why he considered codification an important strategy. This is of importance, as the movement toward codification in Europe was actively resisted in England. In this context, Mantena's explanation that Indian codification served as an experiment with legal reform that could be reimported needs more evidence.

Despite weaknesses in the argument, Mantena's clarity and precision in analyzing and formulating the problem of the relationship between liberalism and empire makes this book required reading for historians, legal studies scholars, political theorists, and those in the field of empire studies.

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Rehabilitating Lochner*: Defending Individual Rights against Progressive Reform*. By David E. Bernstein. Chicago and London: University of Chicago Press, 2011. 208 pp. $45.00 cloth.

Reviewed by Ronald C. Den Otter, California Polytechnic State University, San Luis Obispo

In the penultimate scene of John Ford's *The Man Who Shot Liberty Valance* (1969), the reporter remarks, "When the legend becomes fact, print the legend." David Bernstein's well-written, concise, and provocative book, *Rehabilitating* Lochner, is designed to debunk the legend of one of the most infamous U.S. Supreme Court decisions. The author goes into considerable detail about how liberal judges and scholars distorted the decision itself and the era named after it, as well as how they failed to give liberty of contract the credit that it deserves for serving as the basis of some of the decisions that they hold sacred. Anyone who is interested in American constitutional history or law will learn a lot from this book.

After the introduction, Bernstein explains why in 1905, *Lochner* was a plausible legal decision rooted not only in precedent but also

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in sincere beliefs about natural rights and the illegitimacy of class legislation (pp. 23–39). The law in question in *Lochner* was not a health regulation but rather a product of the undue influence of special interests on the legislative process. In invalidating the maximum hours law, the Court was protecting two discrete and insular minorities: nonunionized bakery employees, many of whom were immigrants, and small bakery owners, like Joseph Lochner, who employed them. Bernstein also contends that the significance of *Lochner* as a purportedly procapitalist decision has been overstated. From 1905 to 1937, the Court upheld most of the economic regulations that it reviewed. As he puts it, *Lochner* was more of a "moment" than an era (p. 49). Next, Bernstein articulates how Progressivism and its penchant for unlimited state action led to discrimination against African Americans, women, and other minorities (pp. 56–89). Finally, he shows how the idea of liberty of contract (the rights to buy and sell labor without government interference) engendered other important civil rights and liberties decisions.

The thesis that *Lochner* has been misunderstood and has less ignominious origins is not new (Gillman 1993). However, Bernstein's story about how the legend came into being will capture and keep the reader's attention. The section on how the *Lochner* era gained such notoriety reveals how the victors—here, the Progressives and their ideological descendants—write constitutional history. What is equally interesting is why subsequent generations came to accept uncritically the Progressives' narrative as fact. After 1937, liberal judges and scholars kept what they liked about substantive due process and developed the double standard, whereby economic liberties, unlike other fundamental rights, are subject only to minimal judicial scrutiny (pp. 103–04). According to Bernstein, Douglas, Blackmun, Gunther, and Tribe deliberately severed *Lochner* and its idea of liberty of contract from substantive due process to promote liberal ends (pp. 115–18). Furthermore, other justices and prominent legal academics went out of their way to distinguish *Lochner* from *Griswold*, *Roe*, and *Casey* (pp. 120–21). If that were not enough, most conservatives also condemned *Lochner* as judicial activism (p. 122). As such, over time, the legend became fact.

Bernstein insists that that his revisionist account is not intended to be normative (pp. 6–7), but it is hard not be curious about its normative implications. After all, we live at a moment of considerable constitutional uncertainty when settled constitutional meanings are increasingly open to challenge. Several years ago, the notion that the individual mandate renders Obamacare unconstitutional would have struck most law professors as a bad joke. Bernstein is not troubled by *Lochner* and the principle of liberty of

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contract that it represents. Indeed, the maximum hours law for bakery workers whose constitutionality was being challenged is exactly the kind of law that exceeds the legitimate authority of the state.

In arguing that liberty of contract has been misunderstood, Bernstein seems to believe that there is something intellectually dishonest and illegitimate about how certain widely accepted liberal constitutional doctrines came into being. If we only knew the truth about the lineage of the constitutional right to privacy or the beginnings of equal protection jurisprudence, then we might look at liberty of contract in a more favorable light. Thus, Bernstein has done more than rehabilitate *Lochner* historically and attempt to remove it from the anticanon. He has illustrated how certain constitutional understandings can rise from the dead. Sooner rather than later, liberals will have to come to terms with the reality of libertarian constitutional theory and Tea Party popular constitutionalism. In contemporary constitutional theory, what *Lochner* symbolizes—the normative rejection of the New Deal—is ultimately what matters. Thus, there still is something to be said for continuing to print the legend.

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Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties. By Tamara Relis. New York: Cambridge University Press, 2009. 279 pp. $90.00 cloth.

Reviewed by Robert Dingwall, Dingwall Enterprises and Nottingham Trent University

This book is based on Relis's PhD thesis for the London School of Economics and displays both the strengths and the weaknesses of its origins. A particular strength is its comprehensive bibliography—Relis has read everything worth reading in the U.S. literature, although, oddly, the UK coverage is a bit thin, with a rather slight treatment of Hazel Genn's work and no reference to the important contributions from Gwyn Davis and various associates. Although Relis might argue that Davis focuses on family mediation, while she

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