

# INTRODUCTION

## ECONOMIC LIBERTIES AND THE JUDICIARY

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That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.

—Justice Story (1829)<sup>1</sup>

### The Demise of Economic Due Process

The publication of Bernard H. Siegan's *Economic Liberties and the Constitution* (1980) marked the beginning of a resurgence of interest in constitutional economics and the role of the judiciary in protecting property rights and economic liberties. In his pathbreaking book, Siegan explored the background to the framing of the U.S. Constitution and found overwhelming evidence to support his contention that the Framers intended the Constitution and the judiciary to be safeguards against the attenuation of private property rights by the political branches. The Framers never believed that there should be unrestrained majority rule or that special interests should usurp the right to private property that lies at the heart of the Constitution,

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<sup>1</sup>Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

however silent the document itself may be on the precise nature of “the property right.”<sup>2</sup>

According to Siegan, the Framers made no distinction between property rights and human rights or between economic liberties and other liberties. “The most important civil rights,” says Siegan, “were those of life, liberty, and property” (1985, p. 289). Moreover, an exhaustive review of the background materials to the Constitution indicates that “The Framers expected the federal judiciary to exercise judicial review insofar as civil liberties were concerned, primarily to secure property and other economic interests” (Siegan 1980, p. 318).

Things have changed, of course. Since the late 1930s the Supreme Court has given property rights and economic liberties much less protection than “fundamental rights,” so-called by the Court. As Siegan observes: “legislatures have great difficulty in restraining freedom of speech or press, and almost none in curtailing freedom of enterprise” (1985, p. 287).

The degree to which the Court has allowed property rights and economic liberties to be eroded by the political branches is evident from even a brief review of its recent decisions.<sup>3</sup> Of particular importance, in this regard, is *Hawaii Housing Authority v. Midkiff*<sup>4</sup> in which the Court upheld a Hawaii statute that permits the state to condemn private land so that the tenants who occupy the land can then purchase it, thus raising the question whether the state’s eminent domain power can be exercised for such a private use. In that decision the Court followed the precedent set in *Berman v. Parker*<sup>5</sup> where it was argued:

We deal . . . with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to

<sup>2</sup>See Siegan (1980, chap. 4, “The Judicial Obligation to Protect Economic Liberties”). In his 1985 essay “The Supreme Court: The Final Arbiter,” Siegan expands on his 1980 book and again emphasizes that when judicial review is viewed in its proper historical context, it becomes clear that the Framers intended the Court to protect the “liberties of the people by annulling laws that violated them, even though those liberties might not be specified” (p. 274). To do this, “the Court would have to invoke the common law” (p. 274), which “was dedicated to the rule of ‘right and reason’” (p. 275). Thus, Siegan concludes that “although few liberties were enumerated in the original U.S. Constitution, a large measure of freedom was retained by the people, to be safeguarded by the judiciary” (p. 276).

<sup>3</sup>See Epstein (1984).

<sup>4</sup>52 LW 4673 (1984).

<sup>5</sup>348 U.S. 26 (1954).

the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, *when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive*. In such cases the legislature, not the judiciary is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. . . .<sup>6</sup>

Although this passage refers to “specific constitutional limitations,” these all but vanished after the decline, in the late 1930s, of substantive review for socioeconomic legislation. Thus what the Court was actually saying in *Berman* and *Hawaii* was that the floodgates are now open, that almost any statute having a reasonable relation to the “public interest” will be sustained—even if it sanctions what amounts to a private taking. Richard Epstein points out:

With economic liberties . . . the [C]ourt has deployed the so-called “rational basis” test to neutralize the constitutional protection of economic liberties. . . . Under present law, if any conceivable set of facts could establish a rational nexus between the means chosen and any legitimate end of government, then the rational-basis test upholds the statute. *In theory, the class of legitimate ends is both capacious and undefined, while the means used need have only a remote connection to the ends chosen. In practice, every statute meets the constitutional standard, no matter how powerful the arguments arrayed against it.*<sup>7</sup>

As in *Berman*, the Court in *Hawaii* ignored the Framers’ intent to protect private property rights and instead sustained the Hawaiian legislature’s illegitimate use of the taking clause (of the Fifth and Fourteenth Amendments) to transfer ownership rights from one group of private individuals—landlords—to another group—tenants—without the consent of the original owners. This decision only opens the door for further government intervention since it allows the legislature to redistribute property almost at will.

It is clear from the doctrine set down in *Berman* and most recently applied in the *Hawaii* decision that property rights are no longer considered a constraint on legislation. Instead, the will of the legislature (as an expression of popular sovereignty) is seen to be the source of property rights. Today’s legal positivism differs sharply, therefore, from the Framers’ natural rights conception of government and the judiciary. As the Declaration of Independence makes clear, the Founding Fathers who shaped the Constitution were classical

<sup>6</sup>Id. at 32 (citations omitted); emphasis added.

<sup>7</sup>Epstein (1984); emphasis added.

liberals; they viewed life, liberty, and property as inalienable rights that preexist the written law or positive legislation. Thus, Siegan tells us: "When the Constitution was framed, the [common law] system was highly regarded as a guardian of individual rights, and many Americans equated common law with natural law. For them, the unwritten English Constitution, which consisted principally of common law rights, provided the greatest measure of human freedom" (1985, pp. 275-76).

For the classical liberal, justice was a negative concept: the absence of injustice; and injustice referred to the illegitimate use of force, namely, the use of force to take what belongs to another. The Framers used this negative concept of justice to limit the role of government and the judiciary to the safeguarding of property rights, broadly conceived as life, liberty, and property. Thus the object of the law was not to give an exhaustive listing of what government could do, but to delimit the activities of government so that individual freedom could be maximized—not so much to say what government should do, but to determine what government has no right to do.

Under the negative concept of justice, there is no dichotomy between justice and individual freedom or between property rights and personal rights. Economic liberties, as a fundamental component of civil liberties generally, are to be fully protected under the Constitution. As Friedrich Hayek has shown, the "law of liberty" is incompatible with an affirmative view of justice that sees the function of the legislature as one of pursuing "social justice" by redistributing private property.<sup>8</sup>

Perhaps the clearest evidence to be found of the Framers' view that property preexists legislation and is an inherent right of every citizen is James Madison's essay on property, written in 1792.<sup>9</sup> Given the importance of this essay by the "father of the Constitution," it may be useful to quote from it at length. According to Madison, the term "property" can be understood in both a narrow and a broad sense (1792, p. 174):

This term [property] in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right. . . . In the former sense, a man's land, or

<sup>8</sup>See Hayek (1960; 1982, chaps. 5, 8-9).

<sup>9</sup>Madison's essay "Property" was written for the *National Gazette*, which was published by his friend Philip Freneau in Philadelphia. The original essay is unsigned but has been attributed to Madison and is contained in volume 4 of *Letters and Other Writings of James Madison* (1865, pp. 478-79). See also Siegan (1980, p. 58).

merchandise, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties, and free choice of the objects on which to employ them. In a word, *as a man is said to have a right to his property, he may be equally said to have a property in his rights.*<sup>10</sup>

Madison's negative concept of justice and the priority he gave to property rights over legislation or written law led him to argue for limited government (1792, p. 174):

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just government, which impartially* secures to every man, whatever is his own.

When the government goes beyond its legitimate role of protecting property rights, of protecting what is an individual's own, it becomes unjust. The focus of the Framers was on the *prevention* of injustice—the violation of property rights, broadly conceived—not on the pursuit of “social justice.” Madison stated (1792, p. 174):

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.

The following passage provides further strong evidence that Madison held freedom of contract and other economic liberties in high esteem (1792, p. 175):

If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religions, their persons, and their faculties; nay more, which *indirectly* violates their property in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues

<sup>10</sup>Emphasis added. The last sentence of this quotation can be found in the memorial room of the James Madison Library of Congress, inscribed on the wall immediately to the right of Madison's imposing figure. It is a reminder of the importance Madison placed on private property rights.

and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights. . . .

Madison's views on property and the inseparability of justice and liberty—seen as the absence of illegitimate force and, thus, as the protection of property, broadly conceived—make it difficult to understand how the modern Court can justify its discrimination against economic liberties and its failure to safeguard private property rights. The rational-basis test is no justification; it amounts simply to deferring to the will of the legislature, with no test to see if the legislation is consistent with basic property rights.

The judiciary, says Siegan, “has no authority to eliminate constitutional protection for economic liberties” (1980, p. 319).<sup>11</sup> Thus in *Berman* and *Hawaii* (and many similar cases involving property rights and economic liberties since 1936), there is no sound basis from a rights standpoint for saying that the Court's refusal to apply substantive due process is justified. Nor can the Court's actions be justified from an economic efficiency standpoint; for as Siegan clearly illustrates, the great bulk of the legislation regulating property and economic rights has interfered with the smooth operation of a market economy and has redistributed wealth rather than created new wealth.<sup>12</sup>

The conclusions are clear: Attenuating or destroying private property rights is unjust; and it is inefficient since it usually centralizes authority and thus interferes with the freedom to utilize what Hayek has called “the knowledge of the particular circumstances of time and place” (1948, p. 81). If individuals are unsure of the future status of their property rights, they will be less willing to undertake the

<sup>11</sup>See also Siegan (1985, p. 276), where he states: “[I]n the economic area, the Framers believed the judiciary would protect ownership and thereby help perpetuate a system based on freedom of enterprise. The Framers surely would never have accepted judicial review if they had thought it would be used to advance government authority and regulation.” And also Siegan (1985, p. 277): “The early courts accepted the idea that legislatures are inherently limited in power.”

Hamilton's view of the judiciary reinforces Siegan's conclusion. Hamilton saw the judiciary as an instrument to limit the power of government in accordance with constitutional principles. Thus in a republic based on a “limited Constitution,” the judiciary's function “must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing” (*The Federalist Papers*, no. 78, pp. 100–101, as compiled by DeKoster 1976).

<sup>12</sup>See Siegan (1980, especially chap. 13, “The Failure of Regulation”).

risks necessary for economic progress. Instead, they will engage in rent-seeking activity as the market economy becomes politicized in the face of judicial surrender to legislators who believe that all rights to property stem from them, rather than from the "higher law," the rational theory of natural rights. The refusal of the Court to accept and enforce the theory of property rights inherent in the Constitution—as well as its failure to see that property rights, incentives, and economic efficiency are all interrelated—has led to a substantial increase in economic regulation. Such regulation has imposed significant costs on the economy and has led to the rise of vast bureaucracies, often beyond the practical reach of law and judicial review.<sup>13</sup>

Further evidence that the Framers sought to protect the right of property against legislative abuse and that they were, at least initially, successful in doing so can be gained by examining several key passages from the work of Frederic Bastiat. Writing in the first half of the 19th century, Bastiat evaluated the constitutional and judicial system against his own theory of justice, a theory that is predicated on the negative concept of justice. The following passages from Bastiat are noteworthy for their close resemblance to Madison's views on property, the legitimate function of government, and the role of the judiciary.

According to Bastiat, "Property is prior to law; the sole function of the law is to safeguard the right to property" (1848, p. 109).<sup>14</sup> Like Madison, Bastiat made no distinction between property rights and other rights or between property and individual freedom; thus, "Property, the right to enjoy the fruits of one's labor, the right to work, to develop, to exercise one's faculties, according to one's own understanding, without the state intervening otherwise than by its protective action—that is what is meant by liberty (1848, pp. 109–10).

From his theory of rights, Bastiat concluded that "*The object of the law is to prevent injustice from prevailing*. In fact, it is not justice,

<sup>13</sup>See Tumlrir (1984). The judiciary's deference to the political branches in economic matters and the consequent rise in regulation have also given rise to a flood of litigation. Ernest Gellhorn (1984) has observed: "The burden legal services now impose on the economy and on personal freedom is often enormous and far exceeds the out-of-pocket costs estimated at \$40 billion annually. More important, it is also clear that these costs often exceed the benefits generated, that legal rules are far too complicated and intrusive, and that alternative non-litigation solutions need to be explored." According to Gellhorn, "the major source of the law explosion is the legislature, acting not in ignorance or mendacity but rather in response to public pressure for yet more rules and laws."

<sup>14</sup>Page citations to Bastiat's work refer to the 1964 volume of his *Selected Essays on Political Economy*.

but injustice, that has an existence of its own. The first results from the absence of the second" (1850b, p. 66). According to Bastiat (1850b, p. 65):

When law and force confine a man within the bounds of justice, they do not impose anything on him but a mere negation. They impose on him only the obligation to refrain from injuring others. They do not infringe on his personality or his liberty or his property. They merely safeguard the personality, the liberty, and the property of others. They stand on the defensive; they defend the equal rights of all. They fulfill a mission whose harmlessness is evident, whose utility is palpable, and whose legitimacy is uncontested.

Bastiat thought that the U.S. constitutional system at the time reflected in large part the principles of justice that he thought were legitimate, namely, the protection of person and property. Thus in 1850 he wrote: "There is no country in the world where the law confines itself more rigorously to its proper role, which is to guarantee everyone's liberty and property" (1850b, p. 59).<sup>15</sup> The result of such a system of justice, said Bastiat, is that "In a country like the United States, where the right to property is placed above the law, where the sole function of the public police force is to safeguard this natural right, each person can in full confidence dedicate his capital and his labor to production. He does not have to fear that his plans and calculations will be upset from one instant to another by the legislature" (1848, p. 107).

Like the Framers, Bastiat recognized that for law to be legitimate it must be just—not in the sense of imposing some concept of social justice, but in the sense of safeguarding private property rights. Under a regime of just rules of law, individuals can pursue their own goals while respecting the equal rights of others. A harmonious social order will result. Bastiat summed up this relationship between a just legal system and an orderly economic system by noting (1850b, p. 94):

Law is justice. And it is under the law of justice, under the rule of right, under the influence of liberty, security, stability, and responsibility, that every man will attain to the full worth and dignity of his being, and that mankind will achieve, in a calm and orderly

<sup>15</sup>Bastiat did point out two exceptions to a just system of law in the United States: slavery and tariffs. The first, he said, "is a violation, sanctioned by law, of the rights of the person." The second, "a violation, perpetrated by the law, of the right to property. . . ." He thought these deviations from justice might "lead to the dissolution of the Union," and thought it "impossible to imagine any graver situation in a society than one in which the law becomes an instrument of injustice" (1850b, pp. 59–60). Legal positivists should be reminded that it was the legislative will that imposed these injustices on society, not recourse to a rational theory of rights and justice.



way—slowly, no doubt, but surely—the progress to which it is destined.

Hayek likewise has demonstrated the importance of the property right and its connection to the emergence of a “spontaneous order,” an order brought about by the self-regulating activities of free individuals and not by the commands of some central planner. Although Hayek has a somewhat more modest approach to the theory of rights than Bastiat, he thoroughly develops the consequences of substituting distributive justice for commutative justice. He also traces the emergence of the redistributivist state to the decline of the rule of law, a process in which the termination of judicial review of statutes affecting property rights and economic liberties played a critical role.<sup>16</sup>

According to Hayek, the role of the judiciary is to protect property rights so that a spontaneous market order can arise.<sup>17</sup> If it fails in this role, the legislators’ desire for economic regulation will upset the market order. Indeed, as Hayek points out: “the loss of the belief in a law which serves justice [in the negative sense of this term] and not particular interests (or particular ends of government) is largely responsible for the progressive undermining of individual freedom” (1982, chap. 8, p. 34).

From 1897 through 1936, the Supreme Court provided substantial protection for property rights and economic liberties—considering them inviolable except in rare cases. During this period, accordingly, the Court concerned itself as well with the legitimacy of legislative ends. These concerns are evident in numerous Court opinions upholding basic economic rights.<sup>18</sup> It is also clear from a review of the period that the Court had a fairly sound understanding of the meaning of “right” and “justice.” These terms were usually understood in the negative sense of limiting the scope of government power so as to protect the private domain of individuals to freedom of contract and private property (in Madison’s broad sense of this

<sup>16</sup>See, in particular, the following essays in *The Essence of Hayek*, edited by Nishiyama and Leube (1984): “‘Social’ or Distributive Justice” and the appendix, “Justice and Individual Rights” (chap. 5); “The Use of Knowledge in Society” (chap. 11); “Competition as a Discovery Procedure” (chap. 13); and “The Principles of a Liberal Social Order” (chap. 20). See also Hayek (1982, especially chap. 8, “The Quest for Justice”). For a discussion of the difference between Hayek’s approach to justifying rights and that taken by Bastiat, see Dorn (1981).

<sup>17</sup>See Hayek (1982, chap. 5, especially the section entitled, “The function of the judge is confined to a spontaneous order,” pp. 118–22).

<sup>18</sup>The most famous such case is probably *Lochner v. New York*, 198 U.S. 45 (1905), declaring unconstitutional a New York State statute that set maximum hours for bakery workers. For a discussion of the history surrounding this case, see Siegan (1980, chap. 5).

term). Thus it would make little sense to speak of the right to welfare or the right to a market because such claims would be inconsistent with the right to private property and freedom of contract. (Individuals may be said to have a right to compete, but they cannot in justice be said to have a right to prevent others from competing. The right to be free from the illegitimate use of force applies equally to everyone.)

In his dissenting opinion in *Nebbia v. New York* (1934), Justice McReynolds echoed the rule of justice that had guided the Court on numerous occasions prior to the demise of economic due process: "The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, *even if for the moment, this may seem advantageous to the public.*"<sup>19</sup> With *West Coast Hotel Co. v. Parrish* (1937), however, the Court formally terminated substantive due process in reviewing economic legislation.<sup>20</sup> From that time forward the doors have been open to all types of legislative redistribution, and the results have been exactly what the Framers and Bastiat predicted: the politicization of economic life; great uncertainty about the law; and a system of justice based not on the protection of rights to private property and freedom of contract, but on the myriad notions of social or distributive justice that special-interest groups have put before the legislature.

No one has expressed the effects of these alternative systems of justice better than Bastiat (1850a, pp. 238–39):

If you make the law the palladium of the freedom and the property rights of all citizens, and if it is nothing but the organization of their individual rights to legitimate self-defense, you will establish on a just foundation a rational, simple, economical government, understood by all, loved by all, useful to all, supported by all, entrusted with a perfectly definite and very limited responsibility, and endowed with an unshakable solidity.

If, on the contrary, you make of the law an instrument of plunder for the benefit of particular individuals or classes, first everyone

<sup>19</sup>291 U.S. 502, 558–59 (1934) (McReynolds, J., dissenting); emphasis added. This principled approach to judicial review is evidenced in Justice Peckham's majority decision in *Lochner v. New York*: "The [legislative] act must have a . . . direct relation, as a means to an end, *and the end itself must be appropriate and legitimate*, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." 198 U.S. at 57–58; emphasis added.

<sup>20</sup>300 U.S. 379 (1937). For a discussion of this case, see Siegan (1980, pp. 145–50). Siegan points out that Chief Justice Hughes, in rendering the majority opinion in *Parrish*, was not only wrong in his concept of justice—he stood "the concept of liberty on its head"—but was "wrong in his economics" as well, for the "[i]mposition of higher wages [via a minimum wage law] brings unemployment and reduces the economy's flexibility, thereby impeding economic recovery" (1980, p. 149).

will try to make the law; then everyone will try to make it for his own profit. There will be tumult at the door of the legislative chamber; there will be an implacable struggle within it, intellectual confusion, the end of all morality, violence among the proponents of special interests, fierce electoral struggles, accusations, recriminations, jealousies, and inextinguishable hatreds; . . . government will be held responsible for everyone's existence and will bend under the weight of such a responsibility. . . .

There are many explanations for the Court's abandonment of those principles of the Constitution that protected property rights and economic liberties. The political pressures of the New Deal era, culminating in President Roosevelt's attempt to pack the Court, are among them, of course.

More fundamentally, however, the intellectual pressures created by critics from the legal realist movement, coupled with the failure of the defenders of the classical view to adequately articulate their position, helped undermine the Court's confidence in its own ability to give justified and consistent interpretations of the broad language of the Constitution. While the Court had had a number of general insights and principles to inform its constitutional jurisprudence, it had had nothing like a well-developed theory of rights or theory of constitutional interpretation in which it could place its confidence. Absent this confidence, and under political pressure to bend to the will of the majority, the Court eventually yielded its role to the political branches. Thereafter, at least in the area of property rights and economic liberties, the legislature rather than the Court would be the principal interpreter of the Constitution; our property rights and economic liberties would be determined by political will rather than by the moral reasoning that stood behind the Constitution, the "higher law" that was implicit in its broad language.

In the intervening years, a number of moral and legal theorists have combined to address the intellectual deficiencies that led to the Court's loss of confidence. The work of Roger Pilon, in particular, draws some of this research together and builds upon it to show that the broad rights of the Constitution can be given a rigorous, logical justification, as against the skeptical claims of the legal realists, and can be articulated to yield a far-reaching and powerful theory of rights capable of assisting judges in their work of constitutional interpretation.<sup>21</sup>

In essence, Pilon shows that a rigorous approach to justifying rights requires the development of a logic of rights such that "those who

<sup>21</sup>See Pilon (1979a; 1979b, especially part 3; 1979c; 1981; 1982; and 1983).

deny the existence of certain rights can be shown to contradict themselves" (1979c, p. 1332). Using Alan Gewirth's "principle of generic consistency (PGC)," Pilon argues: "Our basic right . . . is a right to our separate lives, to the non-interference that characterizes our voluntary actions" (1979c, p. 1340).<sup>22</sup>

Only a system of rights based on the claim to noninterference can generate a consistent rights structure. Positive "welfare rights" cannot be generated from the PGC without leading to a conflict with the negative right to noninterference. Thus, according to Pilon, only the following rights can be justified since they are "derived from certain necessary but normative features of human action" and do not lead to inconsistency: (1) "rights to noninterference, defined with reference to the property foundations of our action and the taking of that property"; (2) "rights to voluntary association"; and (3) "rights to rectification if involuntarily involved in an association." He concludes that this system of rights is "rooted in reason, not in sentiment" (1979c, p. 1341).<sup>23</sup>

Pilon's work implies, among other things, that the negative concept of justice held by the Framers when they shaped the Constitution can be justified, even if the Framers' arguments did not fully do so, whereas the affirmative concept of justice that leads to economic redistribution cannot be justified, since it is inconsistent with the negative concept. The natural law theory that influenced the Framers generated a consistent set of rights based on the fundamental right to one's property, broadly conceived. As Pilon points out, the Framers, in general, produced a correct theory of rights; however, they did not have the "epistemological tools" to justify the rights to private property and freedom of contract. Consequently, these basic rights have not held up well against the doctrine of legal positivism. What is needed, therefore, is not to reject the principles of the Framers, but to justify them via a more rigorous attack on legal positivism. What must be done, says Pilon, is to base our rights on reason, not on the will of the electorate (or on popular sentiment) as expressed in legislation. Again, "the idea is to show that certain rights [those

<sup>22</sup>For a fuller discussion of the PGC, see Gewirth (1974). Pilon has criticized Gewirth for overextending the PGC by trying to generate positive rights: "Gewirth has construed the normative structure of action—the front part of his argument—beyond its natural bounds; he has gone beyond the property foundations of action that alone can serve as *necessary* content for the right-claims that are inherent in human action, claims that in turn get the whole moral game off the ground" (1981, p. 12).

<sup>23</sup>Note the similarity between Pilon's three fundamental rights and Hume's "three fundamental laws of nature," namely: "stability of possession," "transference by consent," and "performance of promises" (cited in Hayek 1982, chap. 8, p. 40).

listed above] must be accepted as justified such that to deny that individuals have them is to contradict oneself" (Pilon 1983, p. 173).<sup>24</sup>

Hayek's work has reached these same conclusions, but he begins by simply assuming the basic property right, broadly understood, and then proceeds to derive a system of rights that is internally consistent with the fundamental right of property. Using this approach, he shows that private property and freedom of contract are necessary conditions for the emergence of a spontaneous market order.

To test for consistency in the rights structure (or what Hayek calls "the rules of just conduct"), he employs a "negative test of injustice" and criticizes legal positivists for failing to realize that such a test exists. According to Hayek (1982, chap. 8, p. 54):

What is required [for a spontaneous order] is merely a negative test that enables us progressively to eliminate rules which prove to be unjust, because they are not universalizable within the system of other rules whose validity is not questioned. . . . The pursuit of the ideal of justice (like the pursuit of truth) does not presuppose that it is known what justice (or truth) is, but only that we know what we regard as unjust (or untrue).<sup>25</sup>

The post-1936 Court appears oblivious to the long history of rights theory and to the contemporary rebirth of rights theory, both of which generate only negative justice, not the positive "social justice" embraced by modern liberalism. Similarly, the Court appears oblivious to the crucial role of private property and freedom of contract in generating a spontaneous economic order, an order in which individual plans can be coordinated and conflicting wants resolved through market exchanges rather than through coerced political processes. Indeed, the modern Court has turned "justice" on its head: instead of referring to the prevention of injustice—the illegitimate taking of property broadly conceived—justice now refers to the pursuit of "social justice," the use of government coercion via the "law" (that

<sup>24</sup>Pilon argues (1981, p. 7) that the "Founders [Framers] got it right, right as a matter of ethics." In his argument, Pilon emphasizes that to justify a right, it is not enough to simply trace it to the Constitution. Rather, one must ground it in reason. He therefore is critical of "constitutional positivism" (1981, pp. 6–7). Pilon's discussion of the shortcomings of natural law theory as a justificatory argument for basic rights is found in Pilon (1979c, pp. 1333–34; and 1983, especially pp. 172–73). In the latter reference, Pilon states: "It is one thing to develop a theory of rights that is both objectively grounded and consistent, quite another to show that that theory is *justified*. On this score, . . . the Founding Fathers . . . were at their weakest—not surprisingly, for the epistemological tools at their command were altogether primitive."

<sup>25</sup>For a discussion of the negative character of the "rules of just conduct" and the "negative test of injustice," see Hayek (1982, chap. 8, pp. 35–48). His critique of legal positivism runs throughout this chapter.

is, legislation) to redistribute private property. Yet as Hayek has observed: "in a society of free men whose members are allowed to use their own knowledge for their own purposes the term 'social justice' is wholly devoid of meaning" (1982, chap. 9, p. 96).

The demise of economic due process has given rise to a judiciary that now seems all too willing to surrender property rights and economic liberties to the redistributivist political state. The burden of proof is now on those who have lost their property rights to show why those rights should be restored, not on the government to show why it should have the right to interfere with economic freedom.

In deferring to the legislature, the Court has created a false dichotomy between civil liberties and economic liberties, raising the former to the category of "fundamental rights" while relegating the latter to the will of the legislature and special interests. Such is the fate of those rights that were considered fundamental by Madison and the other Framers, which were not even thought necessary to directly express in the original Constitution because they were taken as inviolable and prior to any written law.

To stem this redistributivist tide and restore economic liberties to their original place in the Constitution, Siegan would have the Court once again apply substantive due process to economic legislation. He would require that "In matters affecting people's freedoms [including economic liberties], the scope of judicial review should be defined by its general goal of protecting and preserving liberty" (1980, p. 322). There would be no dichotomy between economic and other freedoms. According to Siegan (1980, pp. 324–25):

[A] statute or ordinance should not be deemed valid if, in the absence of justification by the government under an intermediate standard of judicial scrutiny, 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.

Siegan's test of justice for reviewing social and economic legislation would be "less exacting than strict scrutiny," but this is because he believes that "Always to subject the legislature's will to an extreme standard of justification might eliminate it as a viable branch of government" (1980, p. 324). This, of course, is debatable. Nevertheless, Siegan has a more justifiable approach to constitutional interpretation than that currently practiced by the Court, one that deserves serious consideration. Under Siegan's test, the burden of proof in judicial review of social and economic legislation would once again be shifted

to the government, which Siegan deems only just (1980, p. 325).<sup>26</sup> He concludes: "The application of judicial review to economic matters will not restore laissez-faire to our economy, but at least we should expect reduction of legislative and administrative excesses and abuses. This is an outcome not to be minimized. The rewards of liberty are vast and unpredictable" (1980, p. 331).

Madison and the other Framers of the Constitution would no doubt agree. The difficulty today, however, is in generating popular support for such a change in the context of a political process now thoroughly dominated by special interests. As Epstein (1984) points out, "The connection between politics and markets, so well understood by the Founding Fathers, has been all but forgotten today." Thus, a necessary first step in restoring economic due process is that those individuals who have been entrusted with protecting our property rights *reacquaint themselves with the importance of their responsibility*. To do this they must acquire a better understanding of their role in the light of both prior history and current developments in rights theory and economic theory. The theory of rights shows that our constitutional rights to property and economic liberty can be morally justified, whereas economic theory shows the importance of private property for a viable system of markets and prices. If these lessons are not learned by those who declare what rights will be enforced, then the erosion of property rights in the economic sphere must ultimately lead to the erosion of rights in the noneconomic sphere as well.

If we accept the idea that the Court should be restrained in its review of economic legislation, we face the very real danger that the Court also will be restrained in other areas. The Court must strike a principled balance between restraint and activism in all matters; but to do this it must resort to some ultimate principle. The principle the Framers intended was that of the property right, broadly understood, which is the only principle that ultimately can be justified by the test of logic. The Court's present "rule of reason"—the rational-basis test—is really a pseudo-test of justice, for it submits legislation neither to the moral test of the theory of rights nor to the efficiency test of the theory of economics. Rather than ensure justice as envisioned by the Framers, the "rule of reason" gives us the concept of justice that was expressed in the *Berman* and *Hawaii* decisions: "When the legislature has spoken, the public interest has been declared well-nigh conclusive." And as Siegan warns: "The presumption that the

<sup>26</sup>For a fuller discussion of Siegan's principled approach to judicial review of economic legislation, see Siegan (1980, chap. 15).

state is correct in curtailing people's activities can only be accepted in societies where restraint is normal—those which, unlike ours, equate government direction and control with the public interest" (1980, p. 325).

## The Present State of the Debate

The Court's refusal to extend to economic liberties the same protection it continues to extend to other "fundamental liberties" has arisen in an intellectual climate that has lost contact with Madison's and Bastiat's understanding of justice, rights, and the market process. Thus, we have Judge Bork arguing (1984, p. 8):

Our constitutional liberties arose out of historical experience and out of political, moral, and religious *sentiment* [emphasis added]. They do not rest upon any general theory. Attempts to frame a theory that removes from democratic control [popular sovereignty] areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent [as in *Berman* and *Hawaii*], and the history that gives our rights life, rootedness, and meaning. It is no small matter to discredit the foundations upon which our constitutional freedoms have always been sustained and substitute as a bulwark only abstractions of moral philosophy.<sup>27</sup>

In order to better understand the judicial change of events since 1936—and return the judiciary to its original role—certain basic questions need to be answered. Among them are these:

- What are the forces that led to this change in the role of the judiciary?
- Are there fundamental principles to guide the judiciary in its review of economic legislation, or must the courts defer to the legislature in this area?

<sup>27</sup>According to Bork, "the attempt to define individual liberties by abstract reasoning, though intended to broaden liberties, is actually likely to make them more vulnerable" (1984, p. 7). This is true, however, if and only if one pursues a positive theory of justice, which leads to conflicting rights that cannot be justified in any rational sense. But if we return to Madison and Bastiat's negative concept of justice, we can avoid this pitfall and return to a rational theory of rights. Bork seems to recognize this possibility: "Leading legal academics are increasingly absorbed with what they call 'legal theory.' That would be welcome, if it were real"—by which he means "theory about the source of law, or its capacities and limits, or the prerequisites for its validity" (p. 9).

Nevertheless, Bork appears to fall into the trap of constitutional positivism by arguing: "In a constitutional democracy the moral content of law must be given by the morality of the framer or legislator, never by the morality of the judge" (p. 11). Although there is some truth in this statement, it is also true, as Pilon (1981) has shown, that one must go beyond the written constitution if one is to justify that constitution and the rights it sets forth; and for this we need a substantive theory of moral or natural rights.



- What is the legitimate role of the judiciary, and of government and law generally, in a free society?
- How does the existing incentive structure confronting judges affect their behavior?
- What are the implications of the demise of substantive due process in economic matters for the maintenance of a spontaneous market order?
- Do judges understand the economic consequences of attenuating private property rights and freedom of contract?

These questions deserve serious thought, especially as we approach the Constitution's bicentennial and the possible appointment of several new justices to the Supreme Court over the next few years. To encourage the discussion of these important questions the Cato Institute sponsored a major conference on **Economic Liberties and the Judiciary** in Washington, D.C. on October 26, 1984. This issue of the *Cato Journal* features the papers from that conference, including a lively exchange between Judge Antonin Scalia and Professor Richard Epstein on the role of the judiciary in protecting economic liberties.<sup>28</sup> These papers discuss in much greater detail many of the ideas presented in this introduction, and they provide a valuable contribution to the current study of constitutional economics and jurisprudence.

In his opening paper, Professor Siegan continues the theme of his earlier work on economic liberties and the Constitution. Here, however, he focuses on the history of the framing of the Fourteenth Amendment, demonstrating that the due process clause, authored by Rep. John Bingham, was intended not simply to ensure the civil liberties of the recently freed slaves but to protect broadly our property rights and economic liberties from incursions by the states. In light of recent debates over federalism and the meaning of the Tenth Amendment, Siegan's paper is a particularly important contribution.

In the Scalia-Epstein exchange, Judge Scalia defends the reluctance of the Court to return to substantive due process in reviewing economic regulation. He does not disagree with basic constitutional principles of property and freedom of contract; but he thinks that in today's environment, with its cries for social justice and the positive concept of rights, the judiciary would not be able to limit itself to the protection of property rights and economic liberties in their traditional form. Instead, the Court would face the danger of creating rights where none should be created. To avoid committing this type

<sup>28</sup>In addition to the conference papers, this volume includes articles by Steve Hanke, James C. Miller III, and Ellen Paul.

of error, Scalia favors judicial restraint in reviewing social and economic regulation. In his view, what needs to be accomplished before the Court can actively review economic legislation is to create "a constitutional ethos of economic liberty." Once such a climate is created, the Court will be able to protect the rights of property and contract. Until then, it does no good to try to constitutionalize these rights.

Professor Epstein recognizes the same problems that Scalia sees in today's judicial system but strongly disagrees with Scalia's defense of the Court's post-1936 termination of economic due process. He thinks that the present Court has gone much too far in the direction of judicial restraint in its review of economic legislation, with the result that legislative abuse of property rights and economic liberties has substantially increased. Scalia pays too much attention, Epstein argues, to avoiding the error of striking down economic legislation that should be sustained. In doing so, he increases the risk of the Court's failing to review statutes that conflict with the basic economic rights the Framers meant to be protected by the judiciary. The goal of judicial review, says Epstein, should be to minimize the sum of both types of error, which can be done only by adhering to constitutional principles. By taking such a principled approach to judicial review, the Court can strike the proper balance between activism and restraint. If it does not, it will further erode our rights to property and contract.

Professor Aranson considers judicial control of the political branches. He argues that in its review of socioeconomic legislation, the Court must recognize the scope for legislative abuse; that judges should acquire a better understanding of economic principles, but that economic analysis is not sufficient to protect economic rights and may even be harmful; and that legislative abuse is best constrained by the development of constitutional doctrine in line with the intent of the Framers to protect property rights against the redistributivist state. If the Court were to protect our rights to property and contract, it would help to promote a sound economy as well.

Professor Liebeler takes a property rights approach to adjudication and shows how it can be useful in bringing about an efficient allocation of resources. Drawing on the work of Ronald Coase and Harold Demsetz, he suggests that such an approach can help in determining standards for judicial review of social and economic regulation. According to Liebeler, economic regulation should be applied only in cases involving significant third-party effects. And in those cases, the assignment of rights should proceed as if private transaction costs were zero; thus the adjudication process should approximate the

market process. Resource efficiency would then result, and the final rights configuration would be consistent with voluntary exchange; in this sense it would meet constitutional principles. Since the judiciary will always have to compare costs and benefits at some level of the adjudication process, the property rights approach, says Liebel, can prove beneficial.

In his comment on Liebel's paper, Professor De Alessi agrees with Liebel's economic analysis but would like to see property rights theory applied to the actual behavior of judges. De Alessi asks, how does the institutional structure within which judges operate affect their decision making? And how can we alter the institutional setting to improve the adjudication process? More research is necessary in this area, says De Alessi.

Professor Pilon's paper is a valuable contribution to understanding the predicament of the post-1936 Court. Without a well-developed theory of moral and constitutional rights, and believing that democratic theory serves to justify more than in fact it does, the Court "abandoned reason to will," allowing the legislature, which is driven always by a shifting political climate, to determine what property and economic rights we have—and to redetermine those rights as conditions change. Those who believe that democratic processes are sufficient to determine and justify our rights, including many of today's conservative critics of the Court, have simply not looked closely at democratic theory, Pilon argues. If they would scrutinize that theory, they would see that democratic processes justify very little. In particular, our rights, as the authors of the Declaration of Independence made clear, preexist government; it is not by democratic will that they are justified but by principles of reason—the same principles of reason that the Court must invoke when it reviews legislation to see whether rights are violated by that legislation. Thus, by undercutting democratic theory's overextended claims to establishing legitimacy, Pilon shows that "due process of law" is inescapably substantive. If judges are to properly perform their judicial review, therefore, they must look, in interpreting the broad language of the Constitution, to the substantive, rational theory of rights that tells us more precisely just what our rights are. As Pilon concludes, judges must know their philosophy as well as their law.

Professor Paul illustrates how the Court, by its decisions in *Berman* and *Hawaii*, has all but ended the public-use constraint on governmental takings. She finds the Court's interpretations of the Fifth and Fourteenth Amendments incorrect and inconsistent with the originally intended right to private property. Moreover, the Court's economic logic in *Hawaii* cannot be supported. Judicial deference to

the legislature's quest for popular support has led to the erosion of individual property rights and promises to further erode these rights in the future. Once a precedent for arbitrary redistribution of property is set, there is little protection in the present judicial system—based on the rational-basis test—for limiting legislative abuse. Thus, Paul sees little hope for restoring private property rights unless there is a significant change in judicial thinking, a change that upholds basic constitutional principles.

Professor Barnett adds a new term to the legal lexicon: “judicial pragmativism.” He defines this as “the jurisprudential mean that lies somewhere between the extremes of judicial activism and passivism.” The characteristic feature of judicial pragmativism is that it is a principled approach to the choice between the legislature and the judiciary. Whether the judiciary should strike down a statute or whether it should defer to the legislative will is determined by the principles judicial pragmativists use to evaluate the consequences of these two alternatives. Barnett offers three examples of possible principles: economic efficiency, wealth equalization, and safeguarding individual rights. Depending on which principle is adopted, a pragmativist may be classified as an “efficiency pragmativist,” an “equal-wealth pragmativist,” or a “rights pragmativist.” For the efficiency pragmativist, the choice between the judiciary and the legislature will rest on the expected efficiency of the statute; for the equal-wealth pragmativist, it will depend on whether the statute is expected to create greater wealth equalization; and for the rights pragmativist, the choice will depend on whether the statute protects or impairs individual rights. Barnett concludes that for the rights pragmativist, “judicial activism in pursuit of liberty is no vice; judicial restraint in pursuit of justice is no virtue.”

Professor Rizzo examines the decline of the rule of law in the modern administrative state and explains how a rules-based approach under the common law is policy-neutral compared with a “balancing” approach, based on the subjective evaluation of costs and benefits. He therefore favors a strict liability rule over the use of a negligence standard in tort law. For Rizzo, as for Hayek, the proper function of a legal system is to provide a basis for the emergence of a spontaneous market order, not to balance the interests of conflicting parties by way of cost-benefit analysis. In a world of ignorance and diffused knowledge, the superiority of the principled approach of the common law is evident to Rizzo. A return to a policy-neutral common-law approach to judicial decision making, argues Rizzo, would restore the spontaneous market order, which has been seriously hampered both by the onslaught of the administrative state and

by a judiciary that has lost sight of the principle of *spontaneous order*. Before such a change can be made, however, it is essential that both economists and lawyers acquire the proper understanding of this important principle, says Rizzo.

In their comments on Rizzo's paper, Professors Hanke and Robinson agree that the proper function of the judiciary is to protect private property rights so that individuals can further their own self-interest in a system of private markets. However, both authors express basic disagreements with Rizzo's analysis of the common law. Using the common law of contracts, Hanke argues that the choice of rule and remedy in breach-of-contract cases depends on a balancing of costs and benefits. He criticizes Rizzo for setting up a false dichotomy between rules and cost-benefit analysis. The real problem, says Hanke, which Rizzo fails to consider, is one of finding the "appropriate criteria that should be used to guide cost-benefit analysis."

Robinson basically agrees with Hanke's criticism and raises a key question—one that is at the heart of this volume—namely: "When must individual liberty yield to the demands of order, and vice versa?" Judge-made law cannot, in effect, be policy-neutral, says Robinson, because no common law judge can avoid making cost-benefit comparisons in his subjective evaluation of a particular case. Moreover, "even within a deontological framework, it is necessary to accommodate conflicting rights." Robinson is skeptical of Rizzo's purely formalistic approach to the law and points out that fixed rules do not necessarily promote justice; they must also have the right substance—which again brings us back to the need for a substantive theory of rights and all the questions Pilon addresses in his paper.

Chairman Miller's paper and those of Professors Tollison, Manne, and Rottenberg all deal with the problems inherent in overregulation of economic affairs—and in a judiciary that is unwilling to protect property rights and economic liberties. Property rights theory and public choice theory have pointed to the failure of government in its attempt to regulate the economy. The incentives facing bureaucrats are different from those facing private owners: if individuals within government cannot sell shares of stock in their organization or capture take-home profit for efficient behavior, they will likely have a weaker incentive to promote wealth-increasing activities than under conditions of private ownership.

Miller draws on the principles of property rights theory and public choice to conclude that in setting standards for business practices, self-regulation or voluntary standards are superior to government regulation. Private parties will have a stronger incentive to monitor business practices that enhance profits (and minimize costs) than

would some government agency. The function of government and the Federal Trade Commission here should be to minimize regulation and make sure that self-regulation is not used to restrain trade by suppressing useful information from rivals.

Tollison criticizes the public interest theory of antitrust and uses public choice theory to derive implications for the administration of antitrust laws. In considering antitrust policy, says Tollison, one must look at the constraints facing self-interested policymakers. He is not convinced that "better people make better government." Unless underlying institutions and incentive structures change, we should not expect any significant increase in governmental efficiency to come from putting "better" people in government. Thus Tollison wants to formulate a positive theory of antitrust policy using the public choice-theoretic framework. If we are to arrive at sensible policy decisions in antitrust, we must carefully examine the behavior of decision makers—in this case, enforcement officials—as well as judges and others involved in the antitrust process.

Professors Elzinga and Armentano agree with much of what Tollison says about antitrust policy but criticize him for perhaps placing too much emphasis on the strict utility-maximization paradigm. People and ideas do make a difference within the same institutions—unless, of course, those institutions are already producing "bads." Thus in the case of the Federal Trade Commission, Elzinga shows how different chairmen have made a difference in the enforcement of antitrust policy, including Chairman Miller who endeavored to reduce the FTC's budget. For his part, Armentano thinks that the present antitrust laws interfere with individual choice and therefore with efficiency, in the Hayekian sense of individual plan coordination. Antitrust policy is therefore a "bad" and should be disposed of. Armentano would like to see a more thorough critique of the standard theory of antitrust, which is based on the theory of perfect competition and an end-state notion of efficiency. In its place, he would substitute a theory of market process, which he shows can be reconciled with individual freedom since the competitive market process is based on consent. Tollison, he argues, should have paid more attention to these substantive aspects of antitrust policy.

Manne examines the Security and Exchange Commission's regulation of insider trading and provides a number of arguments, economic and noneconomic, against such regulation. The SEC, even though it has the best of intentions, has not been very effective in monitoring and enforcing its regulatory rules. Moreover, Manne points to the dangers such regulation poses for civil liberties. He sees insider trading as a "victimless crime" for which no government policing is

warranted. In a competitive securities market, says Manne, such regulation would result in an inefficient use of information and rent-seeking activity. He therefore favors deregulating the SEC's insider trading program.

In commenting on Manne's paper, Professor Kripke, a former attorney with the SEC, argues that overregulation should be avoided. Nevertheless, he thinks that Manne's main point—that "nonpublic information is a corporate asset"—is wrong and that the SEC does provide a socially useful function in its regulation of insider trading. If insider information is properly defined, in a narrow rather than a broad sense, then its regulation will ensure fairness in securities trading and will benefit the public. If some efficiency is sacrificed to this goal, so be it, he concludes; efficiency is not the sole goal of the government. In effect, Kripke takes a public interest approach to government and is willing to tolerate some inefficiency if the end result is an increase in the public's confidence in the securities markets.

Kripke sees Manne's insider trading thesis as a reflection of "what is wrong with much conservative economic thinking." He criticizes the assumption that "man is a single-faceted individual, engaged solely in maximizing personal financial gain." This narrow vision, says Kripke, leads conservatives to ignore the real reason for regulating insider trading, namely, to protect the public. Kripke does not accept the conservatives' call for self-regulation of insider trading. He thinks such an argument naive and not a viable alternative to SEC regulation. Kripke also criticizes conservative economists for failing to consider the entire network of regulations when calling for the reform of insider trading.

In the final paper of this volume, Rottenberg uses the law of creditor remedies to demonstrate that often when judges try to do good they end up doing harm because of faulty economic reasoning. He examines alternative rules for creditor-remedy law from a property rights perspective and uses a price-theoretic methodology to derive the implications of alternative remedies for efficient economic behavior. He concludes that the judge's role should be to enforce contracts and thus to protect private property rights. When judges do this they provide a stable institutional environment for the performance of contractual obligations. Under such a regime, contractual expectations can be satisfied with confidence and there is an efficient allocation of resources. When judges fail in this role and interfere with consensual-contractual terms, they upset normal expectations and impose additional costs on the trading parties. Insofar as contractual terms differ from those reached by consent, the allocation of

resources differs from the efficient market-determined pattern, and the contractual parties are made worse off compared with consensual transactions. Thus judges need to understand the impact of alternative creditor remedies on incentives and individual behavior. If they do not, they will err by intervening when, in fact, the existing consensual arrangement is superior to the judge-enforced terms. This is a case of what Rottenberg calls “mistaken judicial activism.” We can minimize this, says Rottenberg, by allowing the market to determine the terms of contract and the optimal creditor remedies.

The Court’s actual performance in the area of creditor remedy law has fluctuated, from mistaken judicial activism to the present creditor-remedy rule approximating what Professor Goetz, who discusses Rottenberg’s paper, calls a “Type B” contract. Under this agreement no prior pre-possession hearing is required, but the debtor may require a “prompt post-repossession hearing.” In commenting on Rottenberg, Goetz suggests that the Type B contract is optimal and probably would not have been arrived at via the market process. Thus Goetz thinks that the Court’s performance in this area has not been as dismal as Rottenberg’s paper implies.

## The Return to Principle and Reason

The papers in this volume raise many important questions, but perhaps the most important is this: If the judiciary fails to place the same emphasis on protecting property rights and economic liberties that it places on protecting “fundamental liberties,” who then will protect those fundamental rights? We may hope with Judge Scalia that “logic will out,” but can we afford to wait for a “constitutional ethos of economic liberty” to develop in the electorate? (And is it realistic to wait—once we recognize, as did the Framers, that the incentives that drive the legislature argue against the appearance of such an ethos in that branch?) Is it not the Court’s duty to uphold constitutional principles, including the right to property? If the Court does not fulfill this obligation, is it not also failing to safeguard what Madison called a person’s “property in his rights”?

If judges become instruments, even if by default, for the redistributivist state, they become pseudo-judges. As Hayek says, “a socialist judge would really be a contradiction in terms; for his persuasion must prevent him from applying only those general principles which underlie a spontaneous order of actions, and lead him to take into account considerations which have nothing to do with the justice of individual conduct. . . . [Thus] he could not act as a judge on socialist principles” (1982, chap. 5, p. 121). In other words, the only legitimate



function of a judge is to preserve the spontaneous market order and thus to protect private property rights. Consequently, a “judge” engaged in the political activity of redistributing property would be acting contrary to the very meaning of the term.

If judges defer to the popular will and to the special interests that invariably determine that will—that is, if judges do not perform their proper function—then popular sentiment rather than reason will determine our “rights.” This of course opens the door to all kinds of redistributivist schemes and to the attenuation of our basic rights to property and contract. Scalia cites this danger in supporting the Court’s reluctance to apply substantive due process in reviewing economic and social legislation. He wants to change the constitutional ethos of the electorate before using judicial review to protect property rights and economic liberties. Epstein reminds us, however, that there is an even greater danger in Scalia’s judicial restraint approach: the danger that the legislature will fail to come to its senses and will be driven by special-interest groups to attenuate our property rights and economic liberties even further. The Framers understood this danger and therefore thought it judicious for the Court to be the final protector of what they considered our fundamental property right—the right to what Pilon calls “private sovereignty.” The Framers did not set up a false dichotomy between economic and personal freedoms; nor did they intend the judiciary to do so, as Siegan has demonstrated.

Insofar as the judiciary abandons the protection of property and the freedom of contract, it will encourage further legislative activism. Expectations will be generated that encourage special-interest groups to use the legislature for furthering their own ends at the expense of the individuals who constitute the rest of society. The Framers warned against this politicization of the marketplace and intended the Constitution and the judiciary to prevent factions from replacing the rule of law (in Hayek’s sense of the “law of liberty”). The legislature cannot be trusted to protect our property rights, given the political nature of that institution and of a democratic process driven by majority rule. Siegan has shown that economic regulation has increased neither efficiency nor freedom. Indeed, its interference with the competitive market process and with consensual transactions has been the major cause of plan discoordination and hence of the inefficient allocation of resources.

A return to principle and reason, or to what Bastiat called “the law of justice,” in reviewing economic and social legislation would restore the stability necessary for a spontaneous market order. This seems to be the basic message of the majority of the papers in this volume. The change to a new judicial regime in which property and economic

liberties are afforded the same protections as other fundamental rights no doubt must be preceded by two conditions: (1) an increased understanding of the interrelationship of private property rights, incentives affecting the use of resources, and the resulting behavior of economic agents; and (2) an understanding of the moral legitimacy of private property and freedom of contract, which can be obtained only by developing the foundations of the theory of moral rights.

The developments in property rights theory and the theory of public choice offer considerable hope on the first front, while the development of a rational foundation for the theory of rights offers considerable encouragement on the second front. In generating a constitutional ethos that upholds the right to property, it is also important to revive the arguments made by Madison and Bastiat, for our intellectual heritage is an essential element in creating a solid framework for economic liberties.

If the courts do not understand the nature of a spontaneous market order and the essential function of private property in creating such an order, or if they do not understand the theoretical foundations of a moral order, they are unlikely to adequately protect property rights, even if they can be convinced that it is their duty to do so. In this sense, Scalia's call for a "constitutional ethos of economic liberty" must be taken seriously. The papers in this volume help lay the groundwork for a return to principle and reason in the treatment of economic liberties.

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# ECONOMIC LIBERTIES AND THE CONSTITUTION: PROTECTION AT THE STATE LEVEL

*Bernard H. Siegan*

## I. Introduction

In terms of protecting personal liberty, no provision of the Constitution is more important than the second sentence of the Fourteenth Amendment's Section 1, which states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>1</sup>

The importance of this sentence derives from the fact that there are few other provisions in the Constitution that protect citizens or other persons against violation of their rights by the states. The Bill of Rights, for example, applies only to the federal government.<sup>2</sup> Were there no Fourteenth Amendment, such commonly accepted liberties as those of speech, press, religion, and property might not be guaranteed against infringement by the states. Because most efforts to limit individual or corporate activity occur at the state or local levels, Section 1 of the Fourteenth Amendment likely is involved in more litigation than any other provision of the Constitution.

The author of the above-quoted provision was Rep. John Bingham of Ohio (described by Justice Black as "the Madison of the first section of the Fourteenth Amendment"<sup>3</sup>), who explained to his colleagues in the debates on the framing of the amendment that it

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<sup>1</sup>U.S. Constitution.

<sup>2</sup>*Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

<sup>3</sup>*Adamson v. California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting).