

Constitutional Protection of Economic Liberties in Switzerland and the United States

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I. INTRODUCTION

The right to possess property and the opportunity to engage freely in a business, trade, occupation, or profession are among the most

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important liberties of society. Economic liberties are essential for building a prosperous society, and they are essential for securing various other individual liberties. The freedom of the press, for example, is substantially diminished absent the freedom to own a printing press to mass produce a publication. The protection of economic liberties against state interference with individual economic interests, therefore, is fundamental to secure the foundation of an open society.

This Article analyzes the extent to which the federal and state constitutions of Switzerland and the United States protect economic liberties. The focus will be on the freedom to engage in a business, trade, occupation, or profession.¹ The Article first addresses the constitutional provisions which individuals may invoke in defense of their individual economic interests in Switzerland and in the United States. It further briefly examines the extent to which European countries other than Switzerland protect economic interests. Next, the Article will study the Economic Freedom Clause in the Swiss Constitution. A discussion of the protection of economic liberties in the United States, on the federal and state levels, follows. The Article concludes by arguing that the United States Supreme Court should grant greater protection of economic interests than it does under its current legal doctrine.

II. SAFEGUARDING ECONOMIC LIBERTIES IN SWITZERLAND, OTHER EUROPEAN COUNTRIES, AND THE UNITED STATES

The Federal Constitution of Switzerland of 1999² recognizes two fundamental rights that protect economic interests. Article 26 and Article 27 state:³

Art. 26 Right to property

- (1) The right to property is guaranteed.
- (2) Expropriation and restrictions of ownership equivalent to expropriation shall be fully compensated.

Art. 27 Economic Freedom

- (1) Economic freedom is guaranteed.

1. This Article does not examine the protection of property in detail, though the right to property is an important part of an individual's economic liberties.

2. Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18 April 1999, Constitution fédérale de la Confédération suisse du 18 avril 1999, Costituzione federale della Confederazione Svizzera del 18 aprile 1999 [Federal Constitution of the Swiss Confederation of April 18, 1999] [hereinafter BV, CST, COST.]. An official English translation of the Swiss Constitution is available at <http://www.admin.ch/ch/e/rs/c101.html>.

3. The following provisions are quoted according to the official English translation of the Swiss Constitution, *supra* note 2.

- (2) It contains particularly the freedom to choose one's profession, and to enjoy free access to and free exercise of private economic activity.

In a section entitled Powers of the Confederation, the Swiss Constitution sets out principles concerning the economic order. Article 94 reads:

Art. 94 Principles of economic order

- (1) The Confederation and the Cantons shall respect the principle of economic freedom.
- (2) They shall safeguard the interest of the national economy, and together with the private sector of the economy, contribute to the welfare and economic security of the population.
- (3) Within the limits of their powers, they shall strive to create favorable conditions for the private sector of the economy.
- (4) Derogations of the principle of economic freedom, in particular measures against competition shall be allowed only if foreseen by the Federal Constitution or based on cantonal monopolies.

Various Swiss cantons⁴ like Zurich,⁵ Berne,⁶ Lucerne,⁷ Zug,⁸ Neuchâtel,⁹ and Geneva¹⁰ guarantee in their cantonal constitutions the right to property and economic freedom. In general, the canton constitutions provide no additional protection of economic interests than the federal constitution. The Swiss Federal Tribunal (*Bundesgericht, Tribunal fédérale, Tribunale federale*)¹¹ relies therefore solely on the federal constitution to review economic legislation. Hence, the significance of the canton provisions is limited.¹²

The broad Swiss guarantee of economic freedom (*Wirtschaftsfreiheit, liberté économique, libertà economica*) in article 27 is unique in Europe and probably worldwide.¹³ Other than Switzerland, only article

4. The Swiss federal state consists of twenty-three Cantons: Zurich, Berne, Lucerne, Uri, Schwyz, Obwald and Nidwald, Glarus, Zug, Fribourg, Solothurn, Basel-City and Basel-Land, Schaffhausen, Appenzell Outer Rhodes and Appenzell Inner Rhodes, St. Gall, Grisons, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, Geneva and Jura. BV, CST., COST. art. 1. Three of these twenty-three cantons are divided into two half-cantons for historical reasons.

5. ZÜRICH CONST. (1869) § 4 (right to property), § 21 (economic freedom).

6. BERNE CONST. (1993) art. 23 (right to property), art. 24 (economic freedom).

7. LUCERNE CONST. (1875) § 9 (right to property), § 10 (economic freedom).

8. ZUG CONST. (1894) § 11 (right to property), § 13 (economic freedom).

9. NEUCHÂTEL CONST. (2000) art. 25 (right to property), art. 26 (economic freedom).

10. GENEVA CONST. (1847) art. 6 (right to property), art. 9 (economic freedom).

11. The Federal Tribunal is the highest court in Switzerland.

12. Giovanni Biaggini, *Wirtschaftsfreiheit [Economic Freedom]*, in VERFASSUNGSRECHT DER SCHWEIZ [CONSTITUTIONAL LAW OF SWITZERLAND] 779 (D. Thürer, J.-F. Aubert & J. P. Müller eds., 2001). See generally ULRICH HÄFELIN & WALTER HALLER, SCHWEIZERISCHES BUNDESSTAATSRECHT [SWISS FEDERAL CONSTITUTIONAL LAW] 73-74 (5th ed. 2001).

13. HÄFELIN & HALLER, *supra* note 12, at 182; JÖRG PAUL MÜLLER, GRUNDRICHTE IN DER SCHWEIZ [FUNDAMENTAL LAWS IN SWITZERLAND] 633 (3rd ed. 1999); PETER SALADIN,

36 of the Constitution of the Principality of Liechtenstein of 1921 guarantees the freedom of commerce within the limits of the law.¹⁴ Germany's *Grundgesetz* of 1949¹⁵ or the French Constitution of 1958¹⁶ which refers in its preamble to the "*Déclaration des droits de l'homme et du citoyen*" of 1789, for instance, lack a comparable provision. Germany's *Grundgesetz*, however, guarantees one aspect of the Swiss Economic Freedom Clause provided in article 27, section 2, of the Swiss Constitution, namely the right to choose an occupation. Article 12, section 1, of the *Grundgesetz* declares:

All Germans have the right to freely choose their occupation, their place of work, and their place of study or training. The practice of an occupation can be regulated by or pursuant to a statute.

The newly adopted Charter of fundamental rights of the European Union of 2000¹⁷ also guarantees the freedom to choose an occupation and the right to engage in work as well as the freedom to conduct a business. Article 15 and Article 16 provide:

Art. 15 Freedom to choose an occupation and right to engage in work

- (1) Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
- (2) Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
- (3) Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Art. 16 Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

The United States Constitution does not embody an Economic Freedom Clause as Switzerland does, but it contains several provisions

GRUNDRECHTE IM WANDEL [CHANGE OF FUNDAMENTAL LAWS] 212 (3rd ed. 1982); Christoph Winzeler, *Die Wirtschaftsfreiheit in der schweizerischen Verfassungsgeschichte des 19. und 20. Jahrhunderts* [The History of the Swiss Economic Freedom Clause in the 19th and 20th century], in ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT (ZSR), Neue Folge, 113/I, 409-32, 410 (1994).

14. Verfassung des Fürstentums Liechtenstein vom 5. Oktober 1921 [Constitution of the Principality of Liechtenstein of October 5, 1921].

15. Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 [Constitution for the Federal Republic of Germany of May 23, 1949].

16. Constitution de la Cinquième République du 4 octobre 1958 (Constitution of the Fifth Republic of October 4, 1958).

17. Charter of Fundamental Rights of the European Union of December 7, 2000, 2000 O.J. (C 364) 1. The Charter, proclaimed by the European Parliament, the Council, and the Commission, is, however, not legally binding.

which prohibit the infringement of individual economic interests.¹⁸ The Fifth Amendment's Takings Clause protects property. Similar to article 26 of the Swiss Constitution, it states that "nor shall private property be taken for public use, without just compensation." In addition to the Takings Clause, the United States Constitution provides other clauses which might be invoked in defense of individual economic interests: the Due Process Clause, the Equal Protection Clause, the Commerce Clause, and the Contract Clause. The Fifth and Fourteenth Amendments' Due Process Clause prohibits the federal and state governments from depriving an individual "of life, liberty or property without due process of law." The Fourteenth Amendment's Equal Protection Clause declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Fifth Amendment's Due Process Clause applies the same limitation to the federal government.¹⁹ The Commerce Clause in article I, section 8, clause 3, authorizes Congress to regulate interstate commerce. The Contracts Clause found in article I, section 10, clause 1, finally provides that "[n]o State shall . . . pass any Law impairing the Obligation of Contracts."

Economic interests are further protected by the U.S. state constitutions.²⁰ State courts rely on their state due process and equal protection clauses to review economic legislation.

III. SWITZERLAND'S ECONOMIC FREEDOM CLAUSE

A. *History*

The origin of Switzerland's Economic Freedom Clause dates back to the French revolution of 1789 and the French occupation of Switzerland from 1798 to 1803. The idea of guaranteeing economic freedom as a fundamental right is based on natural law and economic theories.²¹

In France, the freedom to choose an occupation and engage in commerce was provided by a statute of March 2-17, 1791. The statute abolished the existing traditional system of guilds. In 1798, French troops invaded Switzerland and imposed the Helvetic Republic. The

18. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 449 (2001); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 710 (4th ed. 2001); *see generally Report to the Attorney General on Economic Liberties Protected by the Constitution* (1988) [hereinafter *Report*].

19. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

20. *See infra* notes 90-100 and accompanying text.

21. SALADIN, *supra* note 13, at 216; Winzeler, *supra* note 13, at 411.

newly installed Swiss government followed the French example and abolished the system of guilds. A statute passed on October 19, 1798, guaranteed the freedom of trade and commerce in Switzerland. After the collapse of the Helvetic Republic in 1803, the old system of guilds was reestablished. This status remained unchanged until 1874.²²

In 1848, Switzerland became the first federal state in Europe. The Constitution of 1848 did not contain a guarantee of economic freedom. Switzerland was not prepared to adopt such a provision until it revised its constitution in 1874. The goal of the newly adopted Economic Freedom Clause in article 31 was to liberalize the economy and to set aside the existing economic restrictions, especially the trade barriers between the cantons.²³ Today, the new Federal Constitution of 1999 guarantees the economic freedom in article 27 and article 94.²⁴

B. Function

Switzerland's Economic Freedom Clause fulfills three different functions: an institutional, a federal, and an individual right function.

1. Institutional Function

The Economic Freedom Clause incorporates Switzerland's choice of a free market economic system.²⁵ The federal government is allowed to restrict the free market economic system only if the constitution itself permits the restriction (so-called "*Verfassungsvorbehalt*").²⁶ Thus, derogations from the principle of a free market economic system require a basis in the federal constitution. The Constitution may be revised with the approval of the majority of the Swiss people and the cantons.²⁷ The Economic Freedom Clause differs in this respect from the other fundamental rights guaranteed by the Swiss Constitution which may be

22. For a brief history of the Helvetic Republic and the Swiss Constitution of 1848, see JAMES H. HUTSON, *THE SISTER REPUBLICS. SWITZERLAND AND THE UNITED STATES FROM 1776 TO THE PRESENT* 32-41 (1991).

23. Biaggini, *supra* note 12, at 779-80; HÄFELIN & HALLER, *supra* note 12, at 180; MÜLLER, *supra* note 13, at 632, 640. For a comprehensive history of the Swiss Economic Freedom Clause, see SALADIN, *supra* note 13, at 211-16; Winzeler, *supra* note 13, at 411-19.

24. See *supra* text accompanying note 3.

25. *Wiggis-Park AG v. Kantonale Sachversicherung Glarus und Verwaltungsgericht des Kantons Glarus*, Bundesgerichtsentscheid [decision of the Swiss Federal Tribunal] 124 I 25, 31 (1998) [hereinafter BGE or ATF [Arrêts du Tribunal fédéral] if the decision is rendered in French]; MÜLLER, *supra* note 13, at 637-39; HÄFELIN & HALLER, *supra* note 12, at 181; RHINOW, *Art. 31 BV, KOMMENTAR ZUR BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT* [TREATISE ON SWITZERLAND'S FEDERAL CONSTITUTION] (J.-F. Aubert et al. eds., 1988), at No. 38.

26. BV, CST., COST. art. 94, § 4.

27. BV, CST., COST. art 195.

limited by a statute passed by the legislature. Unlike the federal government, the cantons are not allowed to promulgate regulations which derogate from the principle of economic freedom.²⁸ The cantons are, however, authorized to regulate the economy within the limits of the principle of economic freedom. They act within these limits when they exercise their police power or pursue another generally accepted important public interest.²⁹

2. Federal Function

The Economic Freedom Clause guarantees the free movement of goods, services and persons within Switzerland. The clause protects the market against assertions of power by the cantons.³⁰ The cantons are not allowed to erect barriers to trade in order to protect the economic activities of local residents. In 1933, in *Bernhard v. St. Gallen*, the Swiss Federal Tribunal held that a municipality was violating the Economic Freedom Clause when it denied to a theater from a different canton a permit to give temporary performances, solely to protect its local, subsidized theater.³¹ In this regard, the Swiss Economic Freedom Clause fulfills the same function as the dormant Commerce Clause in the United States Constitution which prevents the states from imposing economic protectionism.³²

3. Individual Right Function

The clause protects the individual from the state. The individual may invoke the Economic Freedom Clause in defense of his individual economic interests against state measures, but not against injury suffered at the hands of private parties.³³

28. There exist, however, some historical cantonal monopolies concerning natural resources (fishing, hunting, mining, etc.) which infringe upon the principle of economic freedom. These derogations from the principle of economic freedom are accepted under Article 94, Section 4, of the Constitution (see *supra* text accompanying note 3). See generally *Georg Müller v. Kanton Aargau*, BGE 124 I 11, 14-16 (1998).

29. See *infra* notes 43-45 and accompanying text.

30. RHINOW, *supra* note 25, at No. 52; Biaggini, *supra* note 12, at 791.

31. BGE 59 I 58, 62 (1933).

32. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 11.1 at 133-34 (3rd ed. 1999). For a discussion of the dormant Commerce Clause, see *infra* notes 81-87 and accompanying text.

33. See, e.g., U.E. v. Anwaltskammer und Verwaltungskommission des Kantonsgerichts des Kantons St. Gallen, BGE 122 I 130, 136 (1996) (for the past decade, the Swiss Federal Tribunal has in general not disclosed the names of the private parties involved in any litigation); RHINOW, *supra* note 25, at No. 105-06; HÄFELIN & HALLER, *supra* note 12, at 187.

C. Protected Activities

Article 27 of the constitution protects every private economic activity that has as its objective to gain a profit or an income.³⁴ An individual who is working for the state is not fulfilling a private economic activity and is therefore not protected under the Economic Freedom Clause. For example, the Federal Tribunal held in *Buff und Mitbeteiligte v. Regierungsrat des Kantons Zürich* that a physician, who works in a hospital administrated by the canton, may not invoke the Economic Freedom Clause when a cantonal statute taxes income earned from treating private patients in the cantonal hospital.³⁵

Article 27, section 2, of the constitution stresses three important aspects of the economic freedom of the individual: the freedom to choose one's profession, the freedom to enjoy free access to private economic activity, and the freedom to enjoy free exercise of private economic activity. First, the freedom to choose one's profession gives Swiss citizens, and aliens with a permit to live in Switzerland, the right to decide if they want to pursue an economic activity. Forced or compulsory labor is prohibited.³⁶ It further gives the individual the right to decide what profession he or she wants to practice.³⁷ Second, the freedom to enjoy free access to private economic activity protects the individual against state measures which prevent or aggravate access to private economic activities.³⁸ Third, the freedom to enjoy free exercise of private economic activity means that the individual may decide how to perform the private activity: alone or in cooperation with others, in the form of a corporation, partnership, or as another business entity. He may decide where to buy supplies and to whom he will sell products. He further decides what technical equipment to use. For example, the Federal Tribunal held in 1937, in *Travalletti v. Conseil du Canton du Valais*, that a local municipality was violating the Economic Freedom Clause when it prohibited the use of excavators in times of high unemployment.³⁹

34. See, e.g., *V. v. Conseil d'Etat du Canton de Genève*, ATF 123 I 212, 217 (1997); *J. v. Direktion des Gesundheitswesens, Regierungsrat und Verwaltungsgericht des Kantons Zürich*, BGE 125 I 335, 337 (1999).

35. BGE 100 Ia 312, 318 (1974); see also HÄFELIN & HALLER, *supra* note 12, at 184.

36. The same prohibition provides Article 8, Section 3, of the International Covenant on Civil and Political Rights of December 16, 1966, 999 U.N.T.S. 171 which entered into force for Switzerland on September 18, 1992.

37. RHINOW, *supra* note 25, at No. 78-79.

38. Biaggini, *supra* note 12, at 782.

39. ATF 63 I 213, 219 (1937).

D. Limitations

The protection of economic freedom is not absolute. Just like the other fundamental rights guaranteed by the Swiss Constitution, the Economic Freedom Clause may be limited if the limitation has a legal basis, is justified by a public interest, is proportionate to the goals pursued, and the essence of the right is safeguarded.⁴⁰

Article 36 of the Constitution declares:

Art. 36 Limitations of Fundamental Rights

- (1) Any limitation of a fundamental right requires a legal basis. Grave limitations must be expressly foreseen by statute. Cases of clear and present danger are reserved.
- (2) Any limitation of a fundamental right must be justified by a public interest, or serve for the protection of fundamental rights of others.
- (3) Limitation of fundamental rights must be proportionate to the goals pursued.
- (4) The essence of fundamental rights is inviolable.

Limitations of the Economic Freedom Clause are further permissible only if the “principle of equal treatment of competitors” is observed.

Both the federal government and the cantons must follow these rules of limitation if they want to restrict the economic freedom. However, the Federal Tribunal lacks the power to review laws passed by the national legislature; it may only review cantonal statutes.⁴¹ This absence of power to scrutinize federal laws diminishes the protection of the individual.

1. Legal Basis

Substantial limitations on liberties granted in the Economic Freedom Clause require a statutory basis. The restriction must be based on a decision by the national or cantonal legislature. Other limitations may rely on an ordinance which might be passed by the federal or state government or an agency. In *Zahnd v. Conseil d’Etat du Canton de Genève*, for example, the Federal Tribunal held that a licensing system

40. See, e.g., U. E. v. Anwaltskammer und Verwaltungskommission des Kantonsgerichts des Kantons St. Gallen, BGE 122 I 130, 133 (1996); X. v. Verein Zürcherischer Rechtsanwälte und Aufsichtskommission über die Rechtsanwälte im Kanton Zürich, BGE 123 I 12, 15 (1997); B. v. Anwaltskammer des Kantons Bern, BGE 125 I 417, 422 (1999). The requirement that the essence of the fundamental right has to be safeguarded has not played a big role in Economic Freedom Clause cases.

41. BV, Cst., COST. art. 191.

for the exercise of a private economic activity, like the profession of a hairdresser, requires a legal basis and cannot be based on an ordinance.⁴²

2. Public Interest

Not every public interest is sufficient for a limitation of the Economic Freedom Clause. The federal government and the cantons may restrict economic freedom when they exercise their police power or pursue some other generally accepted important public interest.⁴³ The police power is an exercise of the right of the government to protect law and order, health, morals, and good faith in contractual relationships.⁴⁴ The federal government and the cantons most commonly limit individual economic freedom on the basis of their exercise of police power. Unless there is a basis in the Federal Constitution, limitations which aim to protect a certain industry against competition and derogate from the principle of economic freedom are not permissible.⁴⁵

3. Proportionality

Limitations of the liberties granted in the Economic Freedom Clause must be proportionate to the goals pursued in the following manner: first, state (federal and cantonal) measures have to be appropriate to achieve the goals pursued; second, the legislature has to select the least restrictive means available to reach the goals; and finally, a balancing of the public and the private interests involved is required. A limitation is only proportionate when the benefit to the public outweighs the infringement upon the individual.⁴⁶ Not proportionate, for instance, is a canton provision which requires an architect to have a business domicile in the canton in order to ensure that he has knowledge of the cantonal construction law.⁴⁷ Very often the Federal Tribunal reviews statutes which aim to safeguard the public health.⁴⁸ In general, a statute violates the principle of proportionality if it requires a prerequisite which is not essential to protect the public health. However, access to a private

42. ATF 104 Ia 196, 200-01 (1978).

43. Margot Knecht v. Stadtrat von Zürich und Regierungsrat des Kantons Zürich, BGE 121 I 129, 131-32 (1995); HÄFELIN & HALLER, *supra* note 12, at 191-93; MÜLLER, *supra* note 13, at 661-65; RHINOW, *supra* note 25, at No. 199.

44. HÄFELIN & HALLER, *supra* note 12, at 191, 197-98; MÜLLER, *supra* note 13, at 661; RHINOW, *supra* note 25, at No. 192.

45. *See, e.g.*, B. v. Anwaltskammer des Kantons Bern, BGE 125 I 417, 422 (1999); *supra* text accompanying notes 25-29.

46. *See generally* HÄFELIN & HALLER, *supra* note 12, at 99-100.

47. Stéphane de Montmollin v. Neuchâtel, Conseil d'Etat, ATF 116 Ia 355 (1990).

48. HÄFELIN & HALLER, *supra* note 12, at 197.

activity can be restricted to licensed persons if this is a necessary and reasonable means of safeguarding public health.⁴⁹

4. Essence

The essence of the economic freedom is inviolable.⁵⁰ Limitations upon the economic freedom are only permissible if the essence of the fundamental right is safeguarded. For example, the freedom to choose one's profession and thus the essence of this fundamental right would be violated if one was required to learn or to practice a certain profession.⁵¹ Liberty of contract is regarded as part of the essence of the individual's economic freedom.⁵²

5. Equal Treatment of Competitors

The Federal Tribunal reads into the Economic Freedom Clause a "right to an equal treatment of direct competitors."⁵³ State regulation of the economy must be neutral; the state may not favor one business competitor over another.⁵⁴ The Federal Tribunal has developed in a long line of cases the definition of "direct competitor". Generally, a direct competitor is one who satisfies the demand of the market with an offer similar to another competitor.⁵⁵ Pharmacies and drugstores, for example, are considered by the Federal Tribunal not to be direct competitors because they offer different products to the market and their customers; they intend to satisfy different needs.⁵⁶ Commentators criticize the court's definition of the term "direct competitors" as too narrow.⁵⁷

49. Perren-Sarbach v. Conseil d'Etat du canton du Valais, ATF 103 Ia 259, 262-63 (1977); Biaggini, *supra* note 12, at 785; HÄFELIN & HALLER, *supra* note 12, at 198.

50. BV, CST., COST. art. 36, § 4.

51. Biaggini, *supra* note 12, at 785; MÜLLER, *supra* note 13, at 667.

52. MÜLLER, *supra* note 13, at 668.

53. In *Margot Knecht*, the Federal Tribunal decided that the "right to an equal treatment of competitors" does not derive from the Equal Protection Clause provided in Article 8 of the Swiss Constitution but from the Economic Freedom Clause. It held that state measures may violate the requirement of equal treatment of competitors even if they are even-handed and, therefore, do not violate the Equal Protection Clause. BGE 121 I 129 (1995).

54. See, e.g., *Circus Gasser Olympia AG v. Regierungsrat und Appellationsgericht des Kantons Basel-Stadt*, 121 I 279, 285 (1995); *X. und Mitbeteiligte v. Kanton Zürich*, BGE 125 I 431, 435-36 (1999).

55. *X. und Mitbeteiligte v. Kanton Zürich*, BGE 125 I 431, 436 (1999).

56. *Bullet et consorts v. Conseil d'Etat du canton de Vaud*, ATF 89 I 27, 35-36 (1963).

57. Biaggini, *supra* note Biaggini, *supra* note 12, at 784.

IV. ECONOMIC LIBERTIES IN THE UNITED STATES

A. *Protection Under the Federal Constitution*

The United States Constitution contains several provisions that expressly restrict government's power to interfere with market ordering and the private economic interests of individuals: the Due Process Clause, the Equal Protection Clause, the Commerce Clause, and the Contracts Clause.⁵⁸

1. Due Process Clause

Between 1900 and 1937, federal courts commonly used the Due Process Clause of the Fifth and Fourteenth Amendments to protect economic interest against state economic regulation and intervention.⁵⁹ In the famous *Lochner v. New York* decision, the United States Supreme Court held unconstitutional a New York statute prohibiting employers from employing workers in bakeries more than ten hours per day and sixty hours per week.⁶⁰ It found that the law necessarily interferes with the liberty of contract protected by the Due Process Clause since "[t]he right to purchase or to sell labor is part of the liberty protected by this amendment."⁶¹ The Court considered that the law was not within the police power of the state, and found no reasonable foundation for holding that the law was necessary or appropriate for safeguarding the health of the public or the employees. "The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts."⁶² The Court questioned if the law was really passed for the purpose of protecting the public health, or if the real legislative objective was the regulation of private labor contracts not within the realm of the state's police power.

After the *Lochner* decision, and until the mid-1930s, the Court used the Due Process Clause to review economic regulations. These decisions centered primarily on labor legislation,⁶³ the regulation of prices,⁶⁴ and

58. See *supra* text accompanying notes 18-19.

59. ROTUNDA & NOWAK, *supra* note 32, § 15.4 at 596-97.

60. 198 U.S. 45 (1905).

61. *Id.* at 53.

62. *Id.* at 61.

63. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a statute prohibiting the employment of women in laundries for more than ten hours per day); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating state legislation forbidding employers to require employees to agree

restriction on entry into business.⁶⁵ During the *Lochner* era, the Court struck down laws that, in its opinion, unduly interfered with freedom of contract, but upheld laws deemed proper exercises of the state's police power to provide for the public health and safety.⁶⁶ In 1934, the Court began to withdraw from using the Due Process Clause to review economic regulation cases.⁶⁷ In 1937 in *West Coast Hotel Co. v. Parrish*, the Court upheld a state law establishing a minimum wage for women.⁶⁸ Chief Justice Hughes questioned the holding in *Lochner* by asking, "[w]hat is this freedom [of contract]? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."⁶⁹ In the wake of *West Coast Hotel*, the Court began to employ a deferential standard of review that upheld economic legislation as long as some *rational basis* could be found for the legislature's action.⁷⁰ Since 1937, the Court has not invalidated one economic regulation on substantive due process grounds.⁷¹

The Supreme Court decision in *Williamson v. Lee Optical of Oklahoma*⁷² illustrates the differing standards of review which the United States Supreme Court and the Swiss Federal Tribunal apply when

not to join a union); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating a law establishing minimum wages for women).

64. See, e.g., *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914) (upholding price regulation regarding fire insurance); *Block v. Hirsh*, 256 U.S. 135 (1921) (upholding price regulation regarding rental housing); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (invalidating price regulation regarding theater tickets); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (invalidating price regulation regarding gasoline).

65. See, e.g., *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928) (invalidating a law limiting entry into the pharmacy business to pharmacists).

66. ROTUNDA & NOWAK, *supra* note 32, § 15.4 at 585-86; STONE ET. AL., *supra* note 18, at 725; *Report, supra* note 18, at 79.

67. *Nebbia v. New York*, 291 U.S. 502 (1934), marked the starting point.

68. 300 U.S. 379 (1937).

69. *Id.* at 391.

70. ROTUNDA & NOWAK, *supra* note 32, § 15.4 at 603; *Report, supra* note 18, at 79.

71. See, e.g., *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938) (upholding a law that prohibited the interstate shipment of "filled" milk); *Ferguson v. Skupra*, 372 U.S. 726 (1963) (upholding a Kansas law that prohibited anyone from conducting the business of debt adjusting unless incident to the practice of law); *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) (upholding a state law requiring that applicants for pharmacy permits be limited either to those who were pharmacists or were corporations the majority of whose stock was owned by pharmacists; the Court explicitly overruled *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928)); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (upholding a state law prohibiting gasoline producers of refiners from operating gasoline retail service stations within Maryland).

72. 348 U.S. 483 (1955).

reviewing economic regulations. In *Lee Optical*, the Court considered the constitutionality of an Oklahoma statute that made it unlawful for an optician to fit or duplicate lenses without a prescription from an ophthalmologist or optometrist. The Court declared:

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription [B]ut in some cases the directions contained in the prescription are essential [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.⁷³

Lee Optical is a classical example of the deferential review of economic regulation which has prevailed since *Lochner's* demise. The opinion demonstrates that the Court is even willing to resort to purely hypothetical facts to uphold economic legislation.

In contrast, the Swiss Federal Tribunal reviewed a case on nearly the same facts as *Lee Optical*. A cantonal statute made it unlawful for licensed opticians to make contact lenses except on a written prescription from an ophthalmologist.⁷⁴ The Court ruled in *Kress* that such a provision is not necessary to protect the public health, and thus is not an appropriate exercise of the police power. It concluded that the regulation violates the “principle of proportionality,” and unfairly favors the ophthalmologists.

Contrary to the United States Supreme Court, the Swiss Federal Tribunal does not limit its review to a rational basis test. The Swiss High Court will not defer to the decision of the legislature, but will instead independently determine the constitutionality of economic legislation by considering whether the regulation has a legal basis, is justified by a public interest, is proportionate to the goals pursued, and observes the

73. *Id.* at 487-88 (citations omitted).

74. *Kress*, Association suisse des opticiens, groupe de Genève et Mattmann v. Grand Conseil du canton de Genève, ATF 110 Ia 99 (1984); *see also* J. v. Direktion des Gesundheitswesens, Regierungsrat und Verwaltungsgericht des Kantons Zürich, BGE 125 I 335, 339-40 (1999).

“principle of equal treatment of competitors.”⁷⁵ Compared to the United States Supreme Court, the Swiss Federal Tribunal uses a heightened standard of review. It more carefully scrutinizes economic regulation, and thereby grants more protection to the individual.

2. Equal Protection Clause

At the same time that the Supreme Court was withdrawing from using the Due Process Clause to review economic regulation, it determined that the Fourteenth Amendment’s Equal Protection Clause did not guarantee that economic legislation must treat all business equally.⁷⁶ A classical illustration for the Court’s retreat from using the Equal Protection Clause to review economic legislation is the case of *Railway Express Agency v. New York*.⁷⁷ In *Railway Express Agency*, the Court held that a city ordinance preventing owners of delivery vehicles from placing advertisements on their vehicles for any business but their own did not violate equal protection, though the regulation was on its face discriminatory. The Court ruled:

The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use [W]e cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection.⁷⁸

City of New Orleans v. Dukes is another example in this line of deferential Supreme Court opinions. In *City of New Orleans v. Dukes*, the Court upheld a New Orleans ordinance that prohibited pushcart vendors from selling their wares in the French Quarter. The ordinance carried a grandfather clause allowing all licensed vendors who had continuously operated the same business for eight years or more to continue selling. The ordinance terminated Dukes’ business in the area, but did not affect other vendors who qualified under the grandfather clause. The Court declared that the ordinance was purely economic regulation, and that when local economic regulation is challenged solely as a violation of the Equal Protection Clause, it would consistently defer to legislative determinations regarding the desirability of particular classifications.

75. See *supra* text accompanying notes 40-57.

76. ROTUNDA & NOWAK, *supra* note 32, § 15.4, at 605; *Report, supra* note 18, at 88.

77. 336 U.S. 106 (1948).

78. *Id.* at 110.

Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be *rationally* related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude [I]n short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.⁷⁹

Although the New Orleans ordinance clearly favored one business competitor over another and left one of the pushcart vendors with a monopoly in the business of selling hot dogs, the Court declined once again to protect the individual's economic interests.

The Court has never completely rejected a judicial role in the review of economic legislation, but it is rare today that any law would be held to violate equal protection under the rational basis test.⁸⁰

3. Commerce Clause

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."⁸¹ This provision is not only a direct grant of power to Congress, but it also directly limits the power of the individual states to regulate commerce. The Supreme Court uses the "negative" aspect of the Commerce Clause—the dormant Commerce Clause—to strike down state or local laws that restrain economic freedom by discriminating against out-of-state parties or by impermissibly burdening interstate commerce.⁸² The Commerce Clause is currently the strongest weapon against economic special-interest legislation.⁸³

A state discriminates against interstate commerce when it adopts regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. When a state statute facially discriminates against interstate commerce, the Supreme Court will strike it down unless the discrimination is demonstrably justified by a valid

79. 427 U.S. 297, 303 (1976) (emphasis added) (citations omitted).

80. ROTUNDA & NOWAK, *supra* note 32, § 15.4, at 607. There are, however, some exceptions. See, e.g., *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (holding that a statute subjecting out-of-state insurance companies to higher taxes than in-state companies in order to promote domestic business not to be a legitimate purpose under the Equal Protection Clause).

81. U.S. CONST. art. I, § 8, cl. 3.

82. *Report*, *supra* note 18, at 83-84.

83. BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 243 (1980).

factor unrelated to economic protectionism. When the state statute amounts to simple economic protectionism, a “virtually *per se* rule of invalidity” has applied.⁸⁴ For example, in *Wyoming v. Oklahoma*, the Court held unconstitutional an Oklahoma statute requiring the state’s coal-fired electric utilities to burn a mixture which contains at least ten percent Oklahoma-mined coal. The Court declared that this “preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory.”⁸⁵ Even if a statute is nondiscriminatory on its face, the law still may be discriminatory in its impact on interstate commerce. In *Hunt v. Washington State Apple Advertising Commission*, a North Carolina statute requiring all closed containers of apples sold or shipped into the state to bear no grade other than the federal U.S. grade was held unconstitutional.⁸⁶ Although on its face the law appeared neutral, the law was intended to advantage the local apple industry at the expense of out-of-state producers.

Even if a law may be even-handed, a state or local regulation can be unduly burdensome when it disproportionately affects out-of-state residents and businesses. Such a disproportionate burden was apparent in *Kassel v. Consolidated Freightways Corp.*⁸⁷ The Supreme Court struck down an Iowa law prohibiting operation of sixty-five foot double-trailer trucks within the state because it imposed added burdens on neighboring states. The law forced larger trucks to drive through other states in order to bypass Iowa.

4. Contracts Clause

The Contracts Clause is another constitutional provision which might be invoked in defense of individual economic interest. The clause prohibits the states from passing any law impairing the obligations of contracts.⁸⁸ However, the Contracts Clause is not a substantive constraint on legislation. The Supreme Court has repeatedly held that “[u]nless the state itself is a contracting party . . . [a]s is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.”⁸⁹ Thus, under current legal thought, the Contract Clause like

84. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).

85. *Id.* at 455.

86. 432 U.S. 333 (1977).

87. 450 U.S. 662 (1981).

88. U.S. CONST. art. I, § 10, cl. 1.

89. *Energy Reserves Group v. Kan. Power & Light*, 459 U.S. 400, 412-13 (1983) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977)); *see also* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 505 (1987).

the due process and equal protection clauses does not serve as an essential protection against state encroachment on individual economic interests.

B. Protection Under State Constitutions

On the state level, greater protection of economic interests is granted. State courts review economic regulations more closely and afford more protection to the individual than the United States Supreme Court under the Federal Constitution. The state courts are not willing to limit themselves to the deferential review now in effect at the federal level. They often rely on their state constitutions and their individual due process and equal protection clauses⁹⁰ to strike down economic regulations interfering with economic interests. Decisions of the United States Supreme Court do not bind state courts in the interpretation of their own state constitutions even when the applicable provisions of the federal and state constitutions are identical.⁹¹ By 1988, all but three states refused to follow the lead of the Highest Court in its rejection of substantive due process and equal protection in the area of economic regulation.⁹² However, while substantive due process is still alive, more state courts currently rely on equal protection as a restraint on unreasonable economic regulation.⁹³ For example, in 1981 in *Grassman v. Minnesota Board of Barber Examiners*, the State Supreme Court of

90. Every state has such provisions; see James C. Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241-82, 242 n.4 (1981), reprinted in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 94-145 (Bradley McGraw ed., 1985). See, e.g., CAL. CONST. art. I, § 7(a) (due process and equal protection); FLA. CONST. art. I, § 9 (due process), art. I, § 2 (equal protection); GA. CONST. art. I, § I, para. I (due process), art. I, § I, para. II (equal protection); ILL. CONST. art. I, § 2 (due process and equal protection), LA. CONST. art. I, § 2 (due process), art. I, § 3 (equal protection); ME. CONST. art. I, § 6-A (due process and equal protection); MD. CONST. DECL. OF RIGHTS art. 24 (due process), art. 46 (equal protection); MICH. CONST. art. 1, § 17 (due process), art. 1, § 2 (equal protection); MINN. CONST. art. I, § 7 (due process), art. I, § 2 (equal protection); NEV. CONST. art. I, § 8, cl. 5 (due process), art. I, § 1 (equal protection); NEB. CONST. art. CI-3 (due process and equal protection), N.C. CONST. art. I, § 19 (due process and equal protection), S.D. CONST. art. VI, § 2 (due process); art. VI, sects. 1, 18 (equal protection); TENN. CONST. art. I, § 8 (due process), art. XI, § 8 (equal protection); TEX. CONST. art. I, § 19 (due process), art. I, § 3a (equal protection); VA. CONST. art. I, § 11 (due process), art. I, §§ 1, 11 (equal protection).

91. A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873-944, 884, 887 (1976) (citing cases from North Carolina, Nevada, and South Dakota).

92. Peter J. Galie, *State Courts and Economic Rights*, 496 ANNALS 76-87, 81 (1988). Kirby reported in 1981 that at least thirty-two states have refused to follow the example of the U.S. Supreme Court. Kirby, *supra* note 90, at 267-68. See also *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1463-93 (1982).

93. Kirby, *supra* note 90, at 268; Galie, *supra* note 92, at 79.

Minnesota declared a statute which imposed various regulations on barbers but not on cosmetologists an unconstitutional denial of equal protection because similarly situated groups were not similarly regulated.⁹⁴ In contrast, the State Supreme Court of Georgia relied in 1986 in *Batton-Jackson Oil Co. v. Reeves et al.* on the Due Process Clause in the Georgia Constitution to strike down a provision of the state Gasoline Marketing Practices Act.⁹⁵ The act prohibited a gasoline distributor from selling gasoline to another distributor at distributor prices when that distributor planned to sell that gasoline itself at retail. The court declared that “[t]he right to contract . . . is a property right protected by the due-process clause of our Constitution, and unless it is a business ‘affected with a public interest,’ the General Assembly is without authority to abridge that right.”⁹⁶ Because the gasoline industry was not affected with a public interest, the court held the price-fixing regulation was unconstitutional.⁹⁷

The state courts have fashioned several tests to review economic regulations.⁹⁸ Some courts have referred to the “less restrictive alternative principle.” This principle means that “an economic regulation violates due process if the government has a less restrictive alternative . . . that is, if the government can achieve the purposes of the challenged regulation equally effectively by one or more narrower regulations.”⁹⁹ Another standard requires the showing of a “real and substantial relation” between the measure under review and the legislative goals. Finally, some courts use a balancing test between the interests of the public and the individual. It is striking how close these tests come to the “principle of proportionality” the Swiss Federal Tribunal uses while reviewing economic regulations under the Swiss Economic Freedom Clause. The Federal Tribunal brings together all three tests mentioned above. A limitation on Swiss economic freedom is permissible under article 36, section 3, of the Constitution only if the state measure is appropriate,

94. 304 N.W.2d 909 (1981). See also *Md. State Bd. of Barber Exam'rs v. Kuhn*, 270 Md. 496, 312 A.2d 216 (1973). The Court of Appeals of Maryland relied in *Kuhn* on due process and equal protection grounds to invalidate a statutory scheme that prohibited cosmetologists from cutting and shampooing men's hair, while permitting them to perform such services for women.

95. 255 Ga. 480, 340 S.E.2d 16 (1986).

96. *Id.* at 482 (quoting *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951)).

97. For further examples of judicial review of economic regulations under state constitutions, see Howard, *supra* note 91, at 883-86, Kirby, *supra* note 90, at 252-77.

98. Howard, *supra* note 91, at 888-89.

99. Guy Miller Struve, *The Less-Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463-88, 1463 (1967).

represents the least restrictive means available, and the benefits to the public outweigh the infringement upon the individual.¹⁰⁰

V. CONCLUSION

The Economic Freedom Clause in the Swiss Constitution is a significant restraint on the government's ability to adopt economic legislation. A limitation of individual economic freedom is permissible only if the restriction has a legal basis, is justified by a public interest, is proportionate to the goals pursued, and the "principle of equal treatment of competitors" is observed.¹⁰¹ The Swiss Federal Tribunal examines if a law satisfies all these requirements. Compared to the current United States Supreme Court, the Swiss Federal Tribunal scrutinizes economic regulations more carefully and affords more protection to the individual as, for example, the *Kress* opinion has demonstrated.¹⁰² The significance of the Economic Freedom Clause in the Court's jurisprudence is immense. The Federal Tribunal's opinions have essentially contributed to the protection of the individual against undue state interference with economic interests.

Similar to the Swiss Federal Tribunal, the state courts in the United States grant protection to economic liberties. The state courts rely on their state constitutions to strike down economic regulations interfering with economic interests. They apply tests to review economic regulations which come close to the standard of review the Swiss Federal Tribunal uses. Almost no protection of economic liberties, however, is granted on the federal level in the United States, though the Federal Constitution provides several clauses which might be invoked in defense of individual economic interest. The United States Supreme Court has largely abdicated any real power in the economic regulation field. As long as some rational basis may be found for the legislature's action, the High Court will not invalidate any economic regulation.

In the future, the Supreme Court should consider giving less deference to the legislature and review the reasonableness of economic legislation more closely by reusing the due process and equal protection clauses.¹⁰³ The opportunity to engage freely in a business, trade, occupation, or profession is among the most important liberties society can provide its citizens. The United States Supreme Court should protect

100. *See supra* text accompanying notes 46-49.

101. *See supra* text accompanying notes 40-41.

102. *See supra* text accompanying notes 74-75.

103. Siegan argues, too, that the Supreme Court should reconsider its position and revive the Due Process Clause in economic matters. SIEGAN, *supra* note 83, at 318-22.

these economic liberties in a manner similar to the Federal Tribunal in Switzerland under the Swiss Constitution, just as many state courts do under their own state constitutions in the United States. A change in its judicial position would strengthen the protection of the individual's economic liberties. Currently, an effective protection of economic interests in the United States is dependent on whether the state courts are willing to scrutinize economic regulation. In those states which have followed the Supreme Court in its rejection of substantive due process and equal protection in the field of economic legislation no protection of economic interest is granted at all. The United States Supreme Court should fill this gap and afford all U.S. citizens and business entities protection against federal or state economic legislation interfering with individual economic interests. It is to be hoped, therefore, that the Supreme Court is willing to give up its deferential stance sometime in the future¹⁰⁴ as the Court did a few years ago in connection with the review of Congress's exercise of the commerce power.¹⁰⁵

104. Rotunda and Nowak have noted that some justices have indicated a desire to review the reasonableness of some economic legislation. Should those justices be joined by new Supreme Court appointees who share this view there may be some possibility that the Court would give up its standard of deferential review. ROTUNDA & NOWAK, *supra* note 32, at 610-12.

105. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).