member *Lochner* majority, held that the New York statute did not fall into any of the permissible police power categories. In-



stead, he classified the statute as a “labor law,” intended to stifle competition by one class of bakers against its economic rivals. That logic proved to have important consequences for other cases of that era. Most notably, the *Lochner* understanding of freedom of contract prevailed against mandatory collective bargaining regimes, whether implemented by the federal government or by the states. Those decisions held for about a generation before they were overturned in practice by the passage of the Railway Labor Act and the National Labor Relations Act, enacted in 1926 and 1935, respectively.

To the Progressive mind, Peckham’s judicial rejection of “worker protection” legislation showed how five badly out-of-touch justices failed to grasp the growing perils that industrialization posed to workers. The most powerful incarnation of the Progressive view was not in the long, elaborate dissent by Justice John Marshall Harlan, which concluded that the ten-hour limitation on bakers, like the limitation in an 1898 case on maximum hours for miners, was a health statute and thus fell within the state’s police power. Harlan, in other words, agreed with Peckham on the constitutional validity of the distinction between health and labor statutes, but drew the line in a place more favorable to the state. Yet once the overhanging health and safety issues were out of the case, it was Harlan who, in *Adair v. United States* (1908), struck down the federal collective bargaining statute as an unconstitutional labor law.

In *Lochner* the progressives’ true hero was Justice Oliver Wendell Holmes, Jr., whose pithy dissent mounted a frontal attack on the entire classical liberal synthesis shared by Peckham and Harlan. Holmes asserted, without trying to demonstrate, that the maximum hours statute could be justified on grounds of health. But his larger attack was on the very notion of freedom of contract, which he dismissed as an inappropriate “shibboleth” for the modern industrial age. His most famous barb was that the 14th Amendment did not “enact Mr. Herbert Spencer’s *Social Statics*,” even though the connection between laissez-faire economics and constitutional principles is far tighter than Holmes acknowledged.

The key point for Holmes, therefore, was his false assertion that the Constitution did not pick sides on what he perceived as a purely economic struggle between warring interest groups, which had to be resolved by political means only. Even though Holmes was a skeptic about the power of regulation to hold back strong economic forces, he thought Congress and the states could try whatever futile experi-

ments they wanted in order to stem the tide of the perceived abuses of industrialization. It is precisely because Holmes thought the theory of limited government had no constitutional pedigree that he became a charter member in the Progressive hall of fame.

**I**N TACKLING THESE FUNDAMENTAL ISSUES, David Bernstein brings a wealth of historical information to the raging dispute over *Lochner*. For the most part, he does not weigh in on the critical doctrinal issues that separate Peckham (and Harlan) from Holmes. Rather he takes a more modest, but ultimately rewarding approach. He thus explains in painful and convincing detail why it was the enlightened Progressives, not the so-called reactionaries of the “Old Court,” who utterly failed to appreciate the long-term social harm wrought by their own misguided reform agenda.

In developing this thesis, Bernstein resorts neither to high philosophy nor deep economic theory. Instead, he relentlessly tracks down every obscure newspaper story, tract, and pamphlet that sheds light on the extensive, prolonged union efforts to take over the baking industry. The objective was to impose burdens on non-union bakeries staffed by recent immigrants that were far heavier than those borne by their unionized competitors. The health law claims were fig leaves for their protectionist activities.

The maximum hours law neatly illustrates how a statute can be neutral on its face but discriminate between two rival classes of enterprises in the same industry. The immigrant bakers worked long single shifts, and often quite literally slept on the job after preparing loaves for baking in the evening and collecting them the next morning. These workers would be shut out of the market by an innocuous-sounding 10-hour maximum-hour law, and the rival union operations left the only ones standing, since they used two separate shifts, each of which worked less than the 10-hour maximum.

On Bernstein’s persuasive reasoning, *Lochner* rightly rejected the unions’ politically successful rent-seeking. He is also correct in showing how *Lochner* might have played out in three explosive areas: sex, race, and religion. On the first, Bernstein recounts the sad story of the 1908 case of *Muller v. Oregon*, in which a chivalrous Supreme Court unanimously upheld Oregon’s law prohibiting women from working more than 10 hours a day. The beneficiaries of this gallantry, the female employees of Curt Muller’s laundry business, all wound up being displaced by male Chinese immigrants not subject to the law.

Muller was also notable for Louis Brandeis’s “social science” brief that carefully sought to steer the Oregon maximum-hours law into the health and safety categories recognized under *Lochner*. Brandeis’s call for maximum hours laws protecting women, resting on endless recitations from learned studies about the United States and Europe, carried the day in the Supreme Court.

Unfortunately, his brief was in fact a sterile endeavor. It paid no attention whatsoever to the huge increases in life expectancy and wealth that took place where the liberty of contract was protected, in large part because his brief at no point recognized the critical proposition of all successful economies: the logic of mutual gain through voluntary exchange.

Furthermore, Brandeis’s brief could not explain why the selective restriction on women’s job options helped to advance their cause. On this issue, at least, the progressive movement has retreated from its protectionist agenda. As Bernstein notes, modern feminists rightly perceive that protective women-only legislation curtails women’s economic opportunities. For them, the truly menacing decision came in 1873 when the Court upheld, in *Bradwell v. Illinois*, a legal prohibition against the practice of law by women on the ground that their destiny in some larger social plan required them to serve only as wives and mothers.

Even if we suppose, for the sake of the argument, that women don’t want to work as lawyers, it should still be their decision about how they lead their own lives, not the state’s. What matters is that a sound system of laws lets men and women decide which jobs to compete for and why, free of the heavy hand of the state.

**T**HE PICTURE ON RACE IS EVEN BLEAKER, precisely because during its supposed heyday *Lochner* was never used to strike down segregationist laws. Bernstein is especially compelling in severing the linkage that noted liberal scholars such as Bruce Ackerman and Cass Sunstein have tried to forge between *Lochner* and the lamentable 1896 Supreme Court decision of *Plessy v. Ferguson*. *Plessy*’s broad reading of the police power allowed for segregation in public schools and on public transportation, and for laws that prohibited marriages between the races.

One supposed link between *Plessy* and *Lochner* is that Justice Rufus Peckham, who wrote *Lochner*, had previously joined the *Plessy* majority. But, as Bernstein notes, this dubious connection reveals only the inconsistency in Peckham’s own worldview, which is best explained by recalling that Peckham himself was a “copperhead” during the Civil War—



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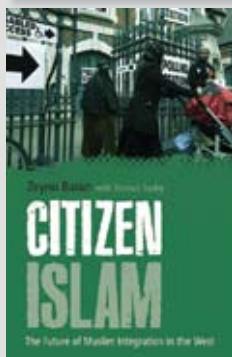
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that is, a Northerner who sympathized with the South.

Intellectually, of course, the relationship runs in the opposite direction. *Lochner* is most notable for recognizing *limits* to the state's police power. *Plessy* flouted that understanding by treating coercive state laws as though they were only upholding genteel social practices. Indeed, it took a *Lochner*-like intervention, starting in the late 1930s, for the Supreme Court to begin to vindicate the rights of African-American citizens who for too long had been neglected in both the political and economic arenas.

FINALLY, THE STORY ON RELIGION HAS something of a happy ending. The great defense of religious liberty is found in the 1925 decision in *Pierce v. Society of Sisters*, in which Justice James McReynolds (a vicious anti-Semite, no less) held that the Due Process Clause protected the liberty of parents to contract to send their children to parochial schools. With *Lochner's* decline, *Pierce* was repackaged as a case dealing with the Free Exercise of Religion. In that area, the modern court protects individual freedom unless there are some strong interests of health and safety that justify a restriction. A prohibition on child sacrifice, and perhaps even child labor, would satisfy that restraint. At this point, the modern law narrows the scope of those interests that are subject to constitutional protection. Religious reasons now qualify to exempt children from public schooling, but objections to public education on other grounds may not. Yet once the case falls within the protected domain, the narrow police power justifications have to be satisfied to sustain the restrictions. The classical liberal synthesis thus survives, but only in limited fields of endeavor.

Bernstein's minute dissection of the Progressive movement thus makes good on his claim that careful legal thinkers should reaffirm the principle of liberty of contract across the board. Far from being the wild invention of unprincipled judges, that doctrine links together the classical liberal protections that span contract, property, speech, and religion. In these times of economic stress and turmoil, it would be indeed welcome if the Supreme Court acknowledged the power of the classical liberal paradigm, in order to confess, and undo, its prior errors.

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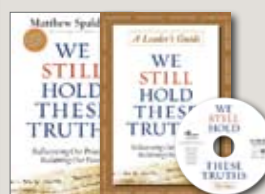
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