

Economics of the Federal Court System

SATURDAY, JULY 11, 2015

Liberty of Contract: Rediscovering a Lost Constitutional Right

In a July, 2011 post on *The Volokh Conspiracy* (the VC site later moved to the *Washington Post*), David Bernstein writes:

A reader emailed to say he enjoyed Rehabilitating Lochner, and wonders if I could recommend additional books on the same or closely related topics. Okay. Just note that my recommendation doesn't necessarily constitute an endorsement of the author's conclusions.

Below are some, but not all, of the books Bernstein lists in his post, and he provides links and brief descriptions of each book:

- *David Mayer*, *Liberty of Contract: Rediscovering a Lost Constitutional Right*
- *Paul Kens*, *Lochner v. New York: Economic Regulation on Trial*.
- *Kenneth Kersch*, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*
- *David Bernstein*, *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal*
- *Bernard Siegan*, *Economic Liberties and the Constitution* Howard Gillman, *The Constitution Besieged: The Rise & Demise of Lochner Era Police Powers Jurisprudence*
- *Barry Cushman*, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution ...*
- *Richard Epstein*, *How Progressives Rewrote the Constitution*
- *James W. Ely*, *The Guardian of Every other Right: A Constitutional History of Property Rights*

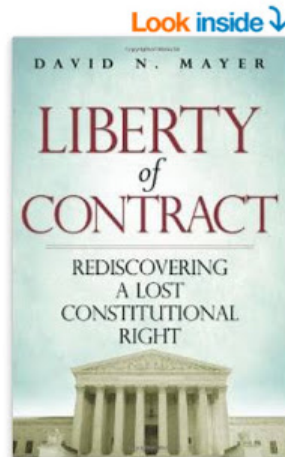
I list these books to give students a sense of the scope of scholarly literature on the Constitution and liberty of contract. Students researching and debating the federal court system reform topic can as well find hundreds of law review articles on both sides of this ongoing debate. (Overruled: The Long War for Control of the U.S. Supreme Court, discussed in the last post, was published in 2014.)

I am reading David Mayer's *Liberty of Contract: Rediscovering a Lost Constitutional Right* now, and recommend it as a survey and history of the topic. Students can "Look inside" on Amazon (at the link above).

A blurb for *Liberty of Contract*, by Ronald Rotunda notes:

As students of constitutional history know, the Lochner era (1897-1937) is typically vilified as a time when judges imposed

their personal opinions to invalidate laws that regulated the economy. Professor Mayer offers a far more complex and nuanced view of that era as a time with judges often, but not always, invoked a presumption of liberty. He shows that Lochner-era justices protected not only economic but personal rights as well, such as the right of parents to teach their children in a foreign language or to send their children to a private school, whereas anti-Lochner justices like Oliver Wendell Holmes rejected such a presumption. ...



Families enjoying the freedom to have a parent-directed, home-centered education, and students enjoying the freedom to participate in homeschool debate, can thank these same Lochner-era, liberty of contract judges for protecting these freedoms.

George Will's July 10, 2015 *Washington Post* column discusses two recent court cases that reference Lochner-era liberty of contract claims:

Today's most interesting debate about governance concerns a 110-year-old Supreme Court decision. Two participants in

this debate are the chief justice of the U.S. Supreme Court and a justice on the Supreme Court of Texas. The latter is trouncing the former.

Will, drawing from a recent decision by Justice Don Willett of the Texas Supreme Court, focuses on the importance of judges

passing judgement on regulations limiting economic freedom:

Sensible

judicial deference to government regulations does not require judicial dereliction of its duty to gaze skeptically on government's often ridiculous rationalizations of them. Since the New Deal, when courts abandoned protection of economic liberty, government has felt no obligation to produce evidence of the rationality of its restrictions. So, disreputable reasons go unchallenged.

Public Choice economists argue that interest groups are relentless in promoting legislation and regulations that protect their industries and occupations from new competition, so they push to raise legal barriers to entry in dozens of professions. These barriers make it harder for people without connections, consultants, or lawyers to legally enter and make a living in dozens of occupations.

The Institute for Justice researches and litigates a variety of cases involving economic liberty and occupational licensing.

Posted by [Gregory Rehmke](#) at 6:08 AM

