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Book Review (reviewing Bernard Siegan, Economic Liberties and the Constitution (1980))

Jonathan Van Patten, *University of South Dakota School of Law*

ECONOMIC LIBERTIES AND THE CONSTITUTION. By Bernard H. Siegan. Chicago, Ill.: University of Chicago Press. 1980. Pp. 383. \$19.50.

JONATHAN K. VAN PATTEN*

If the American Revolution can be characterized as a democratic revolution, it is due in no small part to the Founders' declaration that all men are created equal and that government derives its just powers from the consent of the governed. By this declaration, the Founders rejected the example of aristocratic Europe and sought instead to establish a regime upon principles of liberty and equality. This reflected their belief that the regime could be guided by these principles and not simply by tradition. They presumed that action could be guided by choice, not dictated by circumstances. To be guided by choice, rather than compelled by circumstance, requires citizens to make judgments in light of both the principles of the regime and the necessities which face it. The Virginia Declaration of Rights (1776) stated the matter as follows:

That no free Government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.¹

Thus, preservation of free government requires both attention to circumstance and a frequent recurrence to fundamental principles.

The recurrence to fundamental principles today, however, is marked by strong disagreement over what exactly are the fundamental principles of the regime. This disagreement is not a quibbling over details. One can find scholarly accounts describing the American founding as Lockean,² Hobbesian,³ or Burkean,⁴ as a product of the Scottish Enlightenment,⁵ as a consequence of the ideology picked up from the ancient Greeks and Romans, the French, and the English,⁶ as a triumph of the propertied interests over the ordinary populace,⁷ as basically racist because of the institution of slavery,⁸ and as simply a continuation of the English regime.⁹ There is even a recent

* B.A. 1970, University of California at Los Angeles; J.D. 1973, University of California at Los Angeles. Associate Professor of Law, University of South Dakota.

1. 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 236 (1971).

2. See C. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1922).

3. See G. MACE, *LOCKE, HOBBS, AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF THE AMERICAN POLITICAL HERITAGE* (1979).

4. See R. KIRK, *THE ROOTS OF AMERICAN ORDER* (1974).

5. See G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978).

6. See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

7. See M. PARENTI, *DEMOCRACY FOR THE FEW* (3d ed. 1980).

8. See A.L. HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD* (1978).

9. See M. BRADFORD, *A BETTER GUIDE THAN REASON: STUDIES IN THE AMERICAN REVOLUTION* (1979).

account which argues that the founding had virtually no substantive principles, only a commitment to an open-ended democratic process.¹⁰ In view of these widely disparate accounts, is it still useful to insist upon a frequent recurrence to fundamental principles? Some would answer in the negative because, in their view, the principles of the founding are irrelevant for today's problems¹¹ or, worse, essentially corrupt.¹²

In *Economic Liberties and the Constitution*, Professor Bernard Siegan states his belief that it is still useful to look to founding principles. First, these principles can teach us about current political problems:

Basically, the Constitution speaks to the general political condition of the human species—a condition that has changed little if at all since the eighteenth century. The Framers' major concerns about the distribution, excesses, and abuses of political power are as pressing today as they were two hundred years ago. Their desire to secure individual liberties remains as compelling a concern as ever.¹³

Second, the Constitution, which embodies these principles, is the fundamental social contract and should be followed until altered or abolished.¹⁴ The concept of the rule of law requires us to observe the written words of the Constitution to the maximum degree possible.¹⁵

What are the fundamental principles embodied in the Constitution? Siegan argues that the dominant political ideology at the founding was predicated on fear and distrust of government.¹⁶ Thus, Siegan states:

[L]ibertarian ideas were prominent and influential during the time when the United States Constitution was drafted and ratified. It is evident from the ratification debates that the protection of the individual from government was then the predominant political concern.¹⁷

The principal right to be protected from government interference was the right of property.¹⁸ In this regard, Siegan appears to be in agreement with the thesis of Charles Beard that the Constitution was designed primarily to protect the interests of property owners.¹⁹ However, while Beard thought

10. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Professor Ely noted that the Constitution did contain some "substantive values" but minimized their importance with this comment: "But they're an odd assortment, the understandable products of particular historical circumstances—guns, religion, contract, and so on—and in any event they are few and far between." *Id.* at 101.

11. See, e.g., R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 16-17 (1948).

12. Professor Parenti contends that the founding was fundamentally flawed by triumph of propertied interests over the ordinary populace. See *supra* note 7; Parenti, *The Constitution as an Elitist Document*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* (R. Goldwin & W. Schambra eds. 1980).

13. B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 12 (1980) [hereinafter cited as *ECONOMIC LIBERTIES*].

14. *Id.* at 35-37.

15. *Id.* at 13.

16. *Id.* at 27.

17. *Id.* at 28.

18. *Id.* at 30.

19. See C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

this diminished the reputation of the Founders, Siegan believes that protection of property rights is the firmest ground for the protection of all liberties.²⁰

Siegan argues that the Framers of the Constitution intended the judiciary to be the chief protector of property rights from the excesses of the legislature. "Judicial review is in fact intimately associated with protecting property rights."²¹ This view of the Framers' perspective on property and judicial protection was supported by Justice William Paterson²² in a circuit opinion:

[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man. . . . The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice and moral rectitude²³

Justice Paterson's view was shared by the other members of the Supreme Court and thus the Court served as an important institutional guardian of property rights.²⁴ Siegan says this perspective was true to the original intent of the Constitution.²⁵

The account of the American founding presented by Siegan is one of a successful revolution brought about by sober-minded men whose foremost concern was the protection of property rights. He describes these men as "commercial republicans."²⁶ As such, the account gives no hint of what Abraham Lincoln portrayed as the tragic nature of American politics.²⁷ One

20. ECONOMIC LIBERTIES, *supra* note 13, at 15, 32-33, 98.

21. *Id.* at 32.

22. Justice Paterson was a member of the New Jersey delegation to the Constitutional Convention of 1787. 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 557 (rev. ed. 1966). He was appointed to the United States Supreme Court in 1793 by President Washington.

23. ECONOMIC LIBERTIES, *supra* note 13, at 32 (quoting Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795)).

24. See, e.g., Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

25. ECONOMIC LIBERTIES, *supra* note 13, at 10-11, 32.

26. *Id.* at 104.

27. See, e.g., A. LINCOLN, *Second Inaugural Address*, in 2 ABRAHAM LINCOLN: COMPLETE WORKS 656-57 (J. Nicolay & J. Hay eds. 1894):

On the occasion corresponding to this four years ago, all thoughts were anxiously directed to an impending civil war. All dreaded it—all sought to avert it. . . . Both parties deprecated war; but one of them would make war rather than let the nation survive; and the other would accept war rather than let it perish. And the war came.

. . . Neither party expected for the war the magnitude or the duration which it has already attained. Neither anticipated that the cause of the conflict might cease with, or even before, the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible, and pray to the same God; and each invokes his aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces; but let us judge not, that we be not judged. The prayers of both could not be answered—that of neither has been answered fully.

. . . Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was

can see the omission in the following passage by Siegan:

For the Framers the most fundamental of all rights were those which protect individuals from death or incarceration at the will of the state, and an owner of real or personal property from confiscation. These are the liberties of person and property and the only ones regarded as sufficiently important by the Framers to protect specifically in the text of the original Constitution. These liberties constitute the three absolute rights of life, liberty, and property proclaimed by Blackstone.²⁸

The specific protections afforded in the *original* Constitution are, for life and liberty, the bill of attainder clause, and, for property, the ex post facto and impairment of contracts clauses.²⁹ It should be noted with respect to the protection of property that these textual provisions are not terribly explicit. The ex post facto clause in fact was held early on to apply only to criminal law cases.³⁰ The impairment of contracts clause was held to apply only to retroactive laws.³¹ In addition, it is clear that the specific reference in the fifth amendment to life, liberty, and property is more relevant to the problem of government and property rights.³² The rights of persons and property are not absolute under the fifth amendment. Government may deprive persons of life, liberty, or property, as long as it affords due process. More importantly, even if, as Siegan claims, the ex post facto and impairment of contract provisions are specific protections of property interests, they are not the only ones. Siegan fails to mention that the original Constitution also protected property rights in slaves by guaranteeing the importation of slaves until 1808 and by ensuring that any fugitive slave would be returned to his or her rightful owner.³³ To talk about the Framers' protection of personal liberty and property rights without mentioning that persons could be property under the Constitution is a grievous omission indeed.

The men who successfully guided the break from England and who established institutional government hoped that the regime would be decisively influenced by the principles of the Declaration of Independence. These men, however, were faced with the circumstances of slavery at home and potential war from abroad. They chose to defend against foreign enemies—both real and threatened. The price of this defense was the toleration of slavery. They struggled, however, to bring the regime in line with its

said three thousand years ago, so still it must be said, "The judgments of the Lord are true and righteous altogether."

Id. at 657.

28. ECONOMIC LIBERTIES, *supra* note 13, at 98.

29. U.S. CONST., art. I, § 9, cl. 3, § 10, cl. 1.

30. *See* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394 (1798). Siegan argues, however, that this holding was contrary to the original intent. ECONOMIC LIBERTIES, *supra* note 13, at 67-79.

31. *See* *Ogden v. Sanders*, 25 U.S. (12 Wheat.) 213 (1827). Siegan contends that *Ogden* was contrary to the original intent. ECONOMIC LIBERTIES, *supra* note 13, at 62-66.

32. Two canons of construction support this proposition. First, the specific governs over the general. C. ANTIEAU, CONSTITUTIONAL CONSTRUCTION 27 (1982). The fifth amendment due process clause and taking clause are more specific in their reference to property than are the ex post facto and impairment of contracts clauses. Second, the later amendment governs over the earlier provision with respect to any conflict between the two. *Id.* at 28.

33. U.S. CONST., art. I, § 9, cl. 1, art. IV, § 2, cl. 3.

stated principles by attempting to put slavery on its ultimate course of extinction.³⁴ The decision to tolerate slavery in a regime dedicated to the proposition that all men are created equal proved to be a tragic one for the country. The moral debt accumulated since the American founding could only be met by heavy payments from both sides in the Civil War. There may still be payments due today on this debt.

From the tragic nature of American politics, one can see that a free society is not achieved by a simple declaration. It must be strived for, over many generations, through resolve and sacrifice. Freedom is not merely the absence of restraint; it is the product of a society which has learned to value human dignity. The libertarian ideas advocated by Professor Siegan are a necessary but not a sufficient condition of freedom. The system cannot long endure on fear and distrust of government alone. There must also be a genuine regard for fellow members of the political community. This is possible in a society which believes that all people are created equal.

An understanding of the American founding serves to put property rights in perspective. The Founders considered these rights to be important, but never intended them to be absolute. The power of Congress to tax and spend for the common defense and general welfare, the ability of government to deprive people of property as long as due process is afforded or to take property if just compensation is given, and the reserved power of state government under the tenth amendment to legislate for the health, safety, welfare, and morals of its citizenry, all counsel moderation with respect to property rights. Moreover, the morally equivocal position of slaves under the Constitution³⁵ makes Siegan's position on property rights equivocal as well.

The real purpose of Professor Siegan's book, however, is not to urge an absolute defense of property rights. Rather, he uses the Founders' defense of property rights to show how far the Supreme Court has departed from the original intent (as he sees it) and to urge the return to a more moderate course. In essence, Siegan's primary complaint is that the Supreme Court since 1937 has abdicated its responsibility to provide meaningful review of social and economic legislation.³⁶ *Economic Liberties and the Constitution* is in fact an extended attack on *United States v. Carolene Products Co.*³⁷ and its famous footnote four.³⁸ Siegan recommends that the courts abandon the rational basis test which he contends (rightfully) is no test at all.³⁹ Instead,

34. See Storing, *Slavery and the Moral Foundations of the American Republic*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* (R. Horwitz 2d ed. 1979).

35. I think "equivocal" is the correct description. Under the Constitution, slaves are described as persons but treated as property. See U.S. CONST. art. I, § 2, cl. 3, art. I, § 9, cl. 1, art. IV, § 2, cl. 3.

36. See, e.g., *ECONOMIC LIBERTIES*, *supra* note 13, at 21-23.

37. 304 U.S. 144 (1938).

38. By contrast, John Ely's recent book, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) is actually an extended commentary and defense of *Carolene Products'* footnote four.

39. *ECONOMIC LIBERTIES*, *supra* note 13, at 191-203.

he urges the courts to return to the standard employed in *Lochner v. New York*,⁴⁰ where the court required a direct relation between the end sought and the means used.⁴¹ This would restore the judiciary as a meaningful check against legislative abuse of property rights.⁴²

Probably the most interesting point that Siegan makes about current judicial practice is that a dichotomy results from the recognition of certain fundamental liberties and not others.⁴³ The post-*Carolene Products* Court has sustained general social and economic legislation which has a rational basis, but it has only sustained legislation which touches the exercise of fundamental constitutional rights or utilizes suspect classifications when the state has shown a compelling interest. Although Siegan believes it would be useful to view producers and sellers as discrete and insular minorities,⁴⁴ his main point is that there is no principled distinction between property rights and other fundamental constitutional rights.⁴⁵ Entrepreneurial and occupational freedom ought to stand on equal footing with the freedom to speak, associate, worship, travel, vote and with the rights of due process and privacy. Siegan appears to attribute the dichotomy between property rights and the other constitutional rights to "New Deal politics," where the business community was regarded as the "enemy."⁴⁶ He also appears to attribute the dichotomy to the self-interest of intellectuals who are more concerned with "conceptual rights" than with "material rights."⁴⁷

In practice, the dichotomy between property rights and other constitutional rights is not all that clear because certain property rights are protected if connected, even tangentially, with a fundamental constitutional right. For example, in *Linmark Associates v. Township of Willingboro*⁴⁸ a zoning ordinance prohibited the posting of "For Sale" or "Sold" signs on property. Ordinarily, zoning ordinances enacted for the preservation of community housing quality are routinely sustained by the courts. This ordinance was struck down, however, because it restricted the communication of information. Likewise, the regulation of occupations,⁴⁹ professions,⁵⁰ and the use of property⁵¹ may be subject to scrutiny if other constitutional rights are implicated. Siegan suggests that the Supreme Court should abandon this backdoor approach and recognize property rights generally as deserving of judicial protection.⁵² The protection need not be in the form of strict scrutiny of social and economic legislation. A review that requires a close and substan-

40. 198 U.S. 45 (1905).

41. ECONOMIC LIBERTIES, *supra* note 13, at 113-14, 203.

42. *Id.* at 265.

43. *Id.* at 248-64.

44. *Id.* at 188.

45. *Id.* at 223, 245-46, 251.

46. *Id.* at 189.

47. *Id.* at 251-52.

48. 431 U.S. 85 (1977).

49. *See* *Craig v. Boren*, 429 U.S. 190 (1976).

50. *See* *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

51. *See* *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

52. ECONOMIC LIBERTIES, *supra* note 13, at 223-46.

tial relation between the end sought and the means used would protect the interests of property owners without jeopardizing the allocation of legislative powers to the legislature and judicial powers to the judiciary.

Siegan believes the courts are not compelled by the Constitution, nor by history, nor by present circumstance to routinely uphold social and economic legislation against constitutional attack. They are not compelled by present circumstances because such regulation, he says, causes more harm than good; in short, regulation does not work. Siegan cites several recent studies (many of them published in the University of Chicago's *Journal of Law and Economics*) showing the ill effects of regulation. Siegan would welcome deregulation of most, if not all, industries and enterprises.⁵³ We should be "free to choose," in the words of one of Siegan's heroes.⁵⁴

Freedom cannot be achieved, however, through a simple act of will. Prudent political judgment must also take into account circumstance. It would probably be a mistake to attempt to deregulate overnight. A moderate course will seek to implement principles in view of present circumstances. We should not refrain from the pursuit of liberty, but our pursuit should be tempered by our experience, rather than necessitated by our logic.

53. *Id.* at 301-03.

54. See M. FRIEDMAN & R. FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1979).