

ECONOMIC LIBERTIES AND THE CONSTITUTION

Consider the following peculiarity of history: In 1937 the Supreme Court falls under attack for standing in the way of popular New Deal measures and is induced by President Franklin D. Roosevelt's "court-packing" proposal to curb its much-maligned judicial activism. The Court's adherence to strict doctrines of constitutional due process is depicted as archconservative, and its opponents are styled as speaking for a new liberal theory of popular government.

The years roll forward to 1982, and the judiciary finds itself again under attack by a sitting administration, this time a "conservative" one. Do the right-wingers seek to roll back the changes Roosevelt wrought in the courts, as the textbooks say they should? Hardly. Here are the Reaganites in Congress lodging more than two dozen bills to *further* restrict the judiciary! Again the cry goes up for judges to "desist from actual policy-making,"¹ and the Justice Department announces plans to oppose the growth that "expands judicial power at the expense of legislative power."² Like 1937, 1982 has those who defend judicial activism as a necessary palliative to the breakdown of legislative processes—only this time the defenders are Common Cause and the American Civil Liberties Union.

The surface irony present in this seeming turnabout vanishes once one understands that today's campaign for restrictions on courts is largely the product of social-issue populists; it is aimed at reversing decisions on abortion, busing, prisoner rights, and other matters close to the heart of the "Moral Majority" constituent. Economic intervention has, to be sure, been initiated or aggravated by the judiciary often enough that new restrictions on activism may preserve a businessman's liberty now and then, but this result will be an accident of the administration's campaign. Certainly there is no call being made to reverse the coup d'état of 1937.

So, if economic conservatives and others of a more nearly libertarian persuasion are influential within the Reagan administration, they have yet to be heard from concerning future directions for constitutional law. Rectifying this lack is a challenging new book by Bernard Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980). Siegan, distinguished professor of law and director of law and economic studies at the University of San Diego School of Law, is perhaps best known for his seminal work on voluntary alternatives to government land-use control.³ Here he speaks to a wider audience, arguing that our current public concern over judicial activism is in fact one product of a constitutional approach that, having given up protection of the rights of contract and property ownership, is forced willy-nilly into creating vague new "rights" and, with them, opportunities for judicial policymaking. He

paints a picture of a constitutional system adrift, which could regain coherence by applying across the board concepts of due process reserved today for personal and social liberties only.

"The question," states Siegan, "is really about equal treatment for liberties." That may be, but the better part of what makes Siegan's case initially arresting is the simple breakdown of economic interventionist doctrines themselves. Professor Siegan, no fan of the "Brandeis brief" method of substituting sociology for constitutional analysis, is nonetheless able to cite 53 studies illustrating the failure of regulation.

Better yet is to recall the rationales that were originally offered for intervening in the economy and should be expected to stand the test of ensuing experience. Take, for example, the Supreme Court opinion usually described as the "switch in time that saved nine," *West Coast Hotel Co. v. Parrish*, in which the High Court abandoned economic due process subsequent to Roosevelt's court-packing threats.

Parrish upheld a Washington State minimum-wage law for women and minors, overturning the Court's longstanding opposition to such measures, enunciated in the 1923 case of *Adkins v. Children's Hospital*⁵ and reaffirmed just a year prior to *Parrish*.⁶ The 1937 reversal approvingly quoted Justice Holmes's dissent in *Adkins* to the effect that:

This statute does not compel anybody to pay anything. *It simply forbids employment* at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that *women will not be employed at even the lowest wages allowed unless they earn them*, or unless the employer's business can sustain the burden.⁷

Parrish enlarged upon this theme by endorsing another *Adkins* dissent, by Justice Taft, concerning the economics of minimum-wage legislation. Taft believed that employers would absorb the wage increases by accepting reduced profits. Conceding that "in individual cases hardship may result"—meaning, presumably, that some women would be thrown out of work—*Parrish* held, as per Taft, that the benefit to the general class of employees would justify the exceptional injury.⁸

All this has crystallized in weary practice since 1937. Experience has shown, and economics explained, that in response to the minimum wage employers do *not* simply absorb the increased cost; the marginally profitable companies disinvest or fail, eliminating the jobs of their employees. In response to the reduced profitability occasioned by higher wage costs, investment in the industry narrows, reducing the supply of goods to the market. Thus does the consumer share in part of the cost of the legislation. Throughout all the remaining companies, those employees who cannot produce value equivalent to the minimum wage will have been let go, as Justice Holmes casually predicted.

We can no longer look benignly upon the arbitrary redistribution of income that occurs, since Taft's "exceptional cases" of hardship appear

more nearly the systematic norm among disadvantaged groups, while those reaping the "general benefit" include primarily workers whose productivity is at least sufficient to fund the extra burden of a politically active union. In fact, this state of affairs does not sit well today at all. Economic interventionism has earned a heap of scorn—which has at least robbed courts of the ready presumption of efficacy in considering regulatory proposals. Yet the system might still be ultimately perfectable, or at least refinable, were it not for the spate of constitutional anomalies it generates. Such anomalies arise in the practice of what Siegan has chosen to call "unequal treatment" of liberties. Here is the core of what most readers will find immediately and compellingly persuasive about *Economic Liberties and the Constitution*, and in his analysis of these contradictions Siegan has truly advanced the debate.

The primary disjunction today is between economic liberties and a new class of "fundamental rights and interests" that has grown up in the last four decades: rights of expression, the right to privacy, the right to travel, certain criminal procedures, voting rights, and other material interests sometimes linked to government entitlements. Prior to 1937, rights of expression and related conceptual liberties were treated in a manner roughly consistent with economic liberties—both were balanced against the legitimacy of the government's objectives in restricting them. Following the decline of economic due process, the balancing test itself became controversial; civil-liberties supporters wanted an absolutist construction given to these freedoms. Hence the emergent doctrine of fundamental personal rights and "suspect classifications"—and, too, the de facto reappearance of a more virile due process, but one limited to a few favored liberties.

The 1938 case of *United States v. Carolene Products Co.*⁹ illustrates one resultant contradiction. Here the Court upheld a statute outlawing the sale of milk substitutes in interstate commerce, legislation clearly benefiting the powerful dairy lobby without demonstrating any greater threat of public harm than that some consumers might enjoy the opportunity to deprive themselves of the fat content of whole natural milk. Footnote 4 to *Carolene Products* begins to enunciate the suspect classifications doctrine, suggesting that, while in general regulatory acts will be presumed valid, measures bearing upon particular religious, national, or social minorities may receive closer scrutiny on the theory that political processes do not normally operate to protect them.

Siegan goes to the heart of what is wrong here when he observes that "the footnote incorrectly assumes that the infirmities of legislatures are confined to certain subject matter." On a scale that can be petty or profound, a *failure of political process* follows when regulation disturbs the marketplace.

This power and authority spill over into the marketplace of ideas that Holmes in his later years was so concerned to maintain almost inviolate. Producers, sellers, and sometimes even consumers who re-

quire the approval or dispensation of the regulators surrender willingly their right to criticize rather than imperil their standing with the authorities. They are aware that political contributions, speeches, or articles unwisely directed may lead to unpleasant consequences, *equal in result to sustaining a substantial fine or penalty.* [P. 203, emphasis added]

Compared to the voting power amassed by labor, consumerist, or environmentalist interest groups, business owners would seem to constitute a paradigmatic minority. Even so, it is perhaps difficult to conceive of business as powerless until we realize that in the typical *Carolene Products* scheme of regulation, restricted entry, and consumer “protection,” the bulk of so-called business money is spent supporting the restriction. Because of the nature of *politics*, typically it is the regulationist businesses whose interests are clearly focused, while those who would be injured have only a diffuse perception of the threat. Indeed, our regulation has developed a fine talent for disenfranchising and impoverishing those who lack either the proper residential address to vote, the legal standing to sue, or the financial resources to conduct an effective fight.

In truth, there is no way to police an “equal opportunity to political access” except on the basis of a schema of nonnegotiable rights applicable to all, which becomes part of the ground rules for political participation. But we do know that, while legislation affecting religious, national, or racial minorities receives strict scrutiny under the suspect classifications standard, economic minorities can be systematically, as contrasted to occasionally, injured by the political processes to which they are supposed to turn for relief. It simply will not do to presume that their “money,” real or imagined, gives them political power.

Inconsistency emerges again when we compare judicial attitudes toward censorship and regulation. False and misleading information poses great dangers to society, argues Siegan—greater than the risks of liberty in the material marketplace. Misinformation can start wars and change governments. Still, we forbid censorship out of a pragmatic fear that it will be ugly, arbitrary, and must fail to achieve worthwhile ends. The consensus is that there does not exist such a thing as benevolent public-spirited censorship. What, then, is the basis for the double standard that supposes that government regulates—censors—economic activity more beneficently than it does expression? Surely not because the danger is greater or the process more rational!

Professor Siegan’s remedy for these anomalies will not be well received by the right-populists who are currently busy trying to strip the Court’s personal rights category of its near-absolute status. Instead of urging another jurisprudential “retreat” reminiscent of the 1937 abandonment of economic due process, Siegan is content (perhaps pleased) to leave the strict-scrutiny standards in place for personal liberties. And he has little to say about the “intractable” conflicts arising from government entitlements

which create so many new pseudo-rights.

What *Economic Liberties and the Constitution* does present is a single modest proposal. Reserving judicial concern for personal and expression rights is a political act awaiting a constitutional justification. Article III indicates that the judicial power shall extend to "all cases in law and equity," not merely noneconomic ones. Reallocating judicial concern more evenly would begin to right the awful imbalance present in constitutional law today and would afford a measure of protection to long-ignored liberties.

In practice this means that

a statute or ordinance shall not be deemed valid if . . . it (a) denies an owner the use and disposition of property without just compensation, or (b) denies an individual or corporation freedom to engage in an occupation, trade, profession, or business of one's or its choosing, or (c) denies an individual or corporation freedom of contract to produce and distribute goods and services. [Pp. 324-25]

Strict scrutiny according to these principles would go a long way toward enacting a free-enterprise Nirvana. Siegan believes that the American people, much less the legal community, will not stand for that; and while a libertarian may chafe at the necessity, finding the formula for achieving the maximum acceptable protection for liberty is a task worth surveying.

The formula offered is an "intermediate" standard of scrutiny comparable to the due process review that prevailed throughout much of the *laissez-faire* era. The government would bear the burden of proof that the legislation achieved a proper and compelling state interest, that the specific infringement of liberty was substantially related to achievement of such objective (the "means-ends test"), and, finally, that the same objective could not be achieved while more nearly preserving liberty (the "less-drastic-alternative test").

That Professor Siegan is prepared to countenance increased judicial activism is evident in his stipulation that the Supreme Court, in requiring the existence of a compelling state interest, must look "beyond the stated purposes and post hoc rationalizations into the history and political circumstances attending the enactment to ascertain what the lawmakers sought to achieve." That the rebirth of economic due process would to a large extent quell the incessant litigation wrought by government intervention is also no doubt true.

So, what we have is a neat argument. The proposed rules of intermediate scrutiny are advanced in the spirit of their having already been well-accepted, although in personal liberties cases. "No need exists for either a new constitution or a constitutional amendment," says Siegan, "because these provisions describe the present Supreme Court's approach to liberties it deems fundamental." Those who fully grasp the arbitrariness, first, and the *unfairness*, second, of denying economic liberties commensurate status before the law will be ready to see the Siegan standards applied across the board.

As tidy and, indeed, persuasive as this argument is, its limitations are worthy of note. *Economic Liberties and the Constitution* does not emphasize a straightforward appeal for the legitimacy of economic due process. Rather, it argues a kind of equal protection case: if we protect A, then it is patently unfair to ignore B. Siegan has produced a clear body of evidence that injuring economic liberty inevitably brings harms upon rights of expression, but he does not claim an essential unity for rights of both kinds. The book is inclined to brush over the observation that the viability of "intermediate scrutiny" as a wall against injustice is only as good as the strength of whatever essential libertarianism might exist in society at any given time. The standard can show us the road back to economic due process, but it seems not to have stood in the way of a gradual departure from the "old" (pre-1937) economic due process where such tests were applied. Lastly, Siegan does not address himself to the philosophical soft-headedness that gave rise to ad hoc "fundamental rights"—while allowing constitutionally protected freedoms to wither.

Thus, one can envision a couple of worrisome scenarios. One is that the Moral Majoritarians now on the warpath against the Supreme Court would welcome the opportunity to bring nearly inviolate rights of expression down to a standard of review comparable to that which currently applies to economic liberties; *both* could be curbed in the name of equal treatment for liberties. Another is that the campaign to make economic freedom a fundamental right would further excite those who would devalue all rights through counterfeiting and mindless proliferation. Sooner or later we will be due for a reappraisal as to why ad hoc constitutional rights seem necessary in the first place, and at that point we had better have established the lineage of economic liberties under the Constitution.

On balance, these concerns do not loom large. They are the kind that arise whenever someone attempts to take the first practical step toward a distant political ideal, and the dangers are not diminished by failing to take that step.

Purposefully, and with resolute attention to context, Bernard Siegan has assembled a case that will compel agreement among a broad audience concerning the need to correct the glaring incongruities of present law. Like the economic studies of the last decade that created a national consensus that regulation rarely succeeds on a pragmatic level, *Economic Liberties and the Constitution* will define an agenda for change among those who prize a justice that is not a sometime thing.

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1. Attorney General William French Smith, quoted in Stephen Wermiel and Robert E. Taylor, "The Administration's Critique of the Courts," *The Wall Street Journal*, Jan. 28, 1982.

2. Solicitor General Rex Lee, quoted in *Wermiel and Taylor, ibid.*
3. See Siegan, Bernard H., *Land Use without Zoning* (Lexington, Mass.: D.C. Heath, 1972).
4. 300 U.S. 379 (1937).
5. 261 U.S. 525 (1923).
6. *Morehead v. New York ex rel Tipaldo*, 298 U.S. 587 (1936).
7. 300 U.S. 379. Emphasis added.
8. *Ibid.*
9. 304 U.S. 144.