- Accuracy In Academia - http://www.academia.org -

Liberty in Law School

Posted By Malcolm A. Kline On February 9, 2011 | No Comments

Law school students may not only be getting an incomplete view of American history but a misleading notion of the Law of the Land, a dissident professor shows in a new book. "Modern scholars also refer to the early 20th Century as the 'era of laissez-faire constitutionalism' because they see it as a time when judges injected a radical libertarian, or laissez-faire, philosophy into their constitutional decisions," David N. Mayer writes *in Liberty of Contract: Rediscovering a Lost Constitutional Right*. "Indeed, the stereotypical view sees the *Lochner* era as a time when American judges, motivated by the desire to further the interests of rich capitalists, perverted the original meaning of the due process clauses in order to engraft a laissez-faire ideology—commonly caricatured as synonymous with the doctrines of 'Social Darwinism'—on the Constitution."

"This view so dominates modern scholarship that it is the orthodoxy of college textbooks, both the casebooks used in law school constitutional law classes and the textbooks used in undergraduate and graduate courses in constitutional and legal history." Mayer is a professor of law and history at Chapman University in Ohio.

The Lochner decision referenced by Mayer was decided by the U. S. Supreme Court in 1905 [1]. In it, the Court decided that "Section 110 of the labor law of the State of New York, providing that no employees shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day, is not a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to labor, and, as such, it is in conflict with, and void under, the Federal Constitution."

(Full disclosure, the author's grandfather owned a bakery in New York long after *Lochner* was decided and put in at least that many hours a week.) "The general right to make a contract in relation to his business is part of the liberty protected by the Fourteenth Amendment, and this includes the right to purchase and sell labor, except as controlled by the State in the legitimate exercise of its police power," the Supreme Court decided in *Lochner*. "Liberty of contract relating to labor includes both parties to it; the one has as much right to purchase as the other to sell labor."

"There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Nor can a law limiting such hours be justified as a health law to safeguard the public health, or the health of the individuals following that occupation."

Yet and still, "The orthodox view is found in constitutional commentaries written by both conservatives and liberals, and even in opinions written by Supreme Court justices," Mayer claims in Liberty of Contract.

Today, "If you think about it, the court views liberty in a very narrow sense—sex, the right to privacy," Mayer observed in an appearance at the Cato Institute last month.

In *Liberty of Contract*, Mayer also notes that "'social legislation' is a term of art, referring to a concept first introduced into American law from Europe in the late 19th Century but not recognized by the Supreme Court until 1940."

Another phrase lawyers bandy about a lot has its origins in the same time period. "The phrase 'substantive due process' is anachronistic: It has no known use before the early 1930s, and it has been used since that time as a pejorative oxymoron by opponents of Lochner-era jurisprudence and, later, opponents of the Warren Court," Mayer writes in *Liberty of Contract*.

Malcolm A. Kline is the Executive Director of Accuracy in Academia [2].

If you would like to comment on this article, e-mail mal.kline@academia.org [3]

Article printed from Accuracy In Academia: **http://www.academia.org**

URL to article: **http://www.academia.org/liberty-in-law-school/**

URLs in this post:

[1] 1905: **http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=198&invol=45**
[2] *Accuracy in Academia*: **http://academia.org/**
[3] mal.kline@academia.org: **mailto:mal.kline@academia.org**

Copyright © 2009 Accuracy In Academia. All rights reserved.