

DAVID E. BERNSTEIN

George Mason University School of Law
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EMPLOYMENT

George Mason University School of Law

Professor, August 2002—present
Associate Professor, September 1998—August 2002
Assistant Professor, August 1995—August 1998

Brooklyn Law School

Visiting Professor, Fall 2006

University of Michigan Law School

Visiting Professor, Fall 2005—Spring 2006

Georgetown University Law Center

Visiting Professor, Spring 2003

John M. Olin Foundation

Junior Faculty Fellow, 1997-98 (paid research leave awarded to five humanities scholars nationwide)

Columbia Law School

Mellon Foundation Fellow, Julius Silver Program in Law, Science, and Technology, 1994-95

Crowell & Moring

Associate, 1992-94

Honorable David A. Nelson

Sixth Circuit U.S. Court of Appeals
Law Clerk, 1991-92

PROFESSIONAL SERVICE

Academic Referee: *Independent Review, Journal of American History, Jurimetrics, Law and History Review, Law and Social Inquiry, Law and Society Review, Cambridge University Press, Oxford University Press, Supreme Court Economic Review, Yale Law Journal, Accounting Horizons*

AALS Section on Evidence

Chair, 2005; Chair-elect, 2004; Secretary 2003

Cato Supreme Court Review

Board of Editors, 2003-present

PROFESSIONAL HONORS

Adjunct Fellow, Cato Institute

Finalist, Spooner Prize for Best Book on Liberty Published in 2003 (for *You Can't Say That!*)

Law and Economics Center Prize, 2000, for "Best Book in Law and Economics"

Prize for "Best Article on Law, Science, and Technology" in Volume 41 of *Jurimetrics*

Runner Up, AALS Scholarly Papers Competition, 1996-1997

EDUCATION**Yale Law School**

J.D. 1991

Senior Editor, *Yale Law Journal*

John M. Olin Fellow in Law, Economics, and Public Policy

Lambe Fellow, Institute for Humane Studies

Brandeis University

B.A. *Summa cum laude* (History) 1988

Phi Beta Kappa

PUBLICATIONS**Books**

Rehabilitating Lochner (in progress, University of Chicago Press)

The New Wigmore: Expert Evidence (Aspen Law and Business 2004 and annual supplements) (co-author with Kaye and Mnookin)

You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws (Cato Institute 2003; paperback 2004)

Only One Place of Redress: African-Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal (Duke Univ. Press 2001)

Phantom Risk: Scientific Inference and the Law (MIT Press 1993; paperback 1999) (co-editor)

Articles and Book Chapters (Constitutional Law and History)

Excluding unfit workers: Social control versus social justice in the age of economic reform, *Law & Contemporary Problems* (forthcoming) (with Tim Leonard) (symposium)

Revisiting *Yick Wo v. Hopkins*, 2008 ILL. L. REV. 1393 (symposium)

The Red Menace Revisited, 100 Nw. U. L. REV. 1295 (2006) (review essay of Martin Redish, *The Logic Of Persecution: Free Expression and The McCarthy Era* (2005))

Lochner v. New York: A Centennial Retrospective, 83 WASH. U.L.Q. 1469 (2005)

Thoughts on *Hodges v. United States*: Comment on Karlan, 82 B.U. L. Rev. 811 (2005) (symposium)

Bolling, Equal Protection, Due Process, and *Lochner*phobia, 83 *Geo. L.J.* 1253 (2005) (symposium)

Judicial Power and Civil Rights Reconsidered, 114 *Yale L.J.* 593 (2004) (review essay of Michael Klarman, *From Jim Crow to Civil Rights*) (with Ilya Somin)

Lochner v. New York: Barrier to the Growth of the Regulatory State, in Michael Dorf, ed., *Constitutional Law Stories* (Foundation Press 2004)

Expressive Association after *Dale*, 21 *Social Phil. & Pol'y* 195 (2004), also published in Ellen Frankel Paul, ed., *Freedom of Speech* (Cambridge Univ. Press 2004)

The Right to Petition, in *The Heritage Guide to the Constitution* (David Forte, ed. 2004)

Lochner's Feminist Legacy, 101 *Mich. L. Rev.* 2176 (2003) (review essay of Julie Novkov, *Constituting Workers, Protecting Women*)

Lochner's Legacy's Legacy, 82 *Tex. L. Rev.* 1 (2003)

Lochner Era Revisionism, Revised: *Lochner* and the Rise of Fundamental Rights Constitutionalism, 92 *Geo. L.J.* 1 (2003)

Defending the First Amendment from Antidiscrimination Laws, 92 *N.C. L. Rev.* 223 (2003)

Antidiscrimination Laws and the First Amendment, 66 *Mo. L. Rev.* 83 (2001) (symposium)

The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes, 9 *Wm. & Mary Bill Rts. L.J.* 619 (2001) (symposium)

Railroad Unions, Racism, and Labor Regulations, 5 *Independent Rev.* 237 (2000) (peer-reviewed)

Lochner vs. *Plessy*: The *Berea College* Case, 25 *J. Sup. Ct. Hist.* 93 (2000) (peer-reviewed)

Lochner, Parity, and the Chinese Laundry Cases, 41 *Wm. & Mary L. Rev.* 211 (1999) (symposium)

Two Asian Laundry Cases, 23 *J. Sup. Ct. Hist.* 95 (1999) (peer-reviewed)

Sex Discrimination Laws Versus Civil Liberties, 1999 *U. Chi. Leg. Forum* 133 (1999) (symposium)

Philip Sober Restraining Philip Drunk: *Buchanan v. Warley* in Historical Perspective, 51 *Vand. L. Rev.* 799 (1998) (symposium)

The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans, 74 *Tex. L. Rev.* 781 (1998)

The Shameful, Wasteful History of New York's Prevailing Wage Law, 7 *George Mason Civ. Rts. L.J.* 1 (1997)

The Davis-Bacon Act: Vestige of Jim Crow, 13 *Nat'l Black L.J.* 276 (1994)

Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans, 30 *San Diego L. Rev.* 89 (1994) (symposium)

Roots of the 'Underclass': The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation, 43 *Am. U. L. Rev.* 85 (1993)

Equal Protection for Economic Liberty: Is the Court Ready?, Cato Institute (October 1992)
<<http://www.cato.org/pubs/pas/pa-181es.html>>

Note, The Supreme Court and 'Civil Rights,' 1886-1908, 100 *Yale L.J.* 725 (1990)

Shorter Publications (Constitutional Law and History)

Roberts v. Jaycees, in *Encyclopedia of the First Amendment* (2008)

Right to Petition, in *Encyclopedia of the First Amendment* (2008)

Liberty of Contract, in *Encyclopedia of the Supreme Court of the United States* (2008)

Munn v. Illinois, in *Encyclopedia of the Supreme Court of the United States* (2008)

Allgeyer v. Louisiana, in *Encyclopedia of the Supreme Court of the United States* (2008)

Rufus Peckham, in *The Yale Biographical Dictionary of American Law* (2008)

What About Larry?, *L.A. Times*, Sept. 17, 2007 (op-ed)

Review of Paul Moreno, *Blacks and Organized Labor: A New History*, *Independent Review* (Dec. 2006)

Buchanan v. Warley, in *The New Encyclopedia of Southern Culture* (2006)

Emigrant Agent Laws, in *The New Encyclopedia of Southern Culture* (2006)

Liberty of Contract, in *The Encyclopedia of American Civil Liberties* (2006)

Affirmative Blackmail, *Wall St. J.*, Feb. 11, 2006 (op-ed)

Review of Ken I. Kersch, *Constructing Civil Liberties*, *American Historical Review* (Oct. 2005)

Peg-Leg Williams, in *One Hundred Americans Making Constitutional History* (Melvin Urofsky, ed. CQ Press 2004)

Let Private Colleges Practice Affirmative Action, *Cato Daily J.* (and syndicated newspapers), June 23, 2003 (op-ed)

Codes Out: Department of Education Cuts Red Tape On Speech Restrictions, *Nat'l Rev. Online*, Aug. 21, 2003 (op-ed)

Free Speech? Not on Campus, *Orange County Register*, Oct. 21, 2003 (op-ed)

Solomon Amendment Fight, *Harv. Law Rec.*, Nov. 20, 2003 (op-ed)

Canadian Thought Police on the March, *Nat'l Rev. Online*, Dec. 2, 2003 (op-ed)

Review of Barbara Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920*, *American Journal of Legal History* (2003)

Review of Michael J. Phillips, *The Lochner Court Myth and Reality: Substantive Due Process from the 1890s to the 1930s*, *Law and History Review* (Winter 2003)

Review of Richard C. Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases*, *Ideas on Liberty*, Nov. 2002, at 58

Review of Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law and Labor in the Progressive Era and New Deal Years* (Eh.net—economic historians' listserv)

Casey Martin Ruling is Par for the Course, *Wall St. J.*, May 30, 2001 (op-ed)

The ACLU Has Lost its Way, *Cincinnati Enquirer*, May 16, 2000, at 8 (also published in *Houston Chronicle*, *Philadelphia Daily News*, *Las Vegas Review-Journal*, and other newspapers) (op-ed)

Anti-Bias Laws vs. Civil Liberties, *Wash. Times*, Aug. 15, 1999 (op-ed)

It's Time to Reform New York's Prevailing Wage Law, Empire Foundation for Public Policy Research (September 1993) (think tank study)

The Davis Bacon-Act: Let's Put an End to Jim Crow, Cato Institute (January 1993)
<<http://www.cato.org/pubs/briefs/bp-017es.html>> (think tank study)

Why Johnny Can't Pray, *Reason*, Feb. 1992, at 56 (magazine article)

Exclusionary Rule: Something's Not Kosher About Davis-Bacon, *Reason*, Aug./Sept. 1991, at 32 (magazine article)

Blocking the Lights, *Reason*, Nov. 1990, at 40 (magazine article)

Regulating What Children Watch, *Liberty*, Jan. 1990, at 63 (magazine article)

Articles and Book Chapters (Evidence and Civil Justice)

Getting to Causation in Toxic Tort Cases, 74 *Brooklyn L. Rev.* ____ (2008)

Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the *Daubert* Revolution 93 *Iowa L. Rev.* 451 (2008)

Learning the Wrong Lessons from “An American Tragedy,” 104 *MICH. L. REV.* 1961 (2006)

The *Daubert* Trilogy in the States, 44 *Jurimetrics J.* 351 (Spring 2004) (co-author)

Keeping Junk Science Out of the Asbestos Litigation, 31 *Pepp. L. Rev.* 11 (2003) (symposium)

Improving the Qualifications of Experts in Medical Malpractice Cases, 1 *Law, Probability & Risk* (2002) (peer-reviewed)

Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test, 41 *Jurimetrics J.* 385 (2001) (peer-reviewed)

Assessing the Social and Legal Consequences of Scientific Ambiguity, in *Cutting Green Tape: Tort Law, Bureaucracy and the Environment* (Meiners & Stroup eds., Independent Institute 2000) (co-author)
The Breast Implant Fiasco, 87 *Cal. L. Rev.* 457 (1999)

‘Non-Scientific’ Expert Witnesses: What Degree of Judicial Scrutiny Should They Face?, Washington Legal Foundation, Oct. 1998

The Abuse of Opening Statements and Closing Arguments in Civil Litigation, *Court Rev.: Journal of the American Judges’ Association*, Fall/Winter 1997, at 16 (peer-reviewed); revised version published as Manhattan Institute Civil Justice Memo No. 38 (Aug. 1999)

Lessons from the American Experience, in *Law and Markets* (Robson & Lippert eds. 1997)

Loser-Pays: Where Next? 55 *Md. L. Rev.* 1161 (1996) (co-author) (symposium)

Junk Science in the United States and the Commonwealth, 21 *Yale J. Int’l L.* 123 (1996)

Leading Expert Evidence: A U.S. Perspective, 3 *James Cook U. L. Rev.* 170 (1996)

Procedural Tort Reform: Lessons from Other Nations, *Regulation*, No. 1, 1996, at 67
<<http://www.cato.org/pubs/regulation/reg19n1e.html>>

The Science of Forensic Psychiatry and Psychology, 2 *Psychology, Psychiatry & L.* 75 (1995) (peer-reviewed)

The Admissibility of Scientific Evidence After *Daubert v. Merrell Dow Pharmaceuticals*, 15 *Cardozo L. Rev.* 2139 (1994) (symposium)

Scientific Evidence After *Daubert v. Merrell Dow Pharmaceuticals*, *Health & Environment Digest*, April 1994, at 3

Science and the Toxic Tort: New Guidelines for the Admissibility of Scientific Evidence, 261 *Science* 1509 (1993) (co-author) (peer-reviewed)

Scientific Evidence in the Courtroom: Admissibility and Statistical Significance After *Daubert*, Washington Legal Foundation (1993) (co-author)

Daubert Plaintiffs Won Battle, Lost War, *Product Safety and Liability Rep. (BNA) Special Report: Daubert: What Next?*, Summer/Fall 1993, at 16 (co-author) (symposium) (article also appeared in *Shepard's Scientific and Expert Evidence Quarterly*)

Co-author of several chapters of *Phantom Risk: Scientific Inference and the Law* (MIT Press 1993)

From Pesthouses to AIDS Clinics: Neighbors' Irrational Fears of Treatment Centers for Contagious Diseases, 23 *Colum. Hum. Rts. L. Rev.* 1 (1990)

Note, Out of the *Fryeing* Pan and into the Fire: The Expert Witness Problem in Toxic Tort Litigation, 10 *Rev. Litig.* 117 (1990)

Note, A Contractual Solution to the Contraceptive Crisis, 8 *Yale L. & Pol'y Rev.* 146 (1989)

Shorter Publications (Evidence and Civil Justice)

Quackspertise, *Wall Street J.*, Sept. 30, 2006

Junk Science in the Asbestos Litigation, *Mealey's Asbestos Reporter* (Aug. 2002)

Junk Expert Testimony: The Battle Rages On, 3 *Engage: The Journal of the Federalist Society's Practice Groups* 112 (2002)

Tort Reform Lessons, *Aetna 2001 Annual Report* (2002)

Disinterested in *Daubert*: State Courts Lag Behind in Opposing "Junk" Science, Washington Legal Foundation, Legal Opinion Letter (June 21, 2002)

Comment on *Kumho Tire*, *AALS Section on Evidence Newsletter*, Spring 1999, at 3

Letter to the Editor, Judge Was Correct to Exclude Testimony, *Legal Times*, April 12, 1999, at 23

Comment on Gary Edmond and David Mercer, *The Politics of Jury Competence*, in *Technology and Public Participation* (Xlibris 1999), on-line version of book available at <<http://www.uow.edu.au/arts/sts/TPP/tableofcontents.html>>

A Breast Bone of Contention, *Los Angeles Daily J.*, Aug. 26, 1998, also published in *Litigation News*, Winter 1998, at 7 (op-ed)

Review of *Science on Trial*, *Litigation News*, Spring 1997, at 4 <<http://fed-soc.org/al010206.htm>> (book

review)

Good Science Wins a Victory in the Courtroom, *Charlotte Observer*, Jan. 24, 1997, at 13A (also published in *Seattle Times*, *Los Angeles Daily News*, *Tulsa World*, and *Journal of Commerce*) (op-ed)

Legal Reform: Learning from the Commonwealth, Manhattan Institute Civil Justice Memo No. 25 (May 1996) (think tank study)

Breast Implants: A Study in Phantom Risks, Manhattan Institute Research Memorandum No. 5 (April 1995) (think tank study)

Hauling Junk Science Out of the Courtroom, *Wall St. J.*, July 14, 1993, at A16 (op-ed)

Junk Science in the Courtroom, *Wall St. J.*, March 24, 1993, at A15 (op-ed)

(RECENT) ACADEMIC PRESENTATIONS

Board of Contract Appeals, Annual Judges Conference, Arlington, VA, Jan. 20, 2009: “Recent Developments in the Law of Expert Evidence”

Federalist Society Annual Lawyers Conference, Washington, D.C., Nov. 21, 2008: Some Conflicts Between Antidiscrimination Laws and the First Amendment

Albany Law School, Government Law Center Roundtable on Croley, Nov. 19, 2008: Comments on Chapter 2

Washington University in St. Louis School of Law, St. Louis, MO, Nov. 10, 2008: Rehabilitating *Lochner*

Louisiana and Mississippi State Judicial Conference, Biloxi, MS, July 18, 2007: “Recent Developments in the Law of Expert Evidence”

American Bar Association, Section on Litigation Annual Meeting, San Antonio, TX, May 22, 2007: “Judicial Gatekeeping in Toxic Torts Cases”

American Enterprise Institute, Washington D.C.: “Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the *Daubert* Revolution,” April 27, 2007

University of Alabama School of Law, Tuscaloosa, AL, Jan. 14, 2007: “Plugging *Daubert*’s Holes: The Question of Adversarial Bias”

Florida State University College of Law, Tallahassee, FL, Sept. 14, 2006: “Plugging *Daubert*’s Holes: The Question of Adversarial Bias”

Brooklyn Law School, Brooklyn, N.Y., Sept. 7, 2006: “Plugging *Daubert*’s Holes: The Question of Adversarial Bias”

Tel Aviv University Law and Economics Workshop, Tel Aviv, Israel, Dec. 22, 2005: “Learning the Wrong

Lessons from an American Tragedy”

University of Michigan, Faculty Colloquium, Ann Arbor, MI, Dec. 8, 2005: “Reflections on *Lochner's* Centennial”

N.Y. Bar Association Section on Products Liability, Dec. 1, 2005: Debate with Aaron Twerski and Margaret Berger on “informed choice”

Washington University, Conference on the First Amendment and the Rehnquist Court, St. Louis, MO, Nov. 18, 2005: “The Rehnquist Court and the Right of Expressive Association”

American Society for Legal History Annual Conference, Cincinnati, OH, Nov. 11, 2005: “Author Meets Readers: Commentary on Klarman’s *From Jim Crow to Civil Rights*”

University of Michigan, Fawley Workshop, Ann Arbor, MI, Oct. 26, 2005: “Rethinking Expert Testimony”

AEI-Brookings Judicial Education Project, Washington, D.C., May 17, 2005: “*Frye* and *Daubert* in the States”

American Enterprise Institute, Washington, D.C., April 22, 2005: “*Lochner* at 100: Still Crazy After All These Years?”

Presented talks based on *You Can’t Say That!* at thirty law schools during the 2003-04 academic year, and several more in subsequent years

American Society for Legal History, Austin, TX, Nov. 12, 2004: “*Lochner* era Revisionism, Revised”

Boston University School of Law, Lochner Centennial Conference, Oct. 16, 2004: commentator on paper by Pamela Karlan discussing *Hodges v. United States*

Institute for Economic Affairs, London, UK, May 10, 2004: “Freedom of Expression and Antidiscrimination Laws”

Joseph Bell Centre for Forensic Statistics and Legal Reasoning, University of Edinburgh, Edinburgh, UK, May 7, 2004: “Forensic Psychiatry and Credibility Evidence”

Cañada College, Redwood City, CA, May 3, 2004: “Are Antidiscrimination Laws Eroding Our Civil Liberties?” (endowed lecture)

Georgetown University Law Center, Conference on 50th Anniversary of *Bolling v. Sharpe*, Washington DC, April 16, 2004: “*Bolling*, Equal Protection, and Due Process”

Emory University, Atlanta, GA, March 16, 2004: “The Threat to Academic Freedom from ‘Hostile Environment’ Rules” (endowed lecture)

Social Philosophy and Policy Center, Bowling Green State University, Bowling Green, Ohio, April 11, 2003: “Expressive Association After *Dale*”

Ohio North University, Pettit School of Law, Ada, Ohio, April 10, 2003: “Defending Civil Liberties from

Antidiscrimination Laws”

University of San Diego School of Law, San Diego, CA, Feb. 13, 2003: The Legacy of “*Lochner’s* Legacy”

Georgetown University Law Center, Washington, DC, Jan. 14, 2003: The Legacy of “*Lochner’s* Legacy”

AALS Annual Meeting, Torts Section, Washington, DC, Jan. 4, 2003: Reparations from a Torts Perspective

University of Michigan School of Law, Ann Arbor, MI, Nov. 14, 2002: The Legacy of “*Lochner’s* Legacy”

Columbia Law School, New York, NY, Oct 7, 2002: The Legacy of “*Lochner’s* Legacy”

Washington Legal Foundation, Washington, DC, July 30, 2002: “Junk Science in the Asbestos Litigation”

AALS/APSA Conference on Constitutional Law, Washington, DC, June 6, 2002: “New Deal Labor Laws and the Second Reconstruction”

MEDIA

Quotes in *N.Y. Times*, *Washington Post*, *Wall St. Journal*, *Newsweek*, and many other publications; appeared on dozens of radio shows and several t.v. shows, including twice on *The O’Reilly Factor*.

BAR ADMISSIONS

District of Columbia and Pennsylvania, 1992