

## **DAVID E. BERNSTEIN**

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### **EMPLOYMENT**

#### **George Mason University School of Law**

George Mason University Foundation Professor, August 2010—present  
Professor, August 2002-August 2010  
Associate Professor, September 1998-August 2002  
Assistant Professor, August 1995-August 1998

#### **William and Mary Law School**

Visiting Professor, Spring 2014 (short course)

#### **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:** *Harvard Law 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, Independent Review, Yale University Press*

**AALS Section on Evidence**

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

***Cato Supreme Court Review***

Board of Editors, 2003-present

***George Mason University School of Law***

Annual committee service, including seven-time chair of the appointments committee

**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

*Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law* (Encounter Books Fall 2015)

*A Conspiracy against Obamacare: The Volokh Conspiracy and the Health Care Case* (Palgrave MacMillan 2013) (with Adler, Barnett, Kerr, Kopel, and Somin)

*Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (University of Chicago Press 2011; paperback 2012)

*The New Wigmore: Expert Evidence* (Aspen Law and Business 2004 and annual supplements; 2d edition 2011) (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 University Press 2001)

*Phantom Risk: Scientific Inference and the Law* (MIT Press 1993; paperback 1999) (co-editor with Foster and Huber, co-author of significant parts of the book)

### Articles, Book Chapters, & Think Tank Studies

The Due Process Right to Earn a Living: A Brighter Future Ahead?, *Yale L.J. Forum* (forthcoming 2016)

"Substantive" Due Process: It's Complicated, *Tex. L. Rev. See Also* (forthcoming 2016)

How Anti-Discrimination Became a Religion, and what it means for Judaism, *Mosaic*, Aug. 8, 2016, <http://mosaicmagazine.com/response/2016/08/how-anti-discrimination-became-a-religion-and-what-it-means-for-judaism/>

The Abuse of Executive Power: Getting Beyond the Streetlight Effect, 11 *Fla. Int'l L. Rev.* 289 (2016) (based on keynote symposium address)

The Courts and Tradition: A Begrudging Respect, *Liberty Law Forum*, Aug. 8, 2016, <http://www.libertylawsite.org/liberty-forum/the-courts-and-tradition-a-begrudging-respect/>

Defending *Daubert*: It's Time to Amend Federal Rule of Evidence 702, 57 *Wm. & Mary L. Rev.* 1 (2015) (with Eric Lasker)

What to do about Federal Agency Science: Some Doubts about Regulatory *Daubert*, 22 *George Mason L. Rev.* 549 (2015) (symposium)

Restoring Freedom of Contract between Doctor and Patient in Medicare Part B, Mercatus Center, Sept. 2015

The Misbegotten Judicial Resistance to the *Daubert* Revolution, 89 *Notre Dame L. Rev.* 27 (2014)

The Mainstreaming of Libertarian Constitutional Thought, 76 *L. & Contemp. Probs.* 43 (2014) (with Ilya Somin) (symposium)

"Reverse *Carolene Products*," the End of the Second Reconstruction, and other Thoughts on *Schuette v. Coalition to Defend Affirmative Action*, 2014 *Cato Sup. Ct. Rev.* 261 (invited)

From Progressivism to Modern Liberalism in Constitutional Law: Louis D. Brandeis as a Transitional Figure, 89 *Notre Dame L. Rev.* 2029 (2014) (symposium)

*Schuette v. Coalition to Defend Affirmative Action* and the Failed Attempt to Square a Circle, 89 *NYU J. Law & Liberty* 210 (2013) (invited)

The Progressive Origins of Conservative Hostility to *Lochner v. New York*, in Jonathan O'Neill & Joseph Postell, eds., *Toward an American Conservatism: Constitutional Conservatism during the Progressive Era* (Palgrave MacMillan 2013)

Oyez, Oyez, Oyez! Curious Cases at the Supreme Court, *Phi Kappa Phi Forum*, Fall 2013, at 18 (invited)

The Conservative Origins of Strict Scrutiny, 19 *Geo. Mason L. Rev.* 861 (2012) (symposium)

Brandeis Brief Myths, 15 *Green Bag* 2d 9 (2011)

*Lochner* and Constitutional Continuity, 36 *J. Sup. Ct. Hist.* 116 (2011) (peer-reviewed)

Excluding Unfit workers: Social Control Versus Social Justice in the Age of Economic Reform, 72 *L. & Contemp. Probs.* 177 (2009) (with Thomas C. Leonard) (symposium)

The Unfinished *Daubert* Revolution, *Engage: Journal of the Federalist Society Practice Groups*, Feb. 2009, at 35.

Revisiting *Yick Wo v. Hopkins*, 2008 *Ill. L. Rev.* 1393 (symposium)

Getting to Causation in Toxic Tort Cases, 74 *Brooklyn L. Rev.* 51 (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 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*)

*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)

The Right to Petition, in *The Heritage Guide to the Constitution* (David Forte, ed. 2004 and 2d. ed. 2012)

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 *Daubert* Trilogy in the States, 44 *Jurimetrics J.* 351 (Spring 2004) (with Jeffrey Jackson)

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

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

*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)

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)

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) (invited)

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)

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) (with Foster and Huber)

The Breast Implant Fiasco, 87 *Cal. L. Rev.* 457 (1999)

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

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)

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

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

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

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)

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

Loser-Pays: Where Next? 55 *Md. L. Rev.* 1161 (1996) (with Walter Olson)

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

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

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

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

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)

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) (with Foster and Humber)

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

Scientific Evidence in the Courtroom: Admissibility and Statistical Significance after *Daubert*, Washington Legal Foundation (1993) (with Robert Charrow)

*Daubert* Plaintiffs Won Battle, Lost War, *Product Safety and Liability Rep.* (BNA) *Special Report: Daubert: What Next?*, Summer/Fall 1993, at 16 (co-author with Peter Huber) (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)

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)

The Davis Bacon-Act: Let's Put an End to Jim Crow, Cato Institute (Jan.1993)

Why Johnny Can't Pray, *Reason*, Feb. 1992, at 56

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

Blocking the Lights, *Reason*, Nov. 1990, at 40

Regulating What Children Watch, *Liberty*, Jan. 1990, at 63

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

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

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

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



## Shorter Publications

Review of Sophia Lee, *The Workplace Constitution: From the New Deal to the New Right*, *Reason*, Feb. 2016, at 55

The Racism behind Prevailing Wage, *N.Y. Daily News*, Jan. 25, 2016 (op-ed)

Attacks on Religious Freedom: Coming Soon to a Church near You, *Daily Signal*, Nov. 24, 2015 (op-ed)

A Pattern of Executive Overreach, *Daily Signal*, Nov. 11, 2015 (op-ed)

Review of Phillip Hamburger, *Is Administrative Law Unlawful?*, 33 *Law & History. Rev.* 759 (2015)

Reassessing *Lochner v. New York*, in Paul J. Larkin, ed., *Economic Liberty and the Constitution: An Introduction*, Heritage Foundation Special Report No. 157, Oct. 1, 2014.

Hispanics and Affirmative Action in State Universities after *Fisher*, *Scotusblog*, June 25, 2013, <http://www.scotusblog.com/2013/06/commentary-hispanics-and-affirmative-action-in-state-universities-after-fisher> (op-ed)

Review of Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Times*, *Reason.com*, May 21, 2013

Affirmative Action after *Fisher*: Back to the Future?, *Scotusblog*, Sept. 6, 2012, <http://www.scotusblog.com/2012/09/online-fisher-symposium-affirmative-action-after-fisher-back-to-the-future> (op-ed)

Is this 1936?, *Scotusblog*, June 29, 2012, <http://www.scotusblog.com/2012/06/is-this-1936/> (op-ed)

The Role of *Lochner* in the Health Care Litigation, *Jurist*, March 2012, <http://jurist.org/forum/2012/03/david-bernstein-lochner.php> (op-ed)

*Lochner v. New York*, the Judiciary, and Legitimate Constitutionalism, *Claremont Review of Books* (Dec. 2011)

Response to George W. Liebmann, 21 *L. & Pol. Book Rev.* 441 (2011)

Overt vs. Covert, *N.Y. Times*, May 23, 2011

Oliver Wendell Breyer, *Newark Star-Ledger*, July 12, 2011 (with Josh Blackman) (op-ed)

Context Matters: A Better Libertarian Approach to Antidiscrimination Laws, *Cato Unbound*, June 16, 2010

The Neglected Case of *Buchanan v. Warley*, *Scotusblog*, Feb. 10, 2010

Rufus Peckham, in *The Yale Biographical Dictionary of American Law* (Roger K. Newman ed. 2009)

*Roberts v. Jaycees*, in *Encyclopedia of the First Amendment* (John R. Vile et al. eds. 2008)

Right to Petition, in *Encyclopedia of the First Amendment* (John R. Vile et al. eds. 2008)

Liberty of Contract, in *Encyclopedia of the Supreme Court of the United States* (David S. Tanenhaus ed. 2008)

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

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

*Buchanan v. Warley*, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

Emigrant Agent Laws, in *The New Encyclopedia of Southern Culture* (Charles Reagan Wilson ed. 2008)

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

Liberty of Contract, in the *Encyclopedia of American Civil Liberties* (Paul Finkelman ed. 2006)

The Right to Petition, in the *Encyclopedia of American Civil Liberties* (Paul Finkelman ed. 2006)

Quackspertise, *Wall Street J.*, Sept. 30, 2006 (op-ed)

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

The Right to Petition, in *The Heritage Guide to the Constitution* (2005)

Review of Ken Kersch, *Constructing Civil Liberties*, *American Historical Rev.*, Oct. 2005

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

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

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

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

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

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

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)

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 other newspapers) (op-ed)

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

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)

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)

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

Good Science Wins a Victory in the Courtroom, *Charlotte Observer*, Jan. 24, 1997, at 13A (also published in several other newspapers) (op-ed)

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)