Book Reviews

David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform*, Chicago: University of Chicago Press, 2011. Pp. 208, $45.00. (ISBN 978-0-226-04353-1).
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In this provocative book, the libertarian legal historian David E. Bernstein recounts a critical moment in the drafting history of *Brown v. Board of Education* (1954) in which, at the urging of Hugo Black, the opinion's author, Chief Justice Earl Warren, removed references to key pre-New Deal, "Lochner era" substantive due process cases (including *Meyer v. Nebraska* [1923] and *Pierce v. Society of Sisters* [1925]) as grounds for the Court's ruling (87). The incident encapsulates a central contention of this book: in the celebrated, post-New Deal liberal rights revolution involving both civil liberties and civil rights, the Supreme Court drew extensively upon the legal principles and practices of the much-maligned (and, supposedly, conservative) pre-New Deal Court. As it was doing so and subsequently, moreover, both the Court and its backers in politics, the judiciary, and academia, systematically expunged the debt from the records of legal development as part of the construction of an overarching narrative of the origins and trajectory of civil rights, civil liberties, and the modern administrative state.

Only later, in the triumphal flush of mid-1960s Great Society liberalism, did these roots slip out in an official Court opinion, in *Griswold v. Connecticut* (1965)—although Justice William O. Douglas (a Franklin Roosevelt appointee) alluded to "penumbras formed by emanations" from the Bill of Rights instead of the due process clause in deciding the case. This provoked a response by—yet again—Hugo Black, who accused Douglas of obscuring the true grounds for the decision. This doctrinal dust-up trained a spotlight on the "Lochner Era," a term virtually invented as epithet in *Griswold*'s aftermath by constitutional law professors Gerald Gunther, Laurence Tribe, and John Hart Ely, who inscribed the case (and the era it was said to define) alongside *Dred Scott v. Sanford* (1857) as a pillar of the contemporary "anticanon" of American constitutional law (7, 116–117).

Although Bernstein concludes the book with an absorbing account of *Lochner v. New York*'s (1905) post-history as scourge, symbol, and signifier, most of the book focuses on the pre-New Deal Court itself, in its own time.

In his "rehabilitation" of the case (which, he pointedly emphasizes, is neither an effort to "defend" nor to "restore" the decision's actual legal doctrine) (125), Bernstein seeks to demonstrate the ways in which the real *Lochner* decision was both typical and atypical of its times. One way in which it was atypical was in voiding (ostensibly) progressive labor regulation aimed at improving working conditions. As others before Bernstein have demonstrated — to apparently little effect — the Court in this period put its stamp of approval on many more regulatory initiatives than it struck down. One way in which it was typical was in drawing upon traditional discourses of limited government and natural rights. *Lochner* was indeed oppositional in resisting the new frameworks for understanding law being advanced by progressives and sociological jurisprudes (to which Bernstein devotes a chapter). Acting against the notion that majorities should govern, *tout court*, and that rights were (as Bentham put it) "nonsense upon stilts" (both Felix Frankfurter and Louis Brandeis at one point, we are reminded, advocated repeal of the Fourteenth Amendment), the "conservative" Old Court was willing to void legislation that it believed involved unseemly rent-seeking and "class legislation" (as opposed to the advancement of the collective public good), and sex and race discrimination that violated baseline constitutional standards. Bernstein contends that the natural rights jurisprudence of this era often yielded better results for women and blacks than did the progressive approach, which harbored influential strains of (maternalist) sexism and (bald-faced) racism. These jurisprudential commitments provided the unacknowledged starting point for the Warren Court. Although it is not suggested explicitly (despite the book being published in a series sponsored by The Cato Institute), they might also provide a theoretically consistent grounding for a more aggressive judicial policing of the rights violated by the regulatory octopus of the modern administrative state.

This fresh and invigorating book is tightly argued in taut and well-wrought prose. It is dense with the insight available to those who spurn the conventional categories and perspectives which, as concerns the *Lochner* Court, have been so encrusted—Bernstein rightly notes, by liberals and conservatives alike—as to harden into cliché. The book is not simply an armchair re-interpretion of *Lochner* and its "era." Despite its brevity, it adduces a raft of original source research in contemporaneous newspapers, law reviews, and reports of interest groups to advance its case. Unlike many libertarian scholars (who operate in ideological ghettoes), Bernstein fully engages with most of the important relevant scholarship, whatever its provenance, and endeavors to meet it directly. He opens up new avenues for historical research, and suggests fundamentally new ways of understanding crucial aspects of American constitutional history.

Rehabilitating Lochner reminds us yet again that the past is another country. That "they do things differently there" is an inconvenient truth for many constitutional law professors, who are celebrated to the extent they can map the

past's mad dimensions orthogonally onto the present to mark an ineluctable path forward. Here, Bernstein gratifies in a different way: by expertly complicating the deceptively simple.

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Christian Fritz, *American Sovereigns: The American Constitutional Tradition Before the Civil War*, New York: Cambridge University Press, 2008. Pp. xi + 427. $31.00. (ISBN: 0-521-12560-4).
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Over the last decade, Christian Fritz has authored a number of important articles on constitutional history and theory that attempt to refocus our attention on the importance of state constitutionalism to the American constitutional tradition. As Fritz sees it, our understanding of American constitutionalism has for too long been dominated by our obsession with the federal version. This has led us to naturalize that text, and see the state constitutions as anomalies. However, when we consider that more than 200 state constitutions have been written and revised since 1776, it is the federal constitution that appears to be anomalous. It is especially anomalous to center on the federal constitution in the pre-Civil War period when the states were far more central to American government and politics. *American Sovereigns* is the culmination of Fritz's revision, in which he outlines a constitutional tradition much different from the one we know today. The traditional story of American constitutionalism holds that the ratification of the federal constitution in 1789 marks the emergence of a liberal constitutionalism in which the rule of law (defined by judicial review) reigned. By contrast, Fritz argues that American constitutionalism before the Civil War was defined by popular sovereignty and the powers the people possessed.

The book is divided into three parts. Part I focuses on the emergence of popular sovereignty in the 1760s and 1770s. The intellectual roots of the new American constitutionalism, Fritz argues, can be traced to both natural law ideas and English constitutional doctrine. The origin, however, lies not in the individual and state of nature, but rather in the right of revolution and the common law right of redress. Both the law of redress and the right of revolution were rights possessed by the people rather than by individuals, and were invoked first to cast off the British government. Once independence was accomplished, Americans were unwilling to give up their newfound sovereignty, and directed their attention to creating new government "resting on