

1994

Book Review: The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence. by Howard Gillman.

Herbert Hovenkamp

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

---

**Recommended Citation**

Hovenkamp, Herbert, "Book Review: The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence. by Howard Gillman." (1994). *Constitutional Commentary*. 408.  
<https://scholarship.law.umn.edu/concomm/408>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

to the increasingly prevalent belief that normative moral judgments are matters simply of personal preference. The problem of moral skepticism, however, runs deep and wide in American culture; it is hardly unique to constitutional theory. For us to move beyond the impasse of contemporary constitutional theory, we must confront the moral predicament of American society in general. We must address the existence and meaning of moral truth in the radically pluralistic, and increasingly polarized, society in which we live. A daunting challenge, to say the least.

**THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE.** By Howard Gillman.<sup>1</sup> Durham, N.C.: Duke University Press. 1993. Pp. x, 317. \$29.95.

*Herbert Hovenkamp*<sup>2</sup>

Gillman's book is another in a long and growing list of titles written in the 1980s and early 1990s designed to illuminate the *Lochner* era in Supreme Court jurisprudence. Gillman is interested mainly in antecedents, beginning with the Founders and focusing heavily on the Jackson period. Like most good recent writing on this subject, Gillman eschews the use of legal "formalism" as an explanatory paradigm. That notion, that the judges were rule-bound lawyers who separated law from policy, explains little and is, in any event, wrong. Substantive due process was driven by policy concerns just as much as landmark twentieth-century decisions such as *Brown v. Board of Education* or *Roe v. Wade*, and the judges who espoused it were a highly creative and energetic group.

Gillman argues that although substantive due process was formalized in American constitutional thought in the 1880s and after, its presence is detectable much earlier than historians have generally realized. Indeed, one can find it as early as the late eighteenth century, and it becomes quite visible already in the second decade of the nineteenth century. As he notes, the great revolution in ideas of free trade that facilitated the rise of the Jacksonian movement and an incipient national market created a corresponding hostility toward parochial state and local regulations that tended to favor hometown businesses at the expense of

---

1. Assistant Professor of Political Science, University of Southern California.  
2. Willie Professor of Law, University of Iowa.

others, or to impose unreasonable burdens on those engaged in various enterprises. The result was that already in the 1810s and 1820s numerous courts began to read “reasonableness” requirements into regulatory provisions that, on their face, seemed to state absolute prohibitions. For example, in 1828, in *Vadine’s Case*,<sup>3</sup> the Supreme Judicial Court of Massachusetts held that a law preventing unlicensed persons from removing waste materials or other filth from dwelling houses must be read to prevent them only if they acted unreasonably in the process.

The essentially Jacksonian origins of Gilded Age substantive due process has been known for some time. For example, those who have studied the work of Thomas M. Cooley, whose treatise on *Constitutional Limitations* (1868)<sup>4</sup> became a manifesto for *Lochner* jurisprudence, have often noted his strongly Jacksonian commitments. But on this point Gillman goes even earlier, tracing the origins of substantive due process to the Jackson era’s market revolution itself.

As Gillman notes, Marshall era “vested rights” jurisprudence, which used the Contract Clause as the most aggressive protector of liberties, took a serious beating during the Jackson era. Indeed, conservatives viewed such Jacksonian decisions as the *Charles River Bridge* case (1837)<sup>5</sup> as emasculating the contract clause. Of course, this was done with good reason: those who could claim “vestedness” as the source of their rights were invariably the privileged who had acquired promises from the sovereign to begin with. Rhetorically, at least, the Jackson movement represented the triumph of those who sought to undermine the concept of privilege.

But the failure of vestedness mandated the substitution of a different source for political liberties—and, in this case, one that was more general, in that it did not depend on the state’s former largesse. One problem with the vested rights doctrine was that the only persons who could claim it were those who had a vested right to begin with. The Jacksonian concept of individual rights was much more universal, to be asserted without regard to earlier grants of largesse from the sovereign. Unfortunately, there was not very much in the pre-Civil War Constitution from which such rights could be inferred. Judges began to find it, Gillman argues, in “an aversion to factional or class politics.” That is to say, substantive due process grew out of a kind of early public

---

3. 6 Pick (23 Mass.) 187 (1828).

4. Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power on the States of the American Union* (Little, Brown, 1868).

5. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

choice theory that was deeply suspicious of the regulatory process, inclined to see it as favoring special interests at the expense of the public, and willing to use judicial power to strike down the resulting legislation even if there was no identifiable clause in the Constitution that forbade the legislation at issue.

The effect of this interpretation is to make the *Lochner* era look much more creative and constructive than reactionary. Probably the most common explanation of *Lochner* other than the "legal formalism" explanation is Holmes's explanation that it was a reactionary period in which conservatives responded to socialism, the labor movement, and Progressive politics by ignoring their concerns and aligning themselves with the propertied interests to which the new movements were opposed. However, the movement began to take on a reactionary cast because the free market principles that it professed were challenged by a Progressive regime whose confidence in the equanimity of the market was very much in doubt. As Gillman puts it, the ideology of substantive due process was fairly inclusive, or egalitarian in the early nineteenth century, but as the market increasingly produced maldistributions of wealth it became increasingly exclusive. In that sense, the "story of the *Lochner* era is a story about judicial fidelity to crumbling foundations, not judicial infidelity to recoverable foundations."

This is a readable book that will enlarge any reader's view of the *Lochner* era, even those who know their constitutional history well. It makes clear that, for all that has been said of the period, there are still worthwhile things to say.

**THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC.** By George W. Carey.<sup>1</sup> Champaign: University of Illinois Press. 1989. Pp. 181. \$22.95.

*Michael P. Zuckert*<sup>2</sup>

George Carey has been publishing essays on *The Federalist* at least since 1976, and therefore his recent book is rather like a nicely aged wine or cheese. The comparison is apt, for the book has the kind of delicacy and sureness of touch we associate with a high quality burgundy: smooth and flavorful, without being assertive, sharp-edged, or flashy. In a word, Carey's is a mature study from which all who are interested in *The Federalist* can learn something.

---

1. Professor of Political Science, Georgetown University.

2. Congdon Professor of Political Science, Carleton College.