

LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT. Ellen Frankel Paul¹ and Howard Dickman,² eds. Albany: State Univ. of New York Press. 1990. Pp. vii, 340. Cloth, \$65.50; paper, \$21.95.

JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER v. NEW YORK. By Paul Kens.³ Lawrence, KS.: Univ. Press of Kansas. 1990. Pp. 232. Cloth, \$29.95.

*Herbert Hovenkamp*⁴

These two volumes offer new perspectives on a familiar topic in constitutional history and theory. The first volume is a collection of essays about the proper scope of constitutional protection of economic liberties. The second is a long-needed historical study of the decision that has been treated as epitomizing the Supreme Court's position on these rights during the Gilded Age and Progressive Era: *Lochner v. New York* (1905).

The essays in the Paul-Dickman volume are well balanced, with perspectives from right, left, and center—and, pleasantly, with authors who actually engage one another in debate. James M. Buchanan's essay on "The Contractarian Logic of Classical Liberalism" states what has become a kind of constitutional orthodoxy for the judicial activist new right: the property and due process clauses of the Constitution should be interpreted to protect economic rights, and these rights are best given effect in a regime of free exchange. Voluntary exchanges are a product of unanimous consent, and injure no one provided there are no third party effects. This is the kind of regime, Buchanan argues, that people operating behind a Rawlsian veil of ignorance would adopt, for it maximizes both efficiency and human freedom. This suggests to Buchanan that such institutions as labor unions are bad (he does not exactly say that they are unconstitutional) because they prevent laborers from bargaining individually for wages and force them to accept the

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bargain of the collective. In addition, nothing forces the union members to share their gains with those laborers who become unemployed as a result of the general wage increase. People operating behind a veil of ignorance, Buchanan asserts, would not select such a bargaining regime. Buchanan does not address the fact that business firms are largely collectives, formally treated as persons by the law of corporations. A labor union could organize as a corporation, with each shareholder pledged to sell her labor to the corporation, which would in turn sell it to any employer at a uniform price. Presumably, Buchanan would proclaim such an arrangement a subterfuge. But the individual stockholders in a large manufacturing corporation are in an analogous position on the other side of the table.

Mark Tushnet follows with a radically different perspective on the relationship between property and the Constitution. He begins with a point that has been made before but is worth making again: the theory of regulatory "capture," now the darling of the public choice schools, was really a creation of the Left, not the Right. Further, not even the Constitution itself is exempt. In the case of the Constitution, the theory of regulatory capture derives, of course, from Charles Beard's controversial *Economic Interpretation of the Constitution* (1913). The citation to Beard suggests an important point that Tushnet himself fails to make: any argument that one should use the Constitution to protect property owners from legislatures captured by special interest groups must consider that the Constitution itself was the product of a kind of capture. The reason we have the contract clause and the takings clause in the first place, Beard argued, was that the Constitutional Convention was dominated by property holders and creditors rather than the unpropertied and debtors. Owners of securities from public debts incurred during and after the Revolution and private creditors who feared state debtor relief laws wanted strong protection of both contract and property. They controlled the drafting and ratification processes. The unpropertied, by contrast, were not permitted to vote by the ratifying states and generally were not qualified to be delegates or to participate in the ratifying conventions. Those who would interpret special interest legislation narrowly should practice what they preach when they interpret the Constitution itself.

Lino Graglia's essay attacking "Judicial Activism of the Right" is by far the angriest in this volume, but it is also compelling. Graglia has no respect for Warren Era liberals, particularly Justice Brennan, who freely used their own ideology rather than the Constitution itself as the source of constitutional rights. But con-

servative noninterpretivists such as Richard Epstein are equally wrongheaded, he argues, when they rewrite the contract clause, the takings clause, and other clauses in order to protect a more expansive concept of economic rights from legislative encroachment. On judicial review, Graglia's position is most like that of Holmes or James Bradley Thayer,⁵ who would invalidate legislation only where the constitutional language was clearly inconsistent with the language of the statute or rule under consideration.

Stephen Macedo disagrees with both Graglia and Epstein in "Economic Liberties and the Future of Constitutional Self-Government." Unlike Graglia, he favors relatively expansive judicial review for the protection of property and contract rights. But he faults Epstein's analysis as too explicitly economic, and "only vaguely derived" from the text of the Constitution. More importantly, Macedo argues, Epstein devotes his attention to a few clauses of the Constitution (commerce, contract, takings) and never really attempts to interpret the text as a whole. "[O]nce one begins interpreting parts of the Constitution in terms of the whole, including its broad language and implicit ends and purposes, it becomes harder to find bright lines and clear rules." It particularly becomes "difficult to justify the blanket judgment" of Epstein's book on *Takings*⁶ "that all transfers are, in principle, unconstitutional."

Frank Michelman then argues in "Tutelary Jurisprudence and Constitutional Property" that the constitutional perspective on property rights is far more malleable and indeterminate than the Right would have us believe. Credible arguments can be made for both a republican constitutional vision, which looks to the popular will, and a liberal vision, which regards persons as having absolute, or "pre-political," rights. Likewise, the line between traditional "negative" property rights, such as the right to exclude the world or to use one's property for one's own benefit, and newer "positive" rights, such as welfare entitlements, is not demarcated with any precision. "[O]ne simply can't, at least not while thinking or talking as an insider to American constitutionalism, quite abandon either pole of the liberal/republican axis." Even if one could, that "would leave unresolved the problem of negative-vs.-affirmative rights."

Epstein responds to Graglia, Macedo, and Michelman in "Takings: Of Maginot Lines and Constitutional Compromises." But the brunt of his attack goes against Graglia, whom he accuses of criti-

5. E.g., Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

6. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

cizing all common uses of judicial review without offering any substitute theory of his own. He thinks it naive of Graglia to argue that one must conduct judicial review without the benefit of political theory. The plain language of the Constitution simply does not answer every question, and interpretation and theory are necessary to fill in the gaps.

Although Graglia's position is simple, it may be more subtle than Epstein acknowledges. Graglia argued that in those cases where the Constitution's meaning must be "filled in" and more than one interpretation is rational, it is for legislators, not judges, to choose among the interpretations. To be sure Graglia's view would roll back judicial review a century, to the pre-*Lochner* period, but his position was in fact quite respectable for some time in the middle decades of the nineteenth century: the Constitution's more general or hortatory clauses—such as due process, takings, and free exercise—may have many meanings depending on one's ideology. In such cases, Graglia argued, the judge's duty is to permit the legislature to interpret the Constitution.

In a short essay on "Civil Rights and Property Rights," William H. Riker argues in somewhat idiosyncratic fashion that the Supreme Court's elevation of civil rights over property rights is indefensible. In fact, the two kinds of rights have similar origins and functions in classical liberal political theory. Riker's point may be provable, but probably not by the method he chose. Riker simply takes a few examples of rights—free speech as a civil right and airport landing slots as a property right—and provides a brief thumbnail history of each, designed to show that the rights developed through a bargaining process involving self-interested grantors and grantees. But these three pages of history, citing only a few sources, certainly do not prove that "civil and property rights originate in the persistent demands of potential beneficiaries, and in the calculations of granting officials that satisfying petitioners is less costly than resisting them," or that "civil and property rights have historically similar origins." A "public choice" constitutional history remains to be written.

In "The Politics of the New Property: Welfare Rights in Congress and the Courts," R. Shep Melnick argues that although the Court's creation of federal welfare rights, particularly under AFDC, was superficially a result of statutory construction, the Court's interpretations actually related only loosely to the language and congressional intent of those statutes. This explains why the Reagan administration was forced to cut back, in particular by restoring to the states the power to determine eligibility individually.

The final two essays in this volume concern labor. In "Work, Government, and the Constitution: Determining the Proper Allocation of Rights and Power," Thomas R. Haggard traces the history of Supreme Court supervision of the employer-employee relationship for more than a century. Haggard finds his own history to be inconclusive, but observes that the Court seems to have moved from a rather clearly defined natural rights premise during the *Lochner* era at the turn of the century to a much more pragmatic, situational position today. But more importantly, Haggard argues, the Supreme Court has always played super-legislature on the subject of employee rights. The criticisms of the *Lochner*-era Court for substituting its own judgments for those of the legislatures whose statutes it struck down were certainly well founded. But what the Court has done since the New Deal is, in this respect no different. Finally, Leo Troy argues in "The Right to Organize Meets the Market" that the New Deal and post-New Deal judicial effort to shift bargaining power toward labor unions has failed, not because of legislation, but because the market itself has deprived the unions of their powerful position. The power of private sector unions has declined substantially since the 1970s. Public sector unions have not generally met the same fate, for public leaders are not "accountable" for higher labor costs in the same way that competitive firms are.

Paul Kens's book on *Lochner* attempts to be a comprehensive history of the famous case. He gives a lively account of working conditions in New York bakeries and of the legislative battle that produced the *Lochner* statute. Perhaps the statute, which prevented bakers from working more than sixty hours weekly or ten hours per day, was special interest legislation. But if so, both houses of the New York legislature were thoroughly captured. The vote in the lower house was 120 to 0 and in the upper house 20 to 0. Kens suggests that perhaps the legislators knew of the statute's health provisions but were unaware of the maximum hours regulations. But this seems most unlikely; the statute is only a little over a page long, and the very first section opens with the words, "No employee shall be required, permitted or suffered to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day." The health regulations all appear in subsequent sections. At least some of the 140 legislators must have glanced at the opening paragraph of the bill they were about to vote on.

Kens's book contains a disappointing discussion of other aspects of the *Lochner* era. The discussion of judicial decisions is

much too simple and pedantic. Most of the intellectual and economic history is a heavily derivative, orthodox Progressive critique. For example, Kens attributes the substantive due process Justices' anti-statist beliefs to Social Darwinism, not dealing with more recent scholarship suggesting first that Social Darwinism was not as ubiquitous a political philosophy as we once thought, and secondly that not only were the Justices not Social Darwinists, most may not have been Darwinians at all. Kens also overstates the rigidity of the substantive due process Justices and does not give them sufficient credit for their great creativity—whatever else it was, *Lochner v. New York* was a highly creative piece of constitutional non-interpretivism. Kens's epilogue includes a quick survey of substantive due process scholarship in the 1980s, but this literature is not well-incorporated into the balance of the text.

Kens concludes by observing that President Franklin D. Roosevelt wanted to obtain support for his New Deal by putting an end to the judicial activism represented by *Lochner* and its progeny. But his own Court turned out to be far more willing to support the New Deal than to end judicial activism. Many of Roosevelt's appointees became enthusiastic supporters of the new wave of activism that began a generation later. In that respect, as many of the essays in the Paul & Dickman book suggest, the clock may never again be turned back. Judges, it seems, are inevitably super-legislators, and economic ideologies are their political parties.

AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS. By Ben M. Crouch¹ and James W. Marquart.² University of Texas Press. 1989. Pp. 304. Cloth, \$27.50.

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This book reports the product of one of those rare occasions when researchers happen to be on site gathering data before a major change in policy and practice is imposed on an organization. One of the authors, Professor Ben Crouch, began a series of studies of Texas prison officers in 1973, worked briefly as a uniformed officer himself, and conducted additional studies during 1979 with the other author, Professor James Marquart, who also worked as a uni-

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