

Michigan Law Review

Volume 80 | Issue 4

1982

Economic Liberties and the Constitution

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Law and Economics Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Michigan Law Review, *Economic Liberties and the Constitution*, 80 MICH. L. REV. 697 (1982).

Available at: <https://repository.law.umich.edu/mlr/vol80/iss4/19>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ECONOMIC LIBERTIES AND THE CONSTITUTION. By *Bernard H. Siegan*. Chicago: University of Chicago Press. 1981. Pp. 383. \$19.50.

It is now a commonplace that economic regulations often produce inefficiencies by interfering with the free play of market forces.¹ But the Supreme Court has long applied a highly permissive standard in judging the constitutionality of these regulations: Due process is violated only if the regulation is not rationally related to a legitimate state purpose. In the post-*Lochner* era, the Court has never invalidated economic legislation under this standard.²

Bernard Siegan's³ *Economic Liberties and the Constitution* flatly rejects the Court's well-settled approach and calls for resurrection of substantive due process. His thesis, in short, is that since the framers of the Constitution "sought to perpetuate a system based on private property and private enterprise," the Court should "safeguard liberties consistent with this objective" (p. 15). By failing to defend economic liberties, he argues, the Court has also abdicated its constitutional obligation to protect individual rights.

Because Siegan's thesis is revisionist, his task is difficult. To challenge the conventional wisdom successfully, a revisionist work must either present new evidence or demonstrate convincingly that the accepted doctrine is a flawed response to old arguments. *Economic Liberties* falls short on both counts and is unlikely to persuade readers who think that the federal judiciary should not evaluate the desirability of state economic regulation.

Siegan develops his argument in four steps. He first lays out his conception of the original meaning of due process. This meaning, he claims, "evolved not only from notions of reasonable governmental process but also from the natural law and social compact theories" (p. 26). After reviewing Blackstone, Cooke, Locke, and early Supreme Court decisions, Siegan concludes that "[p]rotection of property and economic rights has been a dominant theme since the creation of the federal government" (p. 59). He finds in the prohibitions of *ex post facto* laws⁴ and laws impairing the obligation of

1. Siegan abstracts a litany of these studies. Pp. 283-303.

2. *Morey v. Doud*, 354 U.S. 457 (1957), invalidated a state statute governing the sale of money orders that excepted those issued by the American Express Company from regulation. The Court held the statute violative of equal protection. *Morey* was later overruled by *City of New Orleans v. Duke*, 427 U.S. 297, 306 (1976) (characterizing *Morey* as "needlessly intrusive judicial infringement on the State's legislative powers").

3. Siegan has authored or edited several books on related subjects. See *LAND USE WITHOUT ZONING* (1972); *OTHER PEOPLE'S PROPERTY* (1976); *THE INTERACTION OF ECONOMICS AND THE LAW* (1977); *REGULATION, ECONOMICS, AND THE LAW* (1979).

4. U.S. CONST. art. 1, § 9, cl. 3.

contracts⁵ "very persuasive evidence . . . that the Constitution's Framers sought to safeguard property and economic interests from infringement" (p. 60), and laments the restrictive interpretation that these provisions have received.

After establishing the importance of property and economic interests, Siegan recalls, in painstaking detail, the halcyon days of substantive due process.⁶ This discussion is intended to serve two purposes. First, it shows that the Court's decisions preserved personal property (pp. 128-32) and fostered competition by eliminating barriers to market entry (pp. 132-38). Siegan concludes that minimum wages laws like that upheld in *West Coast Hotel v. Parrish*⁷ may actually harm workers (p. 147), and argues that "the present court, were it ruling on the matter for the first time, probably would agree with the result" in *Adkins v. Children's Hospital*,⁸ a key case in the substantive due process era that *West Coast Hotel* overruled (p. 146).

Siegan also hopes to paint a better picture of the "old Court's" treatment of noneconomic personal liberties. An entire chapter defends the Court's record in this area and concludes that "the substantive due process judges adequately" protected personal rights (p. 181). Relying primarily on the development of first amendment doctrine to support this conclusion (pp. 161-77), he ignores the Court's refusal to sustain reform legislation aimed at reducing or eliminating practices, like child labor, that most would consider an abuse of economic liberty.⁹ Siegan's appraisal of the Court's handling of personal liberties during this era, therefore, will undoubtedly provoke disputes among legal scholars.

Siegan then considers the standard that currently governs economic regulation, a standard that asks only whether the legislation is rationally related to a legitimate state objective. He argues that the

5. U.S. CONST. art I, § 10.

6. This era is generally thought to have started in 1897 with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), where the Court stated in dicta that citizens were "to be free in the enjoyment of all . . . faculties, to be free to use them in all lawful ways . . . to earn [a] livelihood by any lawful calling . . . and for that purpose to enter into all contracts which may be proper, necessary and essential . . ." 165 U.S. at 589. The substantive due process era ended with the decision in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), where the Court upheld a statute regulating women's wages and stated that "[e]ven if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." 300 U.S. at 399.

7. 300 U.S. 379 (1937).

8. 261 U.S. 525 (1923) (holding that regulation of wages violated the due process clause of the fifth amendment).

9. See *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (tax on goods produced with child labor not a valid exercise of taxing power); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (prohibition of interstate shipment of goods produced with child labor outside scope of congressional power under the commerce clause).

Carolene Products footnote¹⁰ rationale should be criticized for what it ignores — economic liberties — rather than praised for what it protects — the rights of discrete and insular minorities. The Court, in Siegan's opinion, has established a specious distinction between so-called fundamental rights¹¹ and economic liberties. While Siegan correctly identifies the anomaly, he is not the first to do so¹², and his treatment adds little to the current debate on how the Court should decide what rights or interests are sufficiently important to warrant heightened judicial scrutiny.¹³

The book's final section is both its best and worst. Siegan begins by elaborating on one part of the dichotomy that he previously identified. He points out that freedom of expression is afforded greater protection than freedom to engage in economic activity and finds this distinction intolerable. Here, Siegan must be credited for astutely identifying a source of tension confronting the Supreme Court in its attempt to strike some balance between protected commercial and political speech. His choice of first amendment doctrine as a foil for his argument is particularly apt, given the Court's consistent use of marketplace metaphors to describe speech.¹⁴

Siegan follows this comparison with the final elements of his argument. He asserts that the legislature is ill-suited to make socioeconomic decisions because it often does not represent the will of the majority (p. 282), and that the process of legislating is often skewed by special interest groups. He also argues that most economic regulation has produced inefficiency and reduced total welfare.¹⁵ He concludes by proposing a stricter standard for review of economic regulation. Under Siegan's standard, courts would analyze a statute to determine whether its end was legitimate and whether its means

10. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

11. Under the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment, "Statutory classifications, which either imply suspect purposes or affect fundamental rights, will be held to deny equal protection unless necessary to further a compelling government interest." P. 205.

12. *See, e.g.*, J. ELY, *DEMOCRACY AND DISTRUST* 59 (1980):

Thus the list of values the Court and the commentators have tended to enshrine as fundamental is a list with which readers . . . will have little trouble identifying: expression, association, education, academic freedom, the privacy of the home, personal autonomy. . . . But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing; those are important, sure, but they aren't *fundamental*.

(emphasis in original) (footnote omitted).

13. An excellent short summary of the current status of the debate is contained in Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063 (1981).

14. Compare *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (striking down state statute prohibiting the advertising of generic drug prices), with *Friedman v. Rogers*, 435 U.S. 967 (1979) (upholding a Texas statute forbidding the use of trade names in optometrical advertising).

15. *See* note 1 *supra*.

have substantially furthered that asserted end. He also proposes that the courts subject economic regulations to a least restrictive alternative requirement, striking down statutes that failed to use the means least restrictive of economic liberties to accomplish their ends.

Some of the problems with this standard are obvious. First, Siegan makes no attempt to square his proposed standard with his admonition that the courts should avoid affirmative jurisprudence (p. 105). If a court is the final arbiter of what constitutes the least restrictive means of accomplishing a given objective, an assertion that it is not legislating is merely semantic. Siegan's standard also lacks originality: it is but a minor variant of the standards that Justice Brennan and Professor Gunther would apply to economic regulation.¹⁶ Finally, Siegan fails to address the problems that adoption of his standard might entail. How will the judiciary deal with the dilemmas that ultimately led to the demise of *Lochner*-like substantive due process? The reader is left to wonder why the passage of time and a few scattered studies suggesting that economic regulation is inefficient make revival of this standard appropriate.

This unanswered question manifests the book's underlying weakness: It is written like a brief, and too little space is devoted to analyzing competing arguments. This failing undercuts its thesis at every point. The pervasive effect of economic regulation in today's society compels close examination of the regulatory phenomenon, but *Economic Liberties* does not persuasively demonstrate that the courts should jettison close to a half-century of post-*Lochner* jurisprudence.

16. Siegan concedes that Justice Brennan in *Craig v. Boren*, 429 U.S. 190, 197 (1976), required "scrutiny of the ends as well as the means" of legislation. P. 324. Professor Gunther, like Siegan, would require that the legislation substantially further the state's objective in actuality, rather than in mere conjecture. P. 323. See Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Siegan's major contribution, then, is the least restrictive alternative gloss. See pp. 322-24.