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The "Necessary" History of Property and Liberty

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I. INTRODUCTION

I am most pleased to have been invited by the editors of the *Chapman Law Review* to write the Foreword to a volume devoted to one of the hardy perennials of constitutional law: What level of protection, if any, is accorded to private property and economic liberties under the United States Constitution? There are a multitude of ways in which this vital question can be approached. It is possible for textualists to conduct a detailed, clause-bound interpretation in order to determine the extent to which these rights are protected, seriatim, under various clauses of the Constitution. That list is a long one, and includes the Takings Clause, both Due Process Clauses, the Equal Protection Clause, the Speech and Religion Clauses of the First Amendment, and the Commerce Clause in both its affirmative and (more controversial) dormant manifestations. None of these clauses uses exactly the same language, and it is possible to devote extensive discussion to the scope of each clause. One could ask why the Contracts Clause does not contain a "just compensation" component while the Takings Clause does, or why the Due Process Clause refers to property simpliciter, without adjective private, or most critically, why a police power limitation is found everywhere in the case law and the interpretive literature, but nowhere in the constitutional text itself.

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Alternatively, these gaps in the text invite the diligent theorist to undertake a detailed historical exegesis into the original understanding of the Framers and of the early judges, both federal and state, who were charged with the overall interpretation and implementation of constitutional guarantees. At this point, exhaustive reference could be made to secondary sources to establish both the ordinary meaning of terms and the specific understandings that surrounded the adoption of particular clauses. Often this learned search will lead us far afield. However, in most cases, my clear sense (not shared, I suspect, by professional historians) is that ninety percent of the relevant historical evidence is contained in the Federalist Papers, even after we try to discount for its own pro-ratification agenda. Both inquiries require extensive labor, which cannot be carried out in the confines of this short Foreword. But they do not exhaust the possible approaches to constitutional law.

In this Foreword I wish to look at the question of takings and economic liberties from what I like to call, only half-facetiously, "necessary history." The purpose of this exercise is to show that there are certain powerful principles to which any conscientious application of constitutional discourse or doctrine must turn if it is to meet the minimum standards of intellectual coherence and practical common sense. In my view, this form of history is not clause-bound in any strict sense of the term, but rather rests on the broader considerations of the proper relationship between an individual and the state, or, in some cases, the relationships between states in a federal system to each other and to the national government.

To be sure, the use of terminology will differ as we move from clause to clause, or indeed from era to era. There is good evidence, for example, that when John Locke spoke of the need for the state "regulation" of property,[1] the last thing he had in mind was some comprehensive mix of zoning and rent control laws. Rather, the word in all likelihood served two functions: first, it conferred on states the power to regularize transactions, much in the way in which the Statute of Frauds and recordation systems worked to regularize the transfer and protection of real property;[2] second, it

1 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 317 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). *See also* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. (forthcoming Sept. 2003) (on file with Chapman Law Review); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139 (2001).

2 *See* Barnett, *supra* note 1, at 139–46 (providing an extensive discussion of the various meanings of "to regulate"). **R**

prevented certain improper uses of property that trenched upon the like rights of other owners.[3]

Although the term "regulatory taking" is a creature of the 1970s or even the 1980s,[4] it is clear that the question of how to respond to government regulations that fell short of direct occupation was an issue that dominated much of the nineteenth and twentieth centuries—which spoke of "'invasions' of property rights" by some (but not all) regulation.[5] However much terminology may change, my thesis here is very simple. Anyone who is serious about the interaction between individual rights and state controls will gravitate toward the same set of principles no matter what their point of departure—historical or textual. The logic of the argument provides the critical impetus for particular discussions. History is necessary in the sense that any judge, dealing with any particular question, will happen upon the same solution. To understand the framework, therefore, is to grasp the history.

Note the caveat: this method will only work if the judges care about the rightness or wrongness of the outcome not only as a matter of fidelity to text, but also fidelity to principle. On this all too critical question of initial sentiment, the key variable is the level of seriousness that is brought to the task in question. The regrettable legacy of the judicial deference that so influences the United States Supreme Court is intellectual incoherence and judicial irresponsibility.[6] Congress and the states will always be able to do whatever they choose because courts will turn intellectual cartwheels to elude substantive guarantees or jurisdictional limitations. As applied to the manifold manifestations of government taxation and regulation, the so-called "rational basis" test is the death knell of serious constitutional discourse. The question, then, is what greater level of scrutiny is needed to energize courts to engage in serious forms of review. Here the key insight is that the three flavors of constitutional review—strict scrutiny, intermediate scrutiny and rational basis, in descending order—are not equidistant. The gap between rational basis and intermediate scrutiny represents a deep chasm, while that between intermediate scrutiny and strict scrutiny presents only a manageable gulf.

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3 *See* Claeys, *supra* note 1 (manuscript at 21–22). *See also* LOCKE, *supra* note 1, at 310. **R**

4 *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651 (1981) (first Supreme Court case recognizing the term "regulatory" taking). *See generally* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

5 Claeys, *supra* note 1 (manuscript at 3). Claeys has the historian's eye for a good quotation and I borrow from his quotations liberally and without attribution. **R**

6 For the most recent illustrations of the intellectual breakdown, see *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

To see why, note that the key inquiry under rational basis is whether a court can identify some significant advantage to any given piece of legislation, at which point it becomes no part of its duty to weigh that advantage against the correlative disadvantages. So long as there is one plus, no one may tote up the minuses. No major piece of legislation can pass through Congress or the state legislatures unless it has the backing of at least one significant constituency, at which point its private gains, suitably dressed up, supply all the justification needed to sustain the act. Intermediate scrutiny blocks off entrance into that safe-harbor. Instead, the court must now struggle to balance the advantages and disadvantages of the statute under an oft-implicit norm that overregulation, either as to means or to ends, is of equal concern with underregulation. The full range of considerations thus come before the Court, even in the absence of any insistence that the state show the powerful and abiding state interest that strict scrutiny demands. The analysis of economic liberties and private property is made rigorous under the full range of considerations that both parties put before the Court.

My thesis is that once some level of intermediate scrutiny is imposed, the Court, no matter where it begins, will end up with the same basic framework that incorporates these familiar elements: the protection of some core individual right of liberty or property; the requirement of just compensation; the recognition of correlative and reciprocal duties; the nondiscrimination and disparate impact constraints on state action; the need to protect health and safety against nuisance and other externalities; and the ability to use public power only for public purposes. The exact way these leitmotifs interact will differ in detail: there is more room for a just compensation principle with property than with speech, but the principle will apply in both areas. One example of the difference might help here: the First Amendment makes it impossible to condemn all the shares of the *New York Times*, even though that taking would be for a public use, but it does not insulate the newspaper from the payment of local property tax (nondiscriminatory, of course) in exchange for the receipt of public services. The tax represents a benign form of forced exchange because it in no way impinges on the editorial discretion of the press.[7]

The ubiquity of these principles does not mean that the judges who embraced this form of analysis attached some magical force to the immutable baselines of the common law, as has been suggested by Cass Sunstein in his highly influential article Lochner's

7 *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983).

Legacy,[8] most notably for the proposition that the common law baselines were treated as though they were the immutable baselines or "prepolitical" rules supplied by nature. To be sure, there has always been a substantial overlap between the basic outlines of the common law and the usual norms of constitutional law. How could the outcome be otherwise when the animating concerns behind both bodies of law deal with personal liberty and private property?

On all points of detail, however, there is enormous room for refinement and variation both within the common law and within the statutory rules that could be used to modify it. In one of its less distinguished moments, for example, the court (actually Lord Ellenborogh) in *Baker v. Bolton*[9] held that common law did not recognize any action for wrongful death. Yet no judge ever suggested that the overturning of this ill-conceived rule amounted to a violation of the rights of property or liberty of other individuals. Quite the opposite, the most vocal critic of the common law rule was Baron Bramwell, who had a strong libertarian bent.[10] The following year, Lord Ellenborogh also announced that contributory negligence was a complete defense in ordinary negligence actions.[11] Yet again, no one has ever seriously suggested that a general migration to comparative negligence could raise serious constitutional law difficulties. On this and on countless other points the common law was subject to withering criticism. Its rules on privity, proximate causation, assumption of risk, the fellow servant doctrine, contributory negligence, and *res ipsa loquitur* evolved within states and differed among states during the height of substantive due process. I am aware of no case, however, that treated any one variation of the common law rules as so privileged that all others were condemned to constitutional oblivion under the relentless hammer of substantive due process. Here, as David Bernstein has recently documented with his customary thoroughness, constant judicial challenges to these fine points of tort law were routinely rebuffed in the Supreme Court.[12] In some cases the Court upheld statutory reforms of the common law rules, while in others it altered common law rules in its judicial capacity.[13] The explanation is simple. The justices said what

8 Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 882 (1987).

9 170 Eng. Rep. 1033 (N.P. 1808).

10 For my views on Bramwell generally, see Richard A. Epstein, *For a Bramwell Revival*, 38 AM. J. LEGAL HIST. 246 (1994).

11 Butterfield v. Forrester, 103 Eng. Rep. 926, 927 (K.B. 1809).

12 For Bernstein's relentless historical dissection, see David Bernstein, Lochner's *Legacy's Legacy*, 82 TEX. L. REV. (forthcoming Oct. 2003) (manuscript at 26–28, on file with Chapman Law Review).

13 *See, e.g.*, Bowersock v. Smith, 243 U.S. 29, 34 (1917) (upholding a Kansas statute eliminating the fellow servant rule and the defenses of contributory negligence and assumption of risk); Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 574–75, 578–79 (1915) (uphold-

they meant and meant what they said. They never once articulated a belief that all common law rules were immutable or prepolitical. But they did believe that tort rules typically fell within the states' police power to regulate health and safety, even when the Court abolished the contractual defense of assumption of risk.[14]

The ubiquity of these constitutional constants also decisively answers yet another common charge, namely, that the conceptual limitations of the English language prevents any powerful invocation of judicial authority. At root, the principles of economic liberty are no different from those that regulate relations under the First Amendment or relations among states under the Dormant Commerce Clause, areas in which stable and successful doctrine has emerged. My purpose below is to outline what the common framework rightly entails, and how its ubiquitous presence structures so much of our constitutional law. I shall begin by noting the common philosophical frameworks brought to constitutional interpretation to show how they converge sensibly on a single model. I shall then take this standard-issue model and apply it to cases drawn from various doctrinal areas to show how they all make use of a common conceptual framework.

II. An Abundance of Constitutional Theories

One reason why constitutional law is so difficult is that there are, to all appearances, multiple philosophical approaches that can be taken on the critical issues of property rights and personal liberties.[15] Many of the classical writers gravitated to a system of natural law. Others preferred to use the language of social contract, or at least social compact. Still others stressed the impor-

ing an Ohio statute abrogating the fellow servant rule and the defenses of contributory negligence and assumption of risk defenses for employers with greater than five employees); Chi., Indianapolis, & Louisville Ry. Co. v. Hackett, 228 U.S. 559, 563–64, 567 (1913) (upholding an Indiana statute eliminating the fellow servant rule in railroad cases); Mo. Pac. Ry. Co. v. Castle, 224 U.S. 541, 544–45 (1912) (upholding a Nebraska statute abrogating the fellow servant rule and the defense of contributory negligence in railroad cases); Louisville & Nashville R.R. Co. v. Melton, 218 U.S. 36, 53, 57 (1910) (upholding an Indiana statute abolishing the fellow servant rule for railroad employees); Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 71–74 (1907) (upholding an Illinois statute abolishing the fellow servant rule for mining accidents); Minn. Iron Co. v. Kline, 199 U.S. 593, 598 (1905) (upholding a Minnesota statute abolishing the fellow servant rule in railroad cases); Tullis v. Lake Erie & W. R.R. Co. 175 U.S. 348, 351, 353–54 (1899) (upholding an Indiana statute abolishing the fellow servant rule in railroad accidents).

14 *See, e.g.*, Howard v. Ill. Cent. R.R. Co., 207 U.S. 463, 504 (1908) (striking down parts of the statute on Commerce Clause grounds but never once challenging the statutory elimination of the assumption of risk defense). The more sensible criticism of the case is that it gave the state *too* much power, not too little. *See also* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 797–800 (1982) (describing the evolution of private workers' compensation plans).

15 For a summary of the various approaches, see Matthew H. Kramer, et al., A Debate Over Rights: Philosophical Enquiries (1998).

tance of tradition and orderly evolution in the development of social institutions. Finally, other writers stress the instrumental, efficiency or functional justifications of property rights as part of a comprehensive utilitarian, or at least consequentialist approach to the basic subject. We can thus appeal to natural rights, social contract, traditionalist and utilitarian theories to first design a constitution, and then to interpret its constitutive positions.

There is a common delight among authors to stress the differences between these stances in the kinds of authority they appeal to and the sorts of rules that they are said to generate. But in fact the differences as they play out in practice are small curlicues on the same larger comprehensive structure. The writers in the natural tradition knew that natural human tendencies could lead to both virtuous and destructive human behaviors. They therefore tended to favor those laws that brought out the best in human nature, and thus encouraged individual flourishing. The bare articulation of their position does not give clear indications as to what those laws might be, but surely their position has no bite at all if any arbitrary assemblage of rights and duties will satisfy the dictates of the theory. So the natural lawyer has to look for benchmarks for the particular constellation of rights and duties that he wants to defend in the name of human flourishing.

One obvious benchmark is the kind of legal arrangements that grow up naturally—that is without any conscious planning by some central government or agency. That is not difficult to do because, in the vast sweep of history, nation states with defined territories come relatively late in the game. Before then, there were a widespread set of customary practices and norms that evolved (naturally, of course) in order to keep the peace and to advance the ends of individual self-preservation. The natural lawyer looks to those biological imperatives and to the set of customary practices for inspiration. As early as Gaius and Justinian, natural law and common practice across nations are yoked together as part of a single conception.[16] But which of these practices count? Surely only those that lead to the purported end of a just and sustainable society. The practices of societies that do not endure cannot be the role model for the rest of us. So the exemplar becomes those societies whose rules promote the general welfare of the individuals involved. But why do they do this? Often it is because they agree that their overall success will be enhanced if they all agree to abide by certain rules that set up entitlements on the one hand and impose behavioral restrictions on the other. The social compact they wish to reach thus advances the utility of all the members of the group.

16 G. INST. 1.1–7 (Edward Poste trans.); J. INST. 1.1.4.

It is therefore very hard in practice to disentangle natural law from customary practice, from social contract, or from general utility. Custom becomes the proof of a natural arrangement. But that arrangement is a system of trial and error that advances the general welfare of the people involved. Social contracts may be fictions, but the terms that are likely to make sense in these contracts are only those that work for the benefit of the various parties to the agreements, which is just what some utilitarian interested in consequences would desire. In the end, much of constitutional law, and indeed of political theory, is like Roshomon: each person gets a bit of the elephant and tends to describe it from one perspective. But the excluded elements come back in some secondary way. The natural law may not be utilitarian, but it does look to the utility of certain arrangements to show that they are in accordance with human nature.

The real task here is to figure out what the synthesis looks like before going to particular cases. The clusters of observed relationships are, in one sense, easy to identify. It is hard to think of how to begin the analysis of any constitutional order without some presumption in favor of general liberty of action. Why bother with the entire chore of setting up a constitutional government if we are comfortable with anarchy on the one hand or with tyranny on the other? We undertake that enterprise because we need to escape from a state of nature (or original position) in which each person is beholden to someone without being certain to whom. Yet tyranny itself needs no principles of separation of powers, checks and balances, or individual rights. The unwillingness to accept any special hierarchy, such as that involved with the divine right of kings, introduces notions of equal or like liberty on the ground floor. But freedom of action is only a presumptive good until it is shown to be an evil, which happens when that action is used to limit the like liberty of other individuals.

It is of such naïve stuff that we can trace the origins of individual autonomy, which figures large in anyone's system. Forget the difficult debates over euthanasia: is there anyone who thinks that any of the four approaches could be invoked to limit the choice of all individuals to accept or decline medical treatment of their own free will? Or is there any system that holds that no individuals should ever be allowed to acquire property out of a state of nature so that all individuals would starve for want of a universal agreement that might legitimize their actions? There is, in fact, a remarkable convergence to the rule of occupancy (first possession) in both Roman and common law countries, coupled with recognition that some limitations must be placed on the principle in certain circumstances. But those limitations are not invoked when large numbers of ordinary individuals are allowed to

act in an uncoordinated fashion to claim some portion of the commons for themselves. Some people stress that all others give their "implied consent" when one person takes property out of the commons. Others refrain from the use of consent language and prefer to say that necessity is the origin of property, by which they mean that all individuals will perish unless they can avail themselves of nature's abundance.[17] But no matter which way the point is put, free individuals must be allowed to acquire and to retain property in order to survive. Every version of legal theory reaches this same result.

By the same token, there is no legal theory that will treat all property rights as though they were absolute when real dangers may well come from their excessive protection. In most cases, two limitations must be respected in order for institutions of liberty and property to survive. First, no one must be able to engage in actions that compromise the like liberty of other individuals. So long as self-preservation is the end of social organization, it will hardly do to allow one person to take steps that would maim or kill another. Hence the mutual renunciation of force becomes a hallmark of all natural law, social contract, and utilitarian theories of rights. In dealing with property, this proposition translates itself into the standard formula that no person is allowed to use his property to injure the property of another, which becomes the entering wedge for the common law of nuisance.

In some situations, moreover, the law of nuisance may well not suffice because there are system-wide social harms that can emerge even when one person does not invade the property of another, either by direct entry or by casting waste or fumes or other substances on his land. It is possible to think of limitations that could be imposed on all members of a given community for the benefit of all. The law thus has to respond to a variety of "prisoner's dilemma" games where the compensation given to each comes in the form of like restrictions imposed on the activities of others. For example, we have restrictions on the extent to which people can kill game or capture fish from the common pool in light of the risk that untrammeled access will reduce the stock on which all depend. We have developed a set of rules that limits access and seeks to guarantee fairness among the members by insisting that the rule hit as hard on one as it does on the other. We therefore use nondiscrimination principles as a way to limit state discretion when it is not quite clear just what form of restriction should be imposed in the first place.

However, in some instances, as when land is needed for a fort, the nondiscrimination principle will not suffice because it makes

17 For a clear statement of both views, see 1 WILLIAM BLACKSTONE, COMMENTARIES *6.

no sense to take scraps of land from hundreds of people when what is needed is a compact parcel of land located at a single critical point. So one person has to bear the brunt of government action that works for the benefit of all, rendering the nondiscrimination principle useless for the task at hand. The natural lawyer claims that compensation is owed to the party or parties singled out to bear a disproportionate share of the social burden. The social contract theorist comes out the same way because no individual would agree to join society if his fellows could confiscate all that he owned, even for some public purpose from which everyone benefited. And the utilitarian sees compensation as the way in which we have some guarantee that the project in question will produce social value in excess of the costs to its members. But all agree that the state only has this power for the benefit of society at large. No one would agree, for example, to a system wherein an individual could pay the legislature a fixed sum of money to condemn property that it would then turn over to him.

So, in quick succession, we have all the elements: private property; police power controls; common pool risks; nondiscrimination rules; just compensation; and public use. Many of these elements were expressed quite succinctly by Chancellor Kent in his leading nineteenth century *Commentaries on American Law*: "Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order, and the reciprocal rights of others."[18] Similar sentiments were expressed in *Van Horne's Lessee v. Dorrance*: "The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land . . . ."[19] It "says to legislators, thus far ye shall go and no further."[20] Thus,

> [e]very person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large.[21]

All the necessary ingredients are present in these quotations. The proposition that the Constitution is certain and fixed knocks out the ad hoc inquiries of the rational basis test. The rights of acquisition, use, and disposition capture the essence of property. The reference to good order is, albeit somewhat loose, a hint of the role of the law of nuisance. The reference to reciprocal rights and du-

18 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 265 (New York, O. Halsted 1827).
19 2 U.S. (2 Dall.) 304, 308 (1795).
20 *Id*. at 311.
21 *Id*. at 310.

ties talks about the principle of equal liberty and works in tandem with the concept of proportionate contributions, which is the signal to a flat tax for the overall goods of the community at large, thereby negating any putative anarchist tendencies.[22]

In modern terms, the bottom line is that the presumption of liberty can be overcome only in those cases of a socially destructive "prisoner's dilemma" game or a genuine externality. Ordinary market competition does not fall into either of these categories. To be sure, all sellers in a given market face a prisoner's dilemma game, but the game is a virtuous antidote to monopoly power, which itself has always been regarded as an appropriate subject of regulation. This concept was made clear by Justice Peckham in *Addyston Pipe & Steel Co. v. United States*,[23] who six years later wrote the Supreme Court's majority opinion in the much maligned case of *Lochner v. New York*.[24] The usual arguments against monopoly treated the single seller (like a common carrier) as though it had the power of coercion over individuals. That use of terminology creates the unfortunate impression that the refusal to deal is the same as putting a gun to someone's head, when no sane individual would be indifferent to those two possibilities. The point here is to express the uneasiness of putting any person in the position where he or she has no choices in obtaining goods needed for survival or convenience. That person-to-person view of matters dovetails neatly with the standard economic concern that output under monopoly is typically lower than it is under competition. Where monopoly is necessary (i.e., in cases of natural monopoly in which the costs of production decline over the relevant range of production), the forced break-up of a firm makes little sense, and rate regulation, fully tolerated in the nineteenth century, becomes the appropriate mode of attack on this social dislocation.

There is nothing about this approach that necessarily depreciates with time. When the affection for fixed and certain rules is articulated in modern cases, statutes are routinely struck down. Thus, the most famous blanket statement about property comes in a single sentence from Justice Black's opinion in *Armstrong v. United States*, which struck down an effort by the government to wipe out the superior ship liens (yes, a lien is property) by the simple expedient of taking the boat out of Maine waters.[25] The

22 "'Tis true, Governments cannot be supported without great Charge, and 'tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it." LOCKE, *supra* note 1, at 380. *See also* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), *reprinted in* 36 GREAT BOOKS OF THE WESTERN WORLD 401–49 (Encyclopaedia Britannica, Inc. 2d ed. 1990). R

23 175 U.S. 211 (1899).

24 198 U.S. 45 (1905).

25 364 U.S. 40, 48 (1960).

Court held that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[26] But when the chips were down in *Penn Central Transportation Co. v. New York City*,[27] the Court abandoned any effort to articulate rules, and instead wrote:

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.[28]

Downgrade the core proposition of *Armstrong* into a dependent clause, and the Supreme Court can talk its way into the confiscation of air rights (for an admitted public use, to be sure) without a dime in compensation. We thus see in action one of the major techniques used to undermine the classical synthesis, a mixture of linguistic doubt and conceptual mushiness that translates itself effortlessly into a plea for legislative discretion. In making this defense of conceptual clarity, I do not wish to go on the fool's errand of denying that this conceptual framework cuts out all wiggle room in particular cases. There are lots of marginal questions, as with any other legal framework: Just how many people must benefit for some use to be considered public? How does the nondiscrimination principle apply when all persons are not in

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26 *Id*. at 49. The Court recently reiterated *Armstrong*'s rationale in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002).

27 438 U.S. 104 (1978).

28 *Id*. at 123–24 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)) (internal citations omitted) (alterations in original). The passage then continues:

> Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 124 (citing United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)) (internal citations omitted) (alteration in original). I have argued at length for the intellectual coherence of this position in Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the* Lake Tahoe *Case*, *in* CATO SUP. CT. REV. 5–29 (2002).

quite the same place to begin with? How do property protections apply to water, where metes and bounds can establish boundaries between riparians? Or how does protection apply to the various forms of intellectual property? How does the police power apply when one statute both promotes health and blocks competition in different proportions at the same time? Such is life in the big city, for these doubts arise in connection with any area of law, including federalism and First Amendment cases, where it has never been regarded as so serious an obstacle as to junk the entire apparatus. The differences in application, however, should not conceal the universality of the relevant building blocks.

III. The Theory Applied

In order to show how these pieces may be sensibly assembled, I shall examine cases drawn from four different substantive areas. Sometimes their doctrinal home—due process, property, contract, speech, religion—is difficult to pin down, but that is precisely the point. What matters is not the doctrinal pigeon hole, but the level of scrutiny and the concomitant willingness to apply the general framework. Here is how the analysis runs.

One of the most important economic liberties cases during the late nineteenth century was *In re Jacobs*,[29] which struck down a statute that made it illegal for individuals to manufacture tobacco products in tenement units located in cities whose population exceeded 500,000.[30] As befits the general thesis, the New York Court of Appeals did not trouble itself unduly with the question of whether the case was best thought of as a case involving the deprivation of property or of liberty, because the same conceptual frame applied to both. On the property side, the statute did not, of course, dispossess Jacobs from his own premises but only restricted its use, so that today it would be analyzed under the rubric of a regulatory taking. But here the Court thought the loss of use (not all use, but this particular use only) constituted a taking and held: "[A]ny law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."[31] This language is indeed very tough because the attributes of property refer to the rights of possession, use, and disposition that have always been regarded as the essentials of property from Roman times forward. Further, there is no intimation that this rule only applies after the plaintiff is somehow deprived of "all" viable economic use of the property, to use the modern standard.[32]

29 98 N.Y. 98 (1885).

30 *Id*. at 115.

31 *Id*. at 105.

32 The standard is enunciated most forcefully in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). For its tortured application in connection with spe-

By the same token, we should be careful as to what is meant by "destroys its value," for here it is the removal of the incident of ownership that results in that loss of value. The case would have come out quite the opposite way if economic value had been lost because the construction of new buildings had reduced the value of Jacob's tenement. The line between competition and protectionism applies no matter what clause is at issue. Unless there is a restriction on use, the risks of any change in value, positive or negative, fall to the property owner.

The same analysis is also applied to the liberty side of the equation because the statute in question "arbitrarily deprives him of his property and of some portion of his personal liberty."[33] Here again it was sufficient that some aspect of liberty was lost, even if other aspects were retained. Consistent with that view, the Court rejected the proposition that liberty should be defined to cover only those cases of imprisonment or loss of motion:

> Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.[34]

The term "lawful" here is not a "weasel word," but was used in part to connote that the manufacture of tobacco had been traditionally allowed elsewhere, and continued to be allowed everywhere in New York State, except for New York City and Brooklyn.

At the first stage, therefore, *Jacobs* gives the terms property and liberty the same broad meanings that they have in ordinary common law. No compensation of any sort was offered to Jacobs, so the case turned on the question of whether the statute bore a reasonable relationship to health and safety.[35] On that point, the alarm bells once again sounded. Although smoking tobacco could easily be regarded as dangerous, why so its manufacture? And if its manufacture was dangerous, why only in two large cities (Brooklyn was then a separate city) and not everywhere in New York State? If allowed everywhere in workplaces, then why not in homes, especially if the odors could not be detected in the next room? If allowed in single-family homes, then why not in tenements with three or more units? Although the Court in *Jacobs* could not have been populated with trained public choice economists, the text of the statute itself gives clear evidence that strong

cific building restrictions, see *Bowles v. United States*, 31 Fed. Cl. 37, 46–49 (1994), and *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995).

33 *Jacobs*, 98 N.Y. at 105.

34 *Id*. at 106.

35 *Id*. at 115.

factions sought to rig labor markets to frustrate competition from small independent operations. The case thus impinges both liberty and property in circumstances where there is no particular reason to distinguish between them. Indeed, once the New Deal jurisprudence took hold, the Fair Labor Standards Act of 1938 did regulate home labor for just these anticompetitive reasons.[36] All that it took to change the worldview was to combine a narrow definition of the property taken with a capacious reading of the police power: a one-two punch that is devastating to any coherent account of economic liberties.

As should be evident now, the decision in *Lochner* sits comfortably within the mainstream when read in light of the decision in *Jacobs*. As everyone knows, Lochner was convicted under a New York Statute that forbade any employee from working in certain kinds of bakeries for more than ten hours a day. The initial question was whether the liberty of contract under the Due Process Clause was infringed. Here, there could be no barrier of substantive due process after cases like *Jacobs* because, as was often done in this era, the phrase "without due process of law" was construed to cover cases where losses were imposed without just compensation.[37] With that doctrinal point to one side, the first question involved the scope of liberty under the Due Process Clause. Here, in language that parallels the broad definition of property in *Jacobs*, Justice Peckham relied on the strong answer he gave in *Allgeyer v. Louisiana*:

> The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[38]

Once again, compensation is not in the picture, so everything turns on the police power. There was a close debate between Jus-

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36 29 U.S.C. § 202 (1998).

37 *See, e.g.*, Chi., Burlington, & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 235 (1897) (noting the equivalence between the requirements of due process and just compensation); Chi., Milwaukee, & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 458 (1890) (holding that depriving railroads of the right to charge reasonable rates under an administrative order was tantamount "in substance and effect" to a deprivation of property without due process of law).

38 165 U.S. 578, 589 (1897). The Louisiana statute struck down in *Allgeyer* prohibited any out-of-state firm from entering into a contract for marine insurance unless it was licensed to do business in Louisiana, even when the contract was concluded in New York. *Id*. at 579 (dead meat under the modern interpretation of the Dormant Commerce Clause).

tices Peckham and Harlan, but the incomplete coverage of the statute (some but not all bakers, exempted employers, and self-employed individuals), coupled with the clear anticompetitive purpose (nonunion bakers worked longer shifts and slept on the job), made the anticompetitive element stronger. In addition, the removal of part time from the work place made it difficult to treat the case as one of *continuous* exposure with major cumulative losses, which is how Justice Harlan imagined the case to be. My point here is not so much to defend the particular result in the case, as to point out that it turns on the relative proportions of anticompetitiveness. This case comes close to the cusp. But it does not indicate that the line was not worth drawing. When all health aspects were removed from the case in *Adair v. United States*,[39] Justice Harlan switched sides and struck down a statute that authorized mandatory collective bargaining on the railroads.[40] All monopoly issues and no health issues removed the mixed motive issues under the police power.

Indeed, a unanimous Supreme Court sustained the workmen's compensation statute against constitutional challenge in a decision by Justice Pitney,[41] just two years after he *correctly* struck down a state statute that authorized collective bargaining in *Coppage v. Kansas*.[42] The point here has nothing to do with the immutable nature of the common law, for both of these statutes mark limitations on freedom of contract. Rather, this is a case where the judges said what they meant and meant what they said. They could see the connection between worker's compensation statutes on the one hand, and worker health and safety on the other. No such connection was discernible with the labor issue.

The broad definition of liberty given in *Allgeyer* is not only important for economic matters, but is capable of principled expansion into a range of other issues as well. Just that type of expansion took place in two key cases: *Meyer v. Nebraska*[43] and *Pierce v. Society of Sisters*.[44] The former case overturned a conviction for teaching the German language to schoolchildren.[45] The latter overturned a rule that prohibited the education of children in parochial schools.[46] Both of these statutes fell within the broad definition of liberty adopted by Justice McReynolds, who wrote:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to en-

39 208 U.S. 161 (1908). *See also* Coppage v. Kansas, 236 U.S. 1 (1915).
40 *Adair*, 208 U.S. at 180.
41 N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 209 (1917).
42 *Coppage*, 236 U.S. 1, 26 (1915).
43 262 U.S. 390 (1923).
44 268 U.S. 510 (1925).
45 *Meyer*, 262 U.S. at 403.
46 *Pierce*, 268 U.S. at 536.

> gage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[47]

Before dismissing those words as idle chatter, it is worthwhile to recall the forces that McReynolds, himself an anti-Semite, had derailed. The 1922 Oregon statute struck down in *Pierce* did not have a noble heritage.

> The measure was supported by Masons, the Ku Klux Klan, and patriotic societies and vociferously opposed by Roman Catholic groups, Lutherans, and Seventh-Day Adventists, as well as much of the state's press. The purpose of the measure was to destroy nonpublic schools, which enrolled only seven percent of the children in the state.[48]

Consistent with the general analysis, McReynolds did not ignore the role of police power justifications, but noted that the state had the power

> reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[49]

He did not go into the details of this explication, and had no occasion to address the genuine risk that state regulation pursuant to this mandate could be made so onerous and costly as to make it impossible for any private school to function—which is why the intermediate scrutiny standard must be maintained in the first place. However, it is painfully clear that this total ban had to fail under any police power justification, except for the autocratic claim that state security depends on state domination, which marred Justice Frankfurter's ill-starred marriage of safety and national security in *Minersville School District v. Gobitis*.[50]

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47 *Meyer*, 262 U.S. at 399.

48 Diane Ravitch, *American Traditions of Education*, *in* A PRIMER ON AMERICA'S SCHOOLS 12 (Terry M. Moe ed., 2001).

49 *Pierce*, 268 U.S. at 534.

50 310 U.S. 586, 595 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Justice Frankfurter wrote in an indirect appeal to the safety element of the police power justification:

> Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom. Even if it were assumed that freedom of speech goes beyond the historic concept of full opportunity to utter and to disseminate views, however heretical or offensive to dominant opinion, and includes freedom from conveying what may be deemed an implied but

The modern dislike of *Lochner* and substantive due process has not led to the repudiation of either *Meyer* or *Pierce*, but simply to their recharacterization.[51] They are now treated as involving First Amendment rights of speech, association, and religion. That shift cannot be justified on the ground that *Meyer* and *Pierce* misapplied their own conceptual framework. Rather, that opportunistic shift only makes sense for one reason: the level of scrutiny is higher so that the rational basis analysis is not allowed to eviscerate the basic protection through a broad reading of the police power, which in these areas is kept within the traditional boundaries it occupied for economic liberties elsewhere.

The Supreme Court has, to say the least, been inconsistent in applying this general framework in all religious contexts. In *Employment Division v. Smith*,[52] Justice Scalia took the position that the Free Exercise Clause of the First Amendment did not extend to illegal actions (here, the smoking of peyote under tightly controlled circumstances).[53] The resulting outcry is best explained by one simple reason. The health and safety justifications for the drug prohibition in this limited circumstance looks to be vanishingly weak, so much so that the state itself had not bothered to prosecute, so that collaterally the issue was raised on the question of whether Smith could be denied employment benefits because of the commission of this particular crime. Justice Scalia held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[54] Note what this formulation does to the general inquiry. It concedes that religious liberty is abridged, but then avoids the negative implications of that position by holding that the police power requirement is satisfied so long as the rule, any rule, is one of generally applicability. In effect the decision relies on a formal account of nondiscrimination to insulate from a review a statute that has, to say the least, a disparate impact on the individuals subject to its commands. *Smith*, it must be recalled, does not raise the bogus claim that the

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rejected affirmation, the question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills.

Id.

51 *See* GERALD GUNTHER, CONSTITUTIONAL LAW 491 (12th ed. 1991).

52 494 U.S. 872 (1990).

53 *Id*. at 878–79.

54 *Id*. at 879.

free exercise of religion is so broad as to allow the members of Smith's tribe to smoke peyote (let alone cyanide) whenever and wherever they so choose. Nor is it, evidently, a case where the religious group defends its right to receive welfare benefits without having to contribute a penny in funding.

In some cases, however, the police power issues are a bit closer. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[55] the practitioners of the Santeria religion, brought by slaves from Africa to Cuba, engaged in widespread ritual slaughter which the City of Hialeah sought to prohibit by an emergency ordinance as "inconsistent with public morals, peace or safety."[56] An exception was made for slaughters undertaken by licensed establishments for slaughtering animals for ordinary consumption. In striking down the ordinance, Justice Kennedy hit on all the familiar themes in his analysis of the singling out of some religious groups for special treatment, noting how the animus directed to a particular group could taint an otherwise neutral ordinance.[57] As in *Pierce*, the Court noted that ordinances narrower than a total ban could achieve whatever legitimate goals it had, whether measured in terms of the protection of animals from unnecessary cruelty or the public at large from pollution.[58] Indeed in this case, the questions of fit were treated as especially urgent because the entire ordinance was subject to "the most rigorous of scrutiny."[59]

Perhaps, the analysis would have come out somewhat differently under a standard of intermediate scrutiny, which is in general appropriate for questions of property and liberty. But no matter. To be sure, it is easy to identify some cases that come close to the line. It is no surprise that no matter what standard is used, some cases will always be close to the line. But no matter how clear the *conceptual* judgment that certain laws limit the exercise of liberty, the matter of justification is not. Any use of intermediate scrutiny must balance two kinds of error. The process in turn invites a large amount of evidence that, when the dust settles, necessarily gives rise to a subset of cases that will be in equipoise, or nearly so. Equipoise is a fact of life under any legal regime. The key question is whether the right questions have placed the balance point at the right juncture.

IV. Federalism Questions

Thus far I have shown how the same principles play out across the full range of property and liberty interests. It is equally

55 508 U.S. 520 (1993).
56 *Id*. at 526.
57 *Id*. at 534.
58 *Id*. at 538–39.
59 *Id*. at 546.

important to realize that these principles give a good deal of information about the rules governing federalism as well. At first blush, it might be thought that the principles that deal with the coordination of activities among states bear little resemblance to those that organize the relationship of the individual to the state. But this conclusion is erroneous. The point can be made by looking at cases under the Dormant Commerce Clause. Here, it hardly matters that the constitutional pedigree for the recognition of any Dormant Commerce Clause is most uneasy.[60] But for these purposes, it hardly matters whether the clause exists or not. The basic point is that the success of the doctrine rests on the fact that the cases that seek to explicate the Dormant Commerce Clause all begin with the basic realization that the purpose of the clause is to preserve a competitive environment in which both in and out-of-state firms may compete on a level playing field. The distaste for special privilege is now carried over to condemn any advantages afforded in-staters at the expense of out-of-staters. Any barrier to trade, whether in the form of a tax, permit, or regulation, imposed on an outsider, is a form of economic protection for the insiders, just as the restrictions struck down in *Jacobs* and *Lochner* were understood to be anticompetitive "labor" statutes.

At this point we face problems that have an identical structure to those that deal with questions of individual rights. Does the state action constitute an interference with liberty? If so, what justifications may be offered for the restrictions imposed? Any articulation of the inquiry will involve the same cluster of concepts used to evaluate state restrictions imposed on individual rights, and the outcome will depend critically on the standard of review that is brought to these matters. On this issue the tenacious judicial commitment to free trade across state borders (unless Congress intervenes) has proven strong enough to create a durable body of state law that shows no deference to legislative intention.

To see how the difference in standards plays out, it is instructive to start with a contrast between individual due process and federalism claims. Consider the comparison of *Nebbia v. New York*[61] with *Baldwin v. G.A.F. Seelig, Inc.*,[62] both of which involved

60 DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 173 (1985).

> The wording of the clause suggests no limitation on the states; it merely grants Congress the authority to "regulate Commerce." This language contrasts vividly with Congress's power of "exclusive Legislation" over the District of Columbia and with the various provisions of article I, section 10, expressly forbidding states to invade such federal preserves as the making of treaties or the coining of money.

Id.

61 291 U.S. 502 (1934).

62 294 U.S. 511 (1935).

the ongoing saga of monopoly regulation and protectionist practices in the dairy industry. In *Nebbia*, the question was whether the state acted beyond its power when it sought to set the minimum price that retailers could charge for milk. The Milk Control Board had set a price of nine cents per quart, and the defendant was subject to *criminal* penalties for selling two quarts of milk for eighteen cents because he threw a five cent loaf of bread into the bargain. The defendant argued that it was beyond the power of the state to set minimum prices for milk because the dairy industry was not "affected with a public interest" because that industry was not a public utility, and did not hold any monopoly power.[63]

In urging this position, the defendant appealed to a long tradition. Sir Matthew Hale[64] had first used the phrase "affected with the public interest" in the seventeenth century to explain why the rates charged for individuals who operated a public wharf—that is, a wharf to which all *must* come to load and unload—could not charge whatever rates they choose, but must charge rates that were only "reasonable and moderate." Hale supplied the decisive argument for *Allnutt v. Inglis*,[65] in which the state monopoly was a licensed customs house for goods bound for export free of local custom duties. Lord Ellenborough held that the licensee's monopoly power justified limitations on rates.

> There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms.[66]

In that case it meant that the licensed warehouse could charge only the rates that other warehouses, acting in competitive markets, could charge customers for goods bound for sale in England. The principle articulated in *Allnutt* was carried over to the United States in *Munn v. Illinois*,[67] which rejected a constitutional challenge to the maximum rates that Illinois set for grain elevators that operated along-side the railroad tracks on the grounds that they were "affected with a public interest."[68] In his *Munn* opinion, Chief Justice Waite quoted extensively from both Hale

63 *Id*. at 531.

64 Sir Matthew Hale, *De Portibus Maris*, *reprinted in* FRANCIS HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND (1787).

65 104 Eng. Rep. 206 (K.B. 1810).

66 *Id.* at 210–11.

67 94 U.S. 113 (1876).

68 *Id*. at 130.

and *Allnutt*,[69] and included Hale's reference to legal monopoly.[70] Chief Justice Waite also alluded to some agreement among the grain operators, but stopped short of calling this "'virtual' monopoly" a cartel, only to conclude that any remedy for the operators lay at the polls and not with the Court.[71] Justice Field, a consistent libertarian, issued a stinging dissent to the effect that if grain elevators were affected with the public interest, then so, too, was every other business.[72] But Justice Field remained eerily quiet on the issue of monopoly power lurking in the background.[73]

Nebbia rejected the previous tests altogether by upholding New York's *minimum* prices for milk on the ground that the dairy industry, like every major business, was affected with the public interest solely in virtue of its size and importance to the public at large.[74] Thus, *Nebbia* neatly transformed a concept initially designed to limit monopoly power into one that propped up state-sponsored cartels, in part on the dubious public health ground that higher costs offered protection against contamination and spoilage.[75] The net effect is that the rejection of the older tests came from the unwillingness of the court to distinguish between the allocative effects of competition and monopoly. But the Court took quite a different attitude one year later in *Baldwin*, where the question was whether the Milk Control Board was within its rights to prohibit sales within New York of out-of-state milk that had been purchased at below the minimum prices set for buying milk within the state.[76] In effect, an outsider was not licensed to sell milk within the state unless it agreed to price its milk in accordance with the state regulation of imported milk. Justice Cardozo hit the nail on the head when he noted that the regulation in question was equal to a tax in the amount of the difference be-

69 *Id*. at 126–28.

70 *Id*. at 128.

71 *Id*. at 131.

72 *Id*. at 141 ("[T]here is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion . . . .").

73 For a detailed account of the economic arrangements that support the monopoly view, see Edmund W. Kitch & Clara Ann Bowler, *The Facts of* Munn v. Illinois, *in* 1978 THE SUPREME COURT REVIEW 313–43 (Philip B. Kurland & Gerhard Casper eds., 1979).

74 *Nebbia*, 291 U.S. at 531–32. The Court stated:

> We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle.

Id.

75 *Id*. at 516–17.

76 294 U.S. 511 (1935).

tween the local and imported prices.[77] Accordingly, he held that the state could not insulate local sellers from competition from outside the state by adopting a tax that eradicated the outsider's price advantage. Now competition became the dominant motif:

> If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.[78]

Clearly, this statement raises the issue of state retaliation not found in the internal regulation that one state imposes on the property and liberty of its citizens. From this difference, it might be inferred that consumer welfare in the abstract was not the touchstone of the Dormant Commerce Clause. No matter; the critical point remains the same regardless of the judicial motivations. Once the court cares about state competition, for whatever reasons, it then has the means in its power to see through the various schemes that could frustrate its operations. The indifference between competition and monopoly that was so evident in *Nebbia* was nowhere to be found in *Baldwin*, where a higher level of scrutiny led to the correct result.[79] The same conviction of the vital role for interstate competition led, in *H. P. Hood & Sons, Inc. v. Du Mond*,[80] to the invalidation of an effort by New York's Commissioner of Agriculture and Markets to refuse to issue a permit to an out-of-state distributor because of his fear that "destructive competition" would disrupt the stability of markets that were already "adequately served."[81] Once again, the decision struck down the operation of a state-run cartel. But locals would have no recourse against the same form of favoritism.

Cases like *Baldwin* and *Hood* did raise the theme of nondiscrimination against outsiders, but they did not raise the traditional tensions that arise in drawing the line between legitimate state police regulations for health and safety, and the suppression of competition—which is the precise issue in cases like *Jacobs* and *Lochner*. However, in this context, the Supreme Court did care about the outcome. The distinction the Court drew came from the same sensible level of scrutiny (more strict than intermediate in fact) that it could have brought to claims for the protection of individual rights. Here it is sufficient to refer briefly to two well-known cases.

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77 *Id*. at 526.
78 *Id*. at 522.
79 *Id*. at 527, 528.
80 336 U.S. 525 (1949).
81 *Id*. at 529.

In *Dean Milk Co. v. Madison*,[82] the City of Madison adopted an ordinance that required all milk sold within the city to be pasteurized at an approved plant near the city's central square. The state barred Dean from selling milk that had been pasteurized in Illinois or elsewhere in Wisconsin. Consumer safety was the purported justification for this local ordinance, but the entire issue was rightly dismissed as a sham when it was shown that Dean Milk had been processing its milk in conformity with Illinois and Wisconsin law, without visible adverse effects on consumers anywhere.[83] No one could object to the health ends of the statute, but it took only a few sentences to realize that the Madison ordinance had one purpose, "erecting an economic barrier protecting a major local industry against competition from without the State," a conclusion that was reached even though some in-state milk was caught by the prohibition as well.[84] To allow the restriction to remain simply because some in-staters were disadvantaged would not do, as that was the price the local merchants of Madison would have happily paid to achieve their own local cartel. Hence the tougher rule was properly applied, sparing the need to have the Wisconsin Court strike down the Madison ordinance as special legislation of the worst kind.[85]

Yet in *Maine v. Taylor*,[86] a ban on the importation of bait-fish was held justified, here under a virtual strict scrutiny standard, because of a clear showing of the possible dangers of parasites and nonnative species on local flora and fauna.[87] But the clear implication of all this is that the states could *not* keep out apples treated with alar on some supposed health ground. Because the Court cares about competition, it does not let purported health and safety justifications under the police power swallow the basic constitutional provision.

This affection for the competitive solution does not, however, carry over to laws that sanction the adoption of rules neutral on their face but with disparate impacts against out-of-state firms. The clear sign that the level of scrutiny has been reduced is the refusal to look with suspicion on facially neutral rules passed with strategic intent, which characterized Justice Kennedy's First Amendment decision in *Church of Lukumi Babalu Aye*.[88] The lower level of scrutiny allows the disparate impact and legislative motive to disappear from the judicial radar screen, so that results start to flip over.

82 340 U.S. 349 (1951).
83 *Id*. at 352.
84 *Id*. at 354.
85 *Id*. at 356.
86 477 U.S. 131 (1986).
87 *Id*. at 148.
88 508 U.S. 520 (1993).

Two examples illustrate this trend. In *Exxon Corp. v. Governor of Maryland*,[89] the Supreme Court sustained a Maryland statute that prohibited producers and refiners of petroleum products from operating retail establishments within the state.[90] There were no local producers and refiners, so the statute hit solely against out-of-state parties. Justice Stevens did not ask what circumstances could have justified this prohibition on entry, and he certainly did not argue that the vertical integration (commonplace in the industry) posed any antitrust problem. Rather, he contented himself with noting that much competition remained at the retail level even after the statute.[91] For Justice Stevens, it was enough that independent interstate dealers could enter the market.[92] But the implicit targeting of one segment of the market must distort competitive forces locally, so that using the higher standard of scrutiny, now reserved to *explicit* discrimination against out-of-staters, would have produced a different result. There is no discernible state interest to ban an entire class of entrants solely because some out-of-state refiners were alleged to have favored their own retail establishments during the massive oil shortages brought on by the price controls imposed in 1973 after the Yom Kippur War.

Judicial deference became a rout in *Minnesota v. Clover Leaf Creamery Co.*,[93] in which the Court upheld a Minnesota statute that banned the sale of milk in the plastic nonreturnable containers in common use everywhere in the country.[94] Only in Minnesota were nonreturnable containers required to be constructed out of pulpwood. The chief backer of the statute was the local paper manufacturer. The ostensible justification for the restriction was to prevent the adverse environmental impact of plastic containers on solid waste management. The statute was neutral on its face, but it was known at the time of its passage that its burdens would fall on out-of-state producers while its benefits would go to the in-state firms that had supported the statute's passage. No matter. Without explicit discrimination, the out-of-state firms suffered only incidental burdens that were not "clearly excessive in relation to the putative local benefits."[95] Unlike *Taylor*, the purported environmental justifications did not receive close examination, but were taken virtually at face value even though no other state had adopted similar legislation. At no point did Justice Brennan, writing for the Court, recognize the dangers in evaluating this

89 437 U.S. 117 (1978).
90 *Id*. at 119–21.
91 *Id*. at 126.
92 *Id*. at 125–26.
93 449 U.S. 456 (1981).
94 *Id*. at 473.
95 *Id*. at 471 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

neutral rule as if it were a random output from the legislative process. Justice Brennan turned a blind eye to the fact that the legislature knew the impact of passing the statute, and purposely chose a neutral rule that effectively advanced protectionist agenda. This greater deference to facially neutral statutes led to a reduction in scrutiny of the state's purported police power justifications. As a result, silly protectionist legislation was allowed to slip under the constitutional radar.

The imperfect levels of supervision under the Dormant Commerce Clause turns on the extent to which the Supreme Court is prepared to treat the protection of interstate competitive markets as a constitutional norm. When the discussion shifts from dormant to affirmative power under the Commerce Clause, the competitive ideal no longer informs any fraction of the legal analysis. With the disappearance of any normative objective, judicial review disappears under the waves as the Court resorts, first implicitly and then explicitly, to a see-no-evil version of the "rational basis" test.[96] The deleterious consequences are clear enough in connection with agricultural produce cases like *Wickard v. Filburn*,[97] where concerns with competition took a back seat as the Commerce Clause was read to allow the expansion of government sponsored nationwide cartels, here by preventing their erosion by a farmer feeding his own grain to his livestock.[98] The key lesson of the New Deal is that the Courts routinely yield to Congress on the question of whether it is best to preserve competition under the antitrust laws or to foster cartels under some explicit statutory scheme.

The recent decisions of the Supreme Court in *United States v. Lopez*[99] and *United States v. Morrison*[100] should be praised, at least to the extent that they recognize that the doctrine of enumerated powers places some limitation on what Congress may do. But the entire treatment of the conservative majority is muddled because the Chief Justice goes to such enormous pains to indicate that the decisions in *NLRB v. Jones & Laughlin Steel Corp.*[101] and

96 *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (sustaining a federal conviction for "loansharking" under the Consumer Credit Protection Act); Maryland v. Wirtz, 392 U.S. 183 (1968) (holding the wage and hour requirements of the Fair Labor Standards Acts applicable under the Commerce Clause to state governments, hospitals, and school districts).

97 317 U.S. 111 (1942).

98 For my views, see Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y 209 (1998).

99 514 U.S. 549 (1995).

100 529 U.S. 598 (2000).

101 331 U.S. 416 (1947).

Wickard continue to meet with judicial approval.[102] The skin-deep nature of the concern for economic liberties is only made more evident by the frightful performance of the Supreme Court in its recent *Eldred v. Ashcroft*[103] decision that upheld the Copyright Term Extension Act[104] in an opinion replete with deferential rational basis language celebrating the power of Congress to do what it will. The obvious starting point for *Eldred* was to acknowledge that this case was in deep tension with the slender *Lopez* majority, for if the principle of enumeration places limits on Congressional power to deal with commerce, then why not with copyrights and patents as well? One could respond that the Commerce Clause deals with federalism while the Copyright and Patent Clauses do not. But that point is false to the extent that the federal power to grant copyrights and patents necessarily limits the power of the states to impose their own intellectual property regimes.[105] More to the point, with commerce, patents, and copyrights, the deepest questions concern the scope of Congress's power to create and foster monopoly for some end. How the Supreme Court thinks about this power is anyone's guess. Although the connection between the commerce, patent, and copyright issues was squarely raised in Judge Sentelle's dissent[106]—and was the centerpiece of the *Eldred* brief[107]—*none* of the three opinions (Ginsburg, Stevens & Breyer) sought fit to even *cite Lope*z, let alone resolve the issue. This constant willingness to allow the interpretive standards to shift with the wind from clause to clause will surely make it impossible to maintain any consistent constitutional regime that protects economic liberty or private property. A pity.

V. CONCLUSION

The major purpose of this Foreword is to show that the attitudes towards economic liberties are not the product of some random number generator. Once a court believes in the basic proposition that the purpose of government is to protect ordered liberty in all aspects of life, then there is only one way in which it can undertake constitutional interpretation. It must first begin with a broad presumption in favor of the protection of liberty and

102 *See Lopez*, 514 U.S. at 627 (discussing the decision in Wickard v. Filburn, 317 U.S. 111 (1942)). *See also Morrison*, 529 U.S. at 608–09 (discussing the decision in NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416 (1947)).

103 Eldred v. Ashcroft, 123 S. Ct. 769 (2003).

104 Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.). I have railed against this act from the beginning, see Richard A. Epstein, *Congress's Copyright Giveaway*, WALL ST. J., Dec. 21, 1998, at A19.

105 *See, e.g.*, Bonito Boats, Inc. v. Thunder Craft Boats, 489 U.S. 141 (1989).

106 *See* Eldred v. Reno, 239 F.3d 372, 380–84 (D.C. Cir. 2001).

107 *See* Petitioner's Brief, Eldred v. Ashcroft, 123 S. Ct. 769 (2002) (No. 01-618).

property, and then require the state to show some strong justification as to why that liberty ought to be limited or abridged. The justifications that most readily present themselves are the control of externalities, such as pollution, and the need to coordinate the activities of large numbers of individuals when high transaction costs preclude voluntary interaction among individuals.

Seen in this light, the question constantly before the Court is what health and safety needs can justify state regulation under the police power. The level of scrutiny brought to this question determines the fate of the entire inquiry. That level is not explicitly set in the Constitution, which, for that matter, also contains no reference to the police power arguments that are necessary to make it work. History on these subjects therefore often takes the form of "necessary" history. Those people who subscribe to the classical liberal framework will, out of sheer intellectual necessity, use the same set of concepts to evaluate any proposed form of government regulation under intermediate or strict scrutiny. It makes relatively little difference what particular clause prompts the challenge. Those people who do not subscribe to the classical framework will side instead with Justice Holmes in *Lochner*, who managed to repudiate the entire tradition of American constitutionalism with a single sentence: "But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."[108] That may be true of "a" constitution, but it is assuredly not true of our own Constitution, which has succeeded precisely because it does articulate and implement a theory of government. That theory is not one of the organic relation between the individual and the state. Nor is it one of *laissez faire*, if that position is taken to exclude the possibility of police power regulation of health, safety, or taxation, at least in the forms that I have discussed here. Rather, the strength of our Constitution lies in the fact that the implicit tradition of classical liberalism that points the way to a middle road has been intuited and acted on by justices of all political persuasions.

The somber lesson of this inquiry is that the success of any constitution depends ultimately on the intellectual orientation that is brought to the interpretation of its central provisions. Seen in this light, the remarkable intellectual achievement of the late nineteenth century and early twentieth century is how well judges succeeded in the area of economic liberties in preserving the ideal of a free and open society. In the post-New Deal era, the Court has done well, by and large, in protecting individual liberties in areas such as speech and religion. It has a somewhat more mixed

108 198 U.S. 45, 75 (1905).

record in cases under the Dormant Commerce Clause. But its greatest failure has been the dissipation of a precious intellectual heritage in the preservation of private property and economic liberties.

The moral should now be clear. Where we end up depends heavily on where we begin. Anyone who is concerned with limited government will support a system that has strong property rights and limits government power to force, fraud, and monopoly. Competition through markets, within and across state boundaries, becomes a preferred conception. The case law will reflect that fundamental choice. Anyone who reads the Federalist Papers with an open mind will see that they are dominated by concerns with faction and political abuse, and by the desire to limit the scope of the public domain, and then to insure that deliberations within it take place in a responsible matter. No one with that orientation could rest easily with the rational basis gloss that the Supreme Court places on economic liberties and the Constitution. My hope is that the necessary history inherent in our Constitution once again becomes the actual history of the Constitution.

Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich

*Erwin Chemerinsky**

I. INTRODUCTION

When I was invited to participate in this symposium, I immediately accepted without giving any thought to what I would write on the topic of economic liberties. As the date for the symposium approached, I became increasingly worried about what I would say on the topic. I strongly believe that the Supreme Court has gotten it right since 1937 when it comes to economic rights. The Court has been clear that claims of economic rights should receive only rational basis review.[1] Freedom of contract is not regarded as a fundamental right.[2] Government regulations are upheld so long as there is some conceivable permissible purpose and so long as the means are reasonably related to achieving the goal. The Court has greatly deferred to government economic regulations; "the Court has not invalidated an economic regulation on substantive due process grounds since 1937."[3]

Since the famous *United States v. Carolene Products Co.* footnote,[4] the Court has drawn a distinction between political rights and economic liberties. The former—including the provisions of the First Amendment and the protection of "discrete and insular minorities"—receive heightened judicial scrutiny; but the latter is treated with great judicial deference and receives rational basis review. This is exactly right: the Court has made the correct value choice in terms of the importance of the interests at stake and the relative need for government regulations. There is a far greater

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1 *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 487–88, 491 (1955) (upholding an Oklahoma law forbidding opticians from making eyeglass lenses without a prescription); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536–37 (1949) (utilizing rational basis review to uphold state laws preventing employer discrimination against non-union workers).

2 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). This case marked the end of the *Lochner* era. The Court stated: "What is this freedom? The Constitution does not speak of freedom of contract." *Id.*

3 GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 733 (4th ed. 2001).

4 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

need for economic regulation in the complex economy of the late twentieth and early twenty-first centuries, than for regulation of speech or for discrimination against minorities. Political and civil rights and liberties—free speech, privacy, voting, and so on—are properly regarded as fundamental rights because of their importance to personhood and for society; but freedom of contract should not be so regarded.

My belief that the Court has clearly gotten it right for the last sixty-five years with regard to economic liberties created a challenge in choosing a topic for this symposium. Was it worthwhile to write a paper defending a status quo that is so widely accepted as correct?[5]

I initially began a paper doing just that—arguing that the Court has taken the right approach to economic liberties since 1937. This felt strange; perhaps because I have spent the last twenty-five years writing articles criticizing decisions, I am unaccustomed to writing articles praising them. So I searched for an alternative topic and realized that the entire discussion of economic liberties, at this symposium and through most of American history, has been about protecting the rights of the rich to keep and use their money and property. The phrase "economic liberties" brings to mind challenges to regulations—minimum wage laws, minimum hour laws, child labor laws—put in place to help the more disadvantaged and powerless members of our society.

But if we are going to engage in a serious discourse about economic liberties, then our focus should be on the rights of the least well off in America. The wealth gap between the rich and the poor has grown wider in recent years and is increasing. I truly believe that in the long-term, the greatest threat to the survival of the nation will come from the growing class divide. History shows that the division between rich and poor is the most frequent impetus for political uprisings. Moreover, it is immoral that the wealthiest nation in the history of the world does so little for its poor.

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5 Listening to the other papers at this symposium reminded me that the agreement is not universal. Hearing some of the leading advocates for a revival of economic rights caused me to think that maybe a defense of the status quo might have been appropriate after all. On the other hand, advocacy of a return to the *Lochner* era seems limited to a relatively small group of libertarian and quite conservative scholars. There are no suggestions from the Supreme Court that such a revival is likely to happen any time soon, and the overwhelming weight of academic opinion is in favor of continuing the law as it has been for the last sixty-five years. There also is a more subtle reason why even most conservative law professors and judges do not urge a revival of the *Lochner* era doctrines: at least since the Warren Court, conservatives have been the foremost advocates of judicial restraint. Heightened judicial scrutiny of economic regulations, with frequent invalidations of federal, state, and local laws, would be impossible to reconcile with this philosophy of judicial review.

So I decided that the focus for this essay would be a simple message: if there is going to be a rebirth of concern for economic liberties, it should focus on creating and protecting rights for the poor, not on safeguarding the wealth and property of the rich from government regulation. In this essay, I make three points. First, the traditional focus of the Supreme Court's economic liberties decisions has been on protecting corporations and the wealthy from government regulation. Second, the real problem when it comes to economic liberties is poverty. Finally, in the long term, the Court should interpret the Constitution as creating a right to minimum entitlements for all Americans to the necessities of life: food, shelter, and medical care.

I, of course, am not the first to argue this; forceful arguments for a constitutional right to livelihood have been made by eminent scholars such as Charles Black, Peter Edelman, and Frank Michelman.[6] Nor do I have any illusion that this is likely to happen in my lifetime. No Justice on the current Court would advocate such a view and it is as much a minority position in the academy as is advocacy for a revival of *Lochner* era doctrines. More generally, there is little social commitment to dealing with the problem of poverty. For at least the last quarter of a century, welfare reform has been all about cutting benefits and eligibility with increasingly draconian laws. Intellectually, there has been a growth in a libertarian philosophy which seems founded on profound selfishness—a desire of people to have the government leave them and their money alone. There has not been a development of a social ethos of caring and duty to others.

Few seem to remember that President Richard Nixon proposed a guaranteed annual income in the form of a negative income tax. The War on Poverty of President Lyndon Johnson's "Great Society" is a distant, and poorly understood, memory. But I deeply believe that someday attention will turn again to the real problem of economic rights: the plight of the poor. And someday, as social attitudes change, the Supreme Court will say that every person has a fundamental right to basic entitlements such as food, shelter, and medical care. This essay is written in the hope and anticipation of that time, undoubtedly far into the future.

II. The Traditional Focus of Economic Liberties

In this section, I make a simple point: advocacy of economic liberties in the Supreme Court has been about protecting the in-

6 *See, e.g.*, Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 Colum. L. Rev. 1103 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 Hastings L.J. 1 (1987); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

terests of corporations and the wealthy to be free from government regulation. Certainly, this was true during the *Lochner* era. The landmark case of *Lochner v. New York* involved a challenge to a state law that limited bakers to working sixty hours a week and no more than ten hours a day.[7] The law obviously was enacted to protect bakers from being pressured into working inhumane and unhealthy hours. The Court's invalidation of this statute was typical of what occurred throughout this era of American constitutional history: the Supreme Court repeatedly invalidated statutes that were enacted to help workers and consumers.

For example, in *Adair v. United States*,[8] and *Coppage v. Kansas*,[9] the Court declared unconstitutional federal and state laws that prohibited employers from requiring employees to sign agreements stating they would not join a union. In the early part of the century, as workers attempted to unionize, many states and the federal government adopted laws to facilitate unionization by prohibiting employers from insisting, as a condition of employment, that employees agree not to join a union. The Supreme Court declared the laws unconstitutional as impermissibly infringing freedom of contract. The effect of these decisions was to protect the rights of management to be free from unions and deny workers the ability to unionize to equalize their bargaining power.

Similarly, the Court during this era repeatedly invalidated state minimum wage laws which had been enacted to ensure that workers were paid a humane, albeit small, amount.[10] Laws protecting consumers from abuses by businesses were also struck down. For instance, in *Weaver v. Palmer Bros. Co.*, the Court declared unconstitutional a state law prohibiting the use of "shoddy" in making bedding.[11] The Court rejected the claim that the ban was needed to protect public health and found that the law interfered with freedom of contract for anyone who wished to buy and sell such products.[12] The Court said that the public interest in health could be served by regulation, such as by mandating sterilization of the material.[13] In *Jay Burns Baking Co. v. Bryan*, the Court declared unconstitutional a law that required standardized weights for bread loaves.[14]

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7 198 U.S. 45, 52 (1905).

8 208 U.S. 161, 179–80 (1908).

9 236 U.S. 1, 26 (1915).

10 *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 609 (1936); Adkins v. Children's Hosp., 261 U.S. 525, 559–62 (1923).

11 270 U.S. 402, 415 (1926). "Shoddy" consisted of rags and other debris that were used to stuff mattresses. *Id.* at 409.

12 *Id.* at 412–15.

13 *Id.* at 414.

14 264 U.S. 504, 517 (1924).

The consistent theme in all of these cases is that the Supreme Court during the *Lochner* era was ruling in favor of businesses and the wealthy at the expense of laws enacted to protect workers and the less well off. Not surprisingly, *Lochner* era doctrines did not survive the depression. The reality is that the market, far more than government regulations, denied meaningful bargaining power and economic liberty for most people in society. As Professor Tribe explains:

> In large measure . . . it was the economic realities of the Depression that graphically undermined *Lochner*'s premises. . . . The legal "freedom" of contract and property came increasingly to be seen as an illusion, subject as it was to impersonal economic forces. Positive government intervention came to be more widely accepted as essential to individual, family, and community survival, and legal doctrines would henceforth have to operate from that premise.[15]

This is not to deny that occasionally challenges to economic regulations were brought by employees who wanted to work more than sixty hours a week or for less than the minimum wage. Rather, the point is that the overarching motif of the *Lochner* era involved the Supreme Court striking down laws intended to help workers and consumers, which in turn benefited corporations and wealthy propertied interests. That is what claims of economic liberties have always been about, even when the Court has ruled in favor of the government. For example, in *Home Building & Loan Ass'n v. Blaisdell*, the Court upheld a moratorium on foreclosure sales of farm mortgages.[16] The case involved an effort by banks to invalidate a law that had been adopted during the depression to protect consumers. Even today, economic liberties cases are about efforts by those with money and property to resist government regulation. The Supreme Court's most recent property rights case—*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*—involved whether temporary delays in the development of property for purposes of environmental review are a *per se* taking.[17]

"Economic liberties" has a clear and consistent meaning throughout American history: efforts to use the Constitution to protect the rights of corporations and property owners by invalidating laws enacted to protect employees, consumers, and the environment.

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15 LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1358 (3d ed. 2000) (footnotes omitted).

16 290 U.S. 398, 447–48 (1934).

17 535 U.S. 302, 306 (2002).

III. Reconceptualizing Economic Liberties to Protect the Poor

Poverty is a serious problem in American society. 2000 Census data indicated that 31.1 million people lived below the poverty line; and an additional 12.3 million people were only slightly above the poverty line.[18] Whereas 9.4% of whites were below the poverty line, 21.2% of Hispanics and 22% of blacks in the United States are poor.[19] Most tragically, eleven million children—one in six children in the United States—lived in a family below the poverty level.[20] The problem is much greater for minority children. Thirty percent of all black children and 27% of all Hispanic children lived below the poverty level.[21]

A decade of great economic prosperity did not benefit the poor nearly as much as the rich; racial minorities continue to be vastly less well off than whites. In 2000, white households had a median net income of $44,232; black households had a median net income of $30,436.[22] According to recent census statistics, 38.7 million people in the United States—14% of the population—went without health insurance during the entire 2000 calendar year.[23] Thirteen percent of whites were without health insurance, compared to 18% of blacks.[24] In 1995, 39% of black households survived on incomes of $11,612 or less, while only 6% of black households brought in "high incomes" of $50,000 or more.[25] Conversely, at the close of the 1990s, the number of black household's earning under $15,000 exceeded that of whites by more than 11%.[26] As telling as these statistics are, they do not convey the human effects of poverty. Numbers cannot capture the devastating effects of poverty or convey what it is like for a child to grow up hungry and without access to medical care.

There is a serious problem with poverty in this country, but there seems a general lack of awareness on the part of the public to the plight of the poor. The poor are invisible to most Americans. Popular images are shaped by television, yet few television programs focus on the life of the poor in America. In most cities,

18 Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 2002, at 441 tbl.668 (122d ed. 2002).

19 *Id.*

20 *Id.* at tbl.669.

21 *Id.*

22 *Id.* at 433 tbl.653.

23 *Id.* at 102 tbl.137.

24 *Id.*

25 Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 Wis. L. Rev. 751, 752 n.9 (1996) (citing Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 100–01 (1995)).

26 Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 2002, at 433 tbl.652 (122d ed. 2002).

the poor, and especially poor people of color, are physically segregated from the rest of society. A big city dweller can coexist with thousands of homeless people without ever seeing the poor where they live. Even when the poor are physically visible, we make them psychologically invisible. We have become accustomed to ignoring the homeless and stepping over and around street beggars.

None of the presidential candidates in 2000 advocated efforts to deal with poverty in the United States. Over thirty years ago, some in the Richard Nixon administration proclaimed that there should be "benign neglect" of the problem of poverty.[27] What has occurred in recent decades is certainly neglect, but there has been nothing benign about it. Decades have passed since the last new program was created to help the poor. Instead, recent efforts have focused on restricting eligibility and cutting benefits. The current weak economy obviously will make the problem much worse.

IV. Towards a Constitutional Right to Minimum Entitlements

Persuading the public, and ultimately the Supreme Court, that the government has a moral duty to provide every person minimum subsistence will be difficult. Many deeply embedded social attitudes will need to be changed. A fundamental belief exists in this society that people are responsible for themselves and their own fate. Consequently, it is a widely accepted notion that, if people are poor, it is a reflection of their own failings and that they are responsible for a solution. In harmony with this commonly-held misconception about the causes of poverty, welfare programs traditionally have helped only the so-called "deserving poor:" dependent children, the disabled, and the elderly. Others are thought to have the responsibility for caring for themselves. General relief benefits traditionally have been unavailable in some states and extremely limited in others.

But it is wrong to blame the poor for their financial plight. People can become poor in countless ways that are no fault of their own, and people often lack the means to do anything about it. Many who are impoverished—most notably children—are truly blameless. National economic policy, discrimination and its long legacy, and inequalities in the educational system, are among the social factors that limit the jobs available and relegate a signifi-

27 Jill Zuckman, *Senate's Longtime Scholar, Champion of Change, Dies; N.Y. Shoeshine Boy Grew Up to Become 'An Intellectual Pioneer and a Trusted Advisor to the Presidents,'* Chi. Trib., Mar. 27, 2003, at C19, *available at* 2003 WL 17256554. Senator Daniel Patrick Moynihan, a controversial democrat and congressional scholar, died March 26, 2003, as this essay was being completed. Surprisingly, he agreed to remain in the White House as an advisor in the Nixon administration, where he infamously suggested that government exercise "benign neglect" toward minorities. *Id.*

cant proportion of the population to poverty. Regardless, though, why people are poor, the government has a moral obligation to care for those who are less well off. In a society with tremendous wealth—enough to spend $100 billion on a war in Iraq—it is unconscionable that millions of children go to bed hungry and are without health insurance.

Government actions can successfully provide people with what is needed for subsistence. One of the worst, and most inaccurate, lessons of the 1960s is that government poverty programs cannot work. To the contrary, the programs of the 1960s were quite successful in achieving their objectives. Between 1960 and 1969, the poverty rate declined from 22.2% to 12.1% of the population.[28]

Perhaps more importantly, the general relief measures implemented thus far have undeniably raised the quality of life for the poor in America. Food stamps alleviate hunger for millions of people; Medicare and Medicaid provide medical care to millions who have none; and public housing programs, for all their problems, provide shelter. Countless lives were improved because programs provided people with basic necessities.

The real problem with anti-poverty efforts is that they have always been terribly underfunded. During the 1960s, at the height of social commitment to the war on poverty, another war—the one in Vietnam—limited the scope of Great Society programs. The effort to combat poverty was very much hindered by the massive amount of money that was needed to fund the war in Southeast Asia. As William L. O'Neill observed, "$1.6 billion, however carefully expended, didn't go far toward meeting the needs of thirty or forty million poor people. . . . [T]he main problem was always money. OEO [the Office of Economic Opportunity] had $50 million to help 150,000 migrant workers, $32 million for over 200,000 reservation Indians."[29]

Unfortunately, history shows that voluntary efforts will not provide adequate resources for the poor to ensure minimum subsistence. The poor are truly a "discrete and insular minority."[30] The poor possess little political power, and are obviously underrepresented in legislatures. By definition, they lack money to give contributions to political candidates or to set up political action

28 Isabel V. Sawhill, *Poverty in the United States: Why is it So Persistent?*, 26 J. ECON. LITERATURE 1073, 1082 (1988).

29 WILLIAM L. O'NEILL, COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960's 131 (1971).

30 William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1774 (1994). *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

committees. They lack the resources to buy advertising time to use the media to communicate.

Most importantly, the self-interest of the majority of citizens is counter to the interests of the poor. Taxpayers are loath to give up their hard earned money to support programs that will not directly benefit them. Social Security is a paradigm example. But welfare programs are a low priority in the public's consciousness. An ugly element of racism also explains the inadequacy of funding for government programs. Deeply embedded racist attitudes create stereotypes about welfare recipients, and these stereotypes become a tacit basis for limiting programs and benefit levels.

All of this is to explain why it must be for the courts and the Constitution to ensure protection of economic rights. The immediate response to this is that the Constitution is concerned only with negative liberties, not affirmative rights. This is flawed for several reasons. First, it is inaccurate to depict the Constitution as solely a charter of negative liberties. Many parts of the Constitution create a duty on the part of the government to take affirmative acts. The Fourth Amendment requires the police to obtain a warrant before a search or an arrest except under relatively narrow circumstances.[31] Almost the entire Fifth Amendment imposes affirmative duties on the government, including the obligation to convene a grand jury before trying a person for a crime and the requirement that the government pay just compensation if it takes private property for public use.[32] The Due Process Clauses of the Fifth and Fourteenth Amendments require notice and hearing as part of procedural due process.[33] The Sixth and Seventh Amendments require the government to provide a jury in criminal and civil trials, respectively.[34] The Sixth Amendment mandates the provision of counsel in cases in which there is a possible prison sentence.[35] Simply put, it is descriptively wrong to view the Constitution as encompassing solely negative liberties.

Second, in the realm of minimum entitlements, the argument based on negative liberties confuses rights and remedies. Most constitutional rights can be phrased negatively, but remedies are almost always phrased affirmatively. For example, a classic statement of a negative right is that the Fourth Amendment generally prohibits searches and seizures without warrants based on probable cause. The remedy, however, is an affirmative duty: the police must seek warrants before searches or arrests. The Fifth Amendment prohibits involuntary self-incrimination, a negative right.

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31 U.S. CONST. amend. IV.
32 *Id.* amend. V.
33 *Id.* amends. V, XIV.
34 *Id.* amends. VI, VII.
35 *Id.* amend. VI.

The Court has prescribed the affirmative duty of administering Miranda warnings to give effect to the Fifth Amendment guarantee. The Fourteenth Amendment prohibits segregation; the courts have mandated desegregation efforts as a remedy.

Similarly, the Court could and should find that the Constitution forbids the government from ignoring starvation and homelessness in that these are deprivations of life and liberty without due process. These are negative liberties; prohibitions on what the government may do. The remedies are affirmative: assuring minimum entitlements.

Other scholars have developed arguments as to how the Constitution can be interpreted to create rights to minimum entitlements, and why it is desirable to understand the Constitution in such a way. Frank Michelman argued that the Equal Protection Clause should be interpreted to create such rights.[36] Alternatively, the Privileges or Immunities Clause of the Fourteenth Amendment might be construed to include a right to basic entitlements. In fact, conservative scholar Philip Kurland suggested this possibility in a law review article two decades ago.[37] A privilege guaranteed to all would be the essentials needed for life: food, shelter, and medical care. In *Saenz v. Roe*, the Supreme Court revived the Privileges or Immunities Clause and used it for the first time in over a century to invalidate a state law that discriminated against new residents in a state in receiving welfare benefits.[38] The Court declared unconstitutional a California law which provided that those moving into the state would have welfare benefits set at the level of the state from which they moved.[39]

Another possibility is to use the Due Process Clause's protection of "life." The effect of government failure to provide minimum subsistence is to deny individuals life without due process of law. Even if people do not actually die from the lack of basic necessities, the adverse effects on the quality of life from hunger, homelessness, and a lack of medical care are sufficient to constitute a deprivation within the meaning of the Due Process Clause. Basic subsistence is the prerequisite for the exercise of all rights.

Another alternative is to emphasize international law, which does create a right to minimum subsistence for all. Scholars, such as Professor Nadine Strossen, have argued that the interpretation of the American Constitution should be influenced by interna-

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36 Michelman, *supra* note 6, at 11–12.

37 Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U. L.Q. 405, 419–20.

38 526 U.S. 489, 501–03, 510–11 (1999).

39 *Id.* at 493, 510–11.

tional law norms.[40] The United Nations' Universal Declaration of Rights expressly declares in Article 25: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . ."[41]

My goal here, obviously, is not to develop these constitutional arguments. Rather, I want to indicate what arguments might be made. Nor is my objective to suggest that these arguments can be developed in a way that would persuade the current Supreme Court. Instead, my contention is that the Court should, at some future time, find such constitutional rights. Critics are sure to argue that this is an inappropriate judicial role. The Court can declare the right to minimum entitlements and leave the legislatures with discretion as to how to assure provision of the benefits.[42] Legislatures might choose a guaranteed annual income or a negative income tax. Alternatively, legislatures can choose guaranteed employment with sufficient income, together with assistance programs for those unable to work. Another possibility would be a combination of cash programs and in-kind assistance, such as food stamps and Medicaid. However the government chooses to meet its responsibilities, the judicial role would be to guaranty that the government has acted to assure every person of basic essentials needed for life. The Court would declare the rights and then leave to the legislature the choice as to how to provide for them.

V. CONCLUSION

Throughout American history, including in this symposium, it is conservatives who argue for the protection of economic rights. The *Lochner* era featured conservative Justices who were deeply committed to a laissez-faire economy, protecting business from legislative regulation. My objective in this essay is to offer an alternative progressive vision: to see economic liberties as a way for helping not the rich, but the poor. The rich have no problem protecting themselves in the political process. They can make campaign donations and afford lobbyists and do all of the other things incident to the influence of money on the political process. But the poor obviously lack money to do these things. They are the ones who need judicial protection.

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40 Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990).

41 UNIVERSAL DECLARATION OF HUMAN RIGHTS, U.N. Doc. A/811 (1948), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 26 (Ian Brownlie ed., 2d ed. 1981).

42 Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137 (2003).

In the wealthiest nation in the history of the planet, there should not be starving children, or people without medical care, or people without homes. I believe that someday in the distant future, a more humane Supreme Court will find a constitutional right for every person to have the minimum entitlements needed for subsistence.

Protecting Economic Liberties

*Bernard H. Siegan**

I. INTRODUCTION

This Article details the evolution of the treatment of economic liberties, beginning with the Magna Cartas of 1215 and 1225. The Magna Cartas were the original source of protection from governmental intrusion upon economic liberties. The Article considers Sir Edward Coke and William Blackstone's interpretations of the Magna Carta both in their writings and in common law cases. Next, the Article traces the influence of Coke and Blackstone's writings, and of the English common law on American jurisprudence, including a discussion of how these influences affected the United States Constitution. The Article subsequently examines numerous United States Supreme Court cases, mapping the major shifts in the Supreme Court's protections—or lack thereof—of economic liberties. In conclusion, the Article considers the impact of the judicial termination for protections of economic rights.

II. THE MAGNA CARTAS OF 1215 AND 1225†

To quell the barons' revolt against him, John, King of England and Ireland, in 1215 accepted the Magna Carta, a document which the barons largely wrote and which was the first governmental document in the English-speaking countries to protect economic and other liberties.[1] John's own oppressive and arbitrary

* Distinguished Professor of Law, University of San Diego. This article contains and expands views that Professor Siegan has expressed in books and articles he has written as follows: ECONOMIC LIBERTIES AND THE CONSTITUTION (1980), PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT (Social Philosophy & Policy Foundation & Transaction Publishers, 2001), *Separation of Powers & Economic Liberties,* 70 NOTRE DAME L. REV. 415 (1995), and *Majorities May Limit the People's Liberties Only When Authorized To Do So by the Constitution,* 27 SAN DIEGO L. REV. 309 (1990). In the following paper, many quotations from antique sources reproduce obsolete or incorrect spellings which appear in the original. These are reproduced without the customary "sic" designation, because using "sic" after all of these unique spellings would become cumbersome for the reader. Many of the cases discussed in this paper were written in Law French, a mixture of Latin, Norman French, and English, which constituted a unique legal language until the seventeenth century.

† The language and ideas in Sections II through IV.B. are largely drawn from BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM THE MAGNA CARTA TO THE FOURTEENTH AMENDMENT 7–82 (SOCIAL PHILOSOPHY & POLICY FOUNDATION & TRANSACTION PUBLISHERS 2001).

1 1 DAVID HUME, THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE ABDICATION OF JAMES THE SECOND 394–440 (1985); GEORGE MACAULAY TREVELYAN,

behavior, including confiscation of the barons' properties and imposition of confiscatory taxes, caused the revolt.[2] In the Magna Carta, John agreed to undo the deprivations he had arbitrarily imposed in the past and to not impose oppressive measures in the future.[3] In Chapter 52 of this Magna Carta, the King agreed that if anyone "has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him."[4] Chapter 55 provided that all "fines made with us unjustly and against the law of the land, and all amercements imposed unjustly and against the law of the land, shall be entirely remitted."[5] Thus King John had acceded to the barons' demand for restitution.

The barons also sought protection from future transgressions. King John's major commitments for the future were those contained in Chapter 39, which is usually freely translated from the Latin as follows: "No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed . . . except by the lawful judgment of his peers or [and] by the law of the land."[6]

Accordingly, he agreed that in the future he would not deprive freemen of their lives, liberties, or properties unless it was required by a legitimate law, and then, only pursuant to fair and proper procedures.[7] He thereby relinquished authority to apply retroactive or other oppressive laws destroying or damaging freemen as had previously been his practice. A comparable chapter was included in the many subsequent issues of the Magna Carta. Chapter 39 thus introduced the concept of due process of law in English and American law as a protection against governmental oppression.[8]

Shortly after John executed the Charter, Pope Innocent III forbade the King to obey, or the barons to enforce, its terms.[9] In August 1215, King John recalled all of the liberties he had granted his subjects in the charter and repudiated its restraints upon him.[10] He died in October 1216, and was succeeded by his son Henry III.[11]

HISTORY OF ENGLAND 168–76 (2d ed. 1926); GOLDWIN SMITH, A HISTORY OF ENGLAND 78–84 (2d ed. 1957).

2 HUME, *supra* note 1, at 430; SMITH, *supra* note 1, at 78–79.

3 SMITH, *supra* note 1, at 79.

4 WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 448 (Lawbook Exchange, Ltd. 2d ed. 2000) (1914).

5 *Id.* at 454.

6 *Id.* at 375.

7 HUME, *supra* note 1, at 430–31.

8 *See* SMITH, *supra* note 1, at 80.

9 *Id.*

10 *Id.*

11 *Id.* at 81.

While for the most part the monarchy after King John's death respected the rights of the barons, there were enough violations to arouse fears that it did not in fact accept limitations on its powers. To reduce and terminate conflicts with the barons, and to obtain their support, the young King Henry's regents (Henry was nine years old at his father's death) reissued King John's charter in Henry's name on two occasions. In 1225, after he assumed personal control of the throne, King Henry III in a special ceremony executed a document also referred to as Magna Carta. Henry identified this document as a confirmation of the original charter. The 1225 document is considered the definitive version of the Magna Carta. Henry and his successor, Edward I, each confirmed it three times and Parliament did likewise many times thereafter, amounting by 1628 to thirty-two in total.[12] Each subsequent issue followed the form of the 1225 version, which was by statute declared to be "the birthright of the people of England."[13] These confirmations accorded the Magna Carta status as part of the common law of England.

Chapter 29 of the 1225 charter broadened and replaced Chapter 39 of King John's charter and provided as follows:

> No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.[14]

By its terms, Chapter 29 of the 1225 Charter was a greater limitation on royal powers than Chapter 39 of John's Charter, but its meaning, and that of subsequent confirmatory statutes, had to await interpretation by the common-law judges. The English people regarded Henry's Magna Carta—and subsequent statutes broadening its guarantees—as preserving and protecting their lives, liberties, and properties. Those who migrated to America, and their descendants who lived there, asserted these "rights of Englishmen" against restraints imposed by the English authorities.

III. Coke and Blackstone Interpret the Common Law

A. Edward Coke and "The Law of the Land"

Edward Coke (1551-1634) was a major figure in English law. At various times, he was attorney general for the queen, chief jus-

12 1 William Blackstone, Commentaries *123–24.

13 1 *id.* at 124.

14 Edward Coke, The Second Part of the Institutes of the Laws of England *45 (William S. Hein Co. 1986) (1797) [hereinafter Coke, The Second Part of the Institutes].

tice both of the Court of Common Pleas and of the King's Bench, and speaker of the House of Commons. Among other publications, he authored a four-volume commentary on English law entitled *Institutes of the Laws of England* (1600-1615).[15] In the Second Institute, he interpreted King Henry III's 1225 Magna Carta, confirming its high status in English law.[16] On both sides of the Atlantic Ocean, Coke's interpretation was regarded as highly authoritative on the meaning of the Charter and subsequent confirmations of it. The *Institutes* were held in such high esteem in America that they were required reading for most colonial lawyers. According to the noted historian Professor Bernard Bailyn, Coke was cited almost everywhere in colonial American literature.[17]

Although some commentators have criticized Coke's writings, Coke's influence "as the embodiment of the common law, was so strong that it is useless to contend that he 'was either misled by his sources or consciously misinterpreted them,' for Coke's mistakes, it is said, *are* the common law."[18] In his *Institutes*, Coke accepted King Henry's 1225 Magna Carta as the definitive Charter, and he discussed and interpreted its various chapters in light of the additions and interpretations subsequently made to it by the Parliament, judicial decisions, and legal commentaries. Most English and American courts accepted Coke's interpretation of Chapter 29 as authoritative on the meaning of "law of the land" and "due process of law," and numerous United States federal and state judicial opinions have cited his interpretations of the Magna Carta and the common law. Coke has been appropriately referred to by Roscoe Pound, the celebrated legal scholar, as "the great light of our legal system."[19]

By the time Coke wrote the second volume of his *Institutes*, the monarchy, Parliament, and the courts had greatly expanded and supplemented the 1225 charter. Coke viewed the common law—with much of its basis in the Magna Carta—as a restraint on the powers of the monarchy and various other governmental bodies including the Parliament. He relied mostly on the judiciary to protect the people from oppression by government. The common law is, he opined, "the best and most common birth-right that the subject hath for the safeguard and defence, not only of his

15 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (William S. Hein Co. 1986) (1600–1615) [hereinafter COKE, THE FIRST PART OF THE INSTITUTES].

16 COKE, THE SECOND PART OF THE INSTITUTES, *supra* note 14, at *A4.

17 BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30 (1967).

18 W. J. Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORNELL L.Q. 561, 562 (1954) (quoting Lyon, *The Lawyer and Magna Carta*, 23 ROCKY MTN. L. REV. 416, 431 (1951)).

19 Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 459 (1908–09).

goods, lands and revenues, but of his wife and children, his body, fame, and life also."[20]

Coke found the meaning of "law of the land" in a 1363 statute of King Edward III that states "that no man be taken, imprisoned, or put out of his free-hold without process of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law."[21] Coke explained that this provision requires that no man shall be deprived of his liberties and possessions "[w]ithout being brought in to answer but by due process of the common law."[22] He wrote that the law of the land includes only a general public law, operating equally upon every person in the community, and it is a law not intended to favor or harm certain individuals but to extend to all.[23] The last sentence of Chapter 29 emphasizes the king's commitment to rule neutrally and impartially: the monarch promised he "will not deny or defer to any man either justice or right."[24] Judges appointed by the king were given the power to enforce these commitments.

Coke illustrated this judicial power in his *Institutes* by summarizing two common-law decisions that applied the provision in Chapter 29 of King Henry's Magna Carta, which stated that no "freeman shall be . . . disseised of his freehold, or liberties, or free customs":

> 1. A custome was alledged in the town of C. that if the tenant cease[d] [to pay rent for] two yeares, that the lord should enter into the freehold of the tenant, and hold the same untill he were satisfied of the arrerages, and it was adjudged a custome against the law of the land, to enter into a mans freehold in that case without action or answer.
> 2. King Henry, the sixth, graunted to the corporation of diers within London, power to search, and if they found any cloth died with logwood, that the cloth should be forfeit; and it was adjudged, that this charter concerning the forfeiture, was against the law of the land, and this statute: for no forfeiture can grow by letters patents. No man ought to be put from his livelihood without answer.[25]

As revealed in these two cases, protection of property and economic rights was quite broad in Coke's day, extending to the possession of certain leasehold interests as well as to ownership of certain dyed cloths and to business enterprises using these cloths.

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20 COKE, THE FIRST PART OF THE INSTITUTES, *supra* note 15, at *142.a.

21 COKE, THE SECOND PART OF THE INSTITUTES, *supra* note 14, at *50.

22 *Id.*

23 *Id.* "[B]ut that the law might extend to all, it is said *per legem terra* [by the law of the land]." *Id.*

24 *Id.* at *45.

25 *Id.* at *45–47.

In each case, the court held that the law of the land required a judicial hearing to determine whether existing law authorized a termination of the lessee's or owner's interest. The lease in question was apparently sufficient in law to warrant common law protection for the lessee. The Magna Carta prohibited the king from confiscating property on his own behalf, and the logwood case extended this rule to apply to a confiscatory action by the king on behalf of a private group.

Consequently, the lord in the first example had a much stronger legal case. While King Henry's grant might have been a retroactive deprivation of the right of a person to use cloth dyed with logwood, the lord's case involved a custom which presumably existed when the leasehold was executed and therefore was not retroactive with respect to it. Nevertheless, common law principles prohibited any person from being a judge in his own cause. Accordingly, the lord was devoid of power to limit the lessee's possessory interest without a judicial resolution of the controversy in the lord's favor. The failure to pay rent as agreed was likely sufficient reason to enable the lord to obtain possession. The lessee was, however, entitled to submit defenses to the action in court, something which the local custom prevented. Here, the Magna Carta, as interpreted by the common-law courts, afforded process where none had previously been due.

In sum, according to the common law interpretation of Chapter 29 of the 1225 Magna Carta, no person shall be deprived of his property or his livelihood except when it is done in accordance with the law of the land. This protection requires three things: (1) the law which is alleged to have been violated must have been in existence and applicable when the violation occurred; (2) the law must be consistent with common law requirements for legitimacy; and (3) a fair and proper judicial trial conforming to the requirements of due process must be held to determine if wrongdoing has occurred that warrants a deprivation.

As the foregoing discussion reveals, Coke viewed Chapter 29 as a substantive protection of the people's liberties from limitation by the royal power. The argument is often made that Chapter 29 imposed only procedural requirements, that is, its protections only went so far as to require that a deprivation of life, liberty, or property by the king or his appointees be achieved with a fair and proper judicial process.[26] This would mean that the prohibition or deprivation is satisfied when the law has been passed pursuant to the required legal processes. Were this the case, life, liberty, and property would then truly be at the discretion of the lawmaker

26 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 223–40 (1990).

and the judiciary would simply be a conduit to implementing these discretionary laws. Such an interpretation would undermine the libertarian objectives of Chapter 29, and thus this interpretation cannot be attributed to Coke, who generally supported individual rights. Coke believed that the reason for depriving the citizen of his rights must be found in a legitimately enacted law, and not a retroactive one passed for the purpose of curtailing an existing right.

The purpose and effect of the Magna Carta corroborates Coke's belief that the Charter provided substantive protections. In the Charter, King John agreed to restore the properties he had illegally seized and remit the monies he had illegally collected. In the original and all subsequent confirmations of the Magna Carta, the king promised that he would never deprive a law-abiding person of his liberties. Chapter 29 was intended to limit the arbitrary exercise of power, not to secure it merely by the application of due process procedures. For if "law of the land" meant any law the king might impose, then the provision would be a nullity.[27]

1. The Supremacy of the Common Law

Coke's notion that the courts have a decisive role in the interpretation of English law is evident from the famous ruling about judicial power made in *Dr. Bonham's Case* by the Court of Common Pleas in 1610, of which Coke was Chief Justice.[28] The Court ruled that the London College of Physicians was not entitled to punish Dr. Bonham for practicing medicine without its approval, despite Parliament's passage of an act authorizing this penalty.[29] In his decision, Coke declared the following:

> And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.[30]

This declaration crystallized Coke's view that the Magna Carta offered substantive as well as procedural protections.

Dr. Bonham's Case was concerned with Parliament's improper infringement on economic liberties. Parliament denied Bonham the right to practice his profession. While the purpose of the law—protecting the public health—was legitimate, its means were both overinclusive because it applied to graduates of very

27 Wynehamer v. People, 13 N.Y. 378, 432–33 (1856) (Selden, J., concurring).
28 77 Eng. Rep. 646 (K.B. 1610).
29 *Id.* at 651.
30 *Id.* at 652 (citations omitted).

prestigious medical schools, as well as underinclusive because it applied only to persons who practiced medicine in London for more than thirty days.[31] Worst of all, the law violated the basic common law rule that no one should be a judge in his own cause: officials of the college received one-half of the fines it imposed on those who practiced medicine without its consent.[32]

Nevertheless, despite all the infirmities of this law, it was not initially clear that the court had any power over the Parliament. Coke's court decided that it did, a decision which some in the English bar disapproved of, but which met with great approval in English America. Since the source of the common law was the Magna Carta, which only applied to the monarchy, a considerable number of English judges believed the judiciary had no authority over Parliament. The issue of common law jurisdiction in England was finally settled in 1688 when, as a result of the Glorious Revolution, the Parliament achieved supreme authority over the English government.[33]

When the English settlers migrated to America, they were assured by the English authorities that they were entitled to the same protections and benefits of English law that they would have enjoyed if they had remained in England. The colonial courts before the revolution, and the United States courts after it, followed and applied the common law. The fact that as of 1688, Parliament acquired total sovereignty in England did not affect the common law on either side of the Atlantic Ocean, except with respect to the final authority of the Parliament.

Coke's proclamation in *Dr. Bonham's Case* that the common law governed acts of Parliament was used in the American colonies to justify resistance to the British Parliament and by jurists after the American Revolution as a basis for judicial review. The American colonists often cited Coke as proclaiming the supremacy of the common law, and many political leaders invoked Coke in opposition to regulation. Thus, a prevailing argument against the highly condemned Stamp Act of 1765, pursuant to which England imposed substantial taxes on the colonies, none of which had ever consented to it, was that it violated "Magna Carta and the natural rights of Englishmen, and therefore[,] according to Lord Coke[,] null and void."[34] George Mason, the author of the Virginia Decla-

31 *Id.* at 651–52.

32 *Id.* at 652.

33 In English history, the Glorious Revolution was the culmination of the events of 1688, which resulted in the "forced abdication" of James II, and the accession of William III and Mary II. Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L. L.J. 329, 333 n.28 (2002). For an extended discussion of the Glorious Revolution, see G.M. TREVELYAN, THE ENGLISH REVOLUTION, 1688–1689 (1938).

34 Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 970 (1990).

ration of Rights and a Framer of the United States Constitution, cited Coke in a 1772 Virginia case[35] as authority for the proposition that "[a]ll acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void."[36] Thus, Coke's view informed the very beginnings of American jurisprudence.

Other commentators have expounded on Coke's concept of the common law. For example, a major characteristic of the common law is what Roscoe Pound, who has written extensively on it, referred to as "extreme individualism."[37] The common law, wrote Pound, "is concerned not with social righteousness but with individual rights. . . . It is jealous of all interference with individual freedom of action, physical, mental, or economic."[38] The impact of the common law has been enormous. Writers have noted the strong link between the industrial revolution and the arrival of the common law in England.[39] Since the collapse of communism, its rules are operative in much of the world, including the vast areas formerly dominated by that ideology.

2. Common Law Protections of Economic Liberties

Among other freedoms, the common law in the period when *Bonham* was decided protected many economic liberties. As the subsequent cases illustrate, English courts upheld the liberty of a person to practice the trade, occupation, or vocation of his choice and held that an economic monopoly was void.[40]

a. Illegal Monopolies and Other Restraints on Practice of Trade

In *Davenant v. Hurdis*,[41] a tailors' guild known as the Company of Merchant Taylors of London adopted an ordinance pursuant to its royal charter, which required every member who sends cloth to be finished by additional labor to have at least half the work done by members of the guild or pay the guild ten shillings per cloth.[42] In his capacity as an attorney, Coke represented Dav-

35 Robin v. Hardaway, 2 Va. (2 Jefferson) 109, 114 (1772).

36 *Id.* at 115.

37 ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 13 (1921) (defining "extreme individualism" as "unlimited valuation of individual liberty and respect for individual property").

38 *Id.* at 13–14.

39 *See* TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 87–91 (1998).

40 *Cf.* READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 218–35 (Roscoe Pound & Theodore F. T. Plucknett eds., 1927) (noting that "there were three classes of persons who were in a varying degree exempt from [the common law], the priest, the Jew, and the merchant"). *Id.* at 218.

41 72 Eng. Rep. 769 (K.B. 1599).

42 *Id.* at 770.

enant, a cloth merchant who sent out twenty cloths to be finished, and refused to give an equal number to guild members, attacking the ordinance as tending to create a monopoly.[43] Coke argued that while members were then compelled only to hire their fellow members to make or finish half their cloth, a ruling upholding the ordinance might well in time include all of every member's cloth.[44] The result would be a monopoly, the establishment of which, he said, is against common law and void. The judges agreed holding that the ordinance:

> [W]as against the common law, because it was against the liberty of the subject: for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly; and, therefore, such ordinance, by colour of a charter, or any grant by charter to such effect, would be void.[45]

They explained that "a rule of such nature as to bring all trade or traffic into the hands of one company, or one person, and to exclude all others, is illegal."[46]

Based in part on the decision in *Davenant*, *Darcy v. Allen* (also known as *The Case of Monopolies)*[47] held that a grant of letters patent by Queen Elizabeth to Darcy, her groom, for the exclusive making, importing, and merchandising of playing cards contravened common law and was void.[48] Unlike the *Davenant* case, which involved an ordinance of a guild, the *Monopolies* case concerned a royal grant. Coke did not participate as a judge in the latter decision since he was at the time Solicitor General and responsible for defending the contested patent.[49] He had long maintained that a monopoly was forbidden by the Civil Law, and by the Magna Carta, as well as by certain statutes. That he accepted (and applauded) the ruling is evident from his inclusion of its principles in defining the meaning of liberties in Chapter 29.[50] The defendant pleaded that as a resident of London he was protected under the Magna Carta to engage freely in commerce, and this included obtaining royal grants.[51] The *Monopolies* decision held that the grant created various monopolies and that a monopoly was against the common law because it limited trade to the detri-

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43 *Id.*

44 *Id.* at 771.

45 The Case of Monopolies, 77 Eng. Rep. 1260, 1263 (K.B. 1603) (dicussing the rationale in *Davenant*).

46 Davenant v. Hurdis, 72 Eng. Rep. 769 (K.B. 1599) (per author's own translation).

47 77 Eng. Rep. 1260 (K.B. 1603).

48 *Id.* at 1263–64.

49 *Id.* at 1261.

50 *See* COKE, THE SECOND PART OF THE INSTITUTES, *supra* note 14, at *47.

51 *The Case of Monopolies*, 77 Eng. Rep. at 1261.

ment and the liberty and welfare of the people, in three respects: (1) it raised the prices of playing cards; (2) it impaired their quality; and (3) it denied a living to various workmen.[52] Not by the Crown, but only by Parliament, could a man be restrained from exercising a trade.[53]

Similar to *Davenant*, *The Case of the Tailors of Ipswich*[54] involved the validity of a tailors' guild ordinance adopted pursuant to a royal charter. The ordinance mandated that no one could practice the trade of a tailor in Ipswich unless he had served his apprenticeship with the Corporation of the Tailors of Ipswich, or had been given its approval. The defendant ignored the corporation and worked as a tailor, pleading to the court that he had served seven years as a private tailor to a freeman of the locality.[55] Chief Justice Coke and the other justices of the King's Bench held for the tailor, asserting that the Corporation's restraints on the tailor practicing his trade tended to create a monopoly, and thus "are against the liberty and freedom of the subject."[56]

The justices cited two cases in which restraints on workmen practicing their trades were held to be against the common law. First, a restriction on a dyer not to practice his craft for two years,[57] and second, a restriction on a husbandman not to sow his land.[58] Interestingly, the justices went on to note what had become a common complaint in the twentieth century against licensure laws: they are a means "of oppression of young tradesmen, by the old and rich of the same trade, not permitting them to work in their trade freely."[59] Apprentice requirements, the justices stated, have been enacted not only to make workmen skillful, but also to educate youth in lawful sciences and trades.[60] Laws which accord trade organizations power to forbid experienced apprentices from practicing as tradesmen discourage apprenticeship, to the detriment of both the young and the society as a whole.[61]

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52 *Id.* at 1263.

53 *Id.* at 1263–64. In 1624, Parliament enacted the Statute of Monopolies drafted principally by Coke when he was a member of Parliament, which terminated the power of the monarchy and Parliament to grant private monopolies. However, the act reserved to Parliament the power to grant certain exclusive privileges and contained a considerable number of exceptions among which was the continuance of the power of cities, boroughs, guilds, and chartered trading organizations to exercise many of their monopoly powers. Political expediency and the need to accommodate special interests seems to explain the failure of the statute to be more inclusive.

54 77 Eng. Rep. 1218 (K.B. 1614).

55 *Id.* at 1219.

56 *Id.* at 1220.

57 *Id.* at 1219.

58 *Id.*

59 *Id.* at 1220.

60 *Id.*

61 *Id.* at 1219.

In *Tooley's Case*,[62] the accused person was prosecuted for violating the Statute of Artificers because he was engaged in work as an upholsterer after he had served his apprenticeship as a wool packer. The statute required that a person must be apprenticed in the trade that he practiced, but did not specify the trades to which it applied.[63] Coke interpreted the statute as covering only skilled trades, stating that an upholsterer was clearly not covered by the statute since it was neither a "trade nor [a] mystery" and did not require any skill.[64] Moreover, the defendant was a resident of London, a city that permitted a freeman to practice any trade or manual occupation within its area, a custom which had been protected in both the 1215 and 1225 Magna Cartas and also recognized by royal charter and confirmed by Parliament.[65] The Statute of Artificers excluded the city from its scope.[66] According to Coke, a "general law shall not take away any part of Magna Charta; [and consequently] . . . a man is not to be restrained that he shall not labor for his living."[67] The court terminated the prosecution of the accused.[68]

In *Rogers v. Parrey*,[69] the plaintiff sued the defendant on the ground that he had violated an agreement made for adequate consideration that he would not practice the trade of a joyner for twenty-one years in a house in London demised to him. The defendant answered that this agreement was invalid as a restraint on the right to work.[70] Coke held for the plaintiff on the ground that this was not a general restraint on exercising one's trade, but one for a time and place certain.[71] This ruling is neither in conflict with the cases discussed above, nor is it difficult to explain. Unlike a governmental restriction based on a variety of political considerations, the agreement in this case was a product of private bargaining with each side obtaining and transferring a valuable consideration.[72] Freedom of the marketplace includes the freedom to accept limitations on one's own freedom. The case did not, however, validate a total restraint on the practice of a trade.

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62 Dominus Rex v. Tooley, 80 Eng. Rep. 1055 (K.B. 1613).

63 *Id.*

64 *Id.* at 1058.

65 *Id.* at 1059.

66 *Id.* at 1057.

67 *Id.* at 1059.

68 *Id.*

69 80 Eng. Rep. 1012 (K.B. 1613).

70 *Id.* at 1013.

71 *Id.*

72 *Id.* at 1012–13.

b. The King's Prerogatives and Other Restraints

The king's prerogative power was an English historical institution, which Blackstone understood to reflect "that special preeminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity."[73] Professor Dicey explains: "[t]he 'prerogative' appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[74] The king's prerogative powers in the early 1600s were extensive. They included dominion of the sea, control over navigation, foreign affairs, defense of the realm, enforcing acts of Parliament, dispensing justice, coining money, providing for his own household, granting offices and titles of nobility, and collecting taxes.[75] Under these powers, the king and his ministers might use and even confiscate private property without compensation.[76] To be sure, prerogative powers and eminent domain rules and outcomes were different.

The *Case of the King's Prerogative in Saltpetre*[77] concerned a claim for indemnification by a landowner because the king's employees, without payment of compensation, had dug and removed saltpeter from his land to be used for making gunpowder. The king contended that this action was taken in furtherance of his prerogative powers, the exercise of which did not require parliamentary assent or payment of compensation.[78] The prerogative involved in this case was defense of the realm.[79] The eight specially assembled judges, including Coke, then Chief Justice of the Common Pleas, issued the opinion. They observed that gunpowder was required for the nation's defense and unfriendly foreign powers might restrain its sale to England, jeopardizing the nation's security.[80] They acknowledged the legitimacy of the prerogative as applied in this case, which, wrote the justices, "ought to be taken only by the ministers of the King . . . and cannot be converted to any other use than for the defence of the realm."[81]

According to this decision, saltpeter was essential to the national defense, and consequently the king under his prerogative

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73 1 WILLIAM BLACKSTONE, COMMENTARIES *232.

74 A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 420 (8th ed. 1924).

75 William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 562 (1972).

76 *Id.* at 563.

77 77 Eng. Rep. 1294 (K.B. 1606).

78 *Id.* at 1294–95.

79 *Id.* at 1295.

80 *Id.*

81 *Id.*

powers was entitled to remove it from privately owned property pursuant to strict rules intended to preserve intact the balance of the estate.[82] The sole deprivation to the landowner would be the loss of the saltpeter when demanded by the king for defense of the nation, and nothing else. The mining operations must not otherwise damage the estate or harm the owner. Although this case is often cited as a limitation on the right of property, this interpretation is incorrect because it concerns the king's prerogatives, which were exempt from common law protections.[83]

The *Case of the Isle of Ely*[84] was a case referred by the Lords of the King's Council to the justices of the Court of Common Pleas, concerning a decree issued by the king's commissioners of sewers. The decree required that a new river be created on the Isle of Ely and that repairs and replacements be made to its drainage systems, all to be paid for by fifteen towns on the isle, with each town to pay a specified amount.[85] The drainage systems on the isle were not functioning well and required repairs and improvements.[86] The king appointed these commissioners to execute his prerogative powers to drain the land by maintaining in good order and repair pipes, sewers, and ditches.[87]

Coke's court held that the commissioners could not be given power by the king to: (1) procure land for new drainage works (only Parliament could authorize this); (2) create a new river and install other improvements not essential to adequate drainage; and (3) impose taxes upon a town instead of solely upon the persons benefited by the improvements.[88] The justices sought to protect the residents from being taxed for unnecessary public work or for improvements from which they obtained no gain.[89] The judicial decree mandated certain requirements that were limited to making repairs and improvements needed for the satisfactory and safe operation of the drainage systems.[90]

The justices ruled that the cost of the repairs and replacements should be borne only by persons that are benefited, and then according to the quantity of their land and the portion, ten-

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82 *Id.* at 1295–96.

83 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1056 (1992) (Blackmun, J., dissenting) (citing a book that quotes the *Saltpetre* case to argue that regulation during the colonial period could deny an owner of all productive use of his property if it extended to the public benefit; however, the quote fails to mention that it deals only with the King's prerogative and does not relate to the compensation issue).

84 77 Eng. Rep. 1139 (K.B. 1610).

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 1140–42.

89 *Id.* at 1142.

90 *Id.* at 1141.

ure or profit obtained from the improvements.[91] Imposing the taxes on the various towns would burden persons not advantaged by the drainage improvements, and the justices noted that "none could be taxed towards the reparation, but those who had prejudice, damage, or disadvantage by the said nuisances or defaults, and who might have benefit and profit by the reformation or removing of them."[92] While this was not a case of eminent domain, it confirmed a common law principle that no person should be required to contribute more than his fair share to eliminating or reducing public burdens. Or, as contemporary courts put it, a property owner should not bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[93]

Coke's opinion in *Mouse's Case*[94] inaugurated the law of necessity which permitted destruction of property or possessions when such action was essential to protect lives and property. In this case, a commercial barge carrying passengers encountered heavy seas, and in order to save lives the defendant, who was a passenger, threw out of the barge the plaintiff's casket containing his valuable possessions.[95] In a suit for damages, Coke's court held that if the danger to life occurred by an act of God, without any individual's fault, everyone ought to bear his loss without indemnification.[96] It was proved that if the possessions had not been thrown out of the barge, the passengers would have drowned.[97] The rule was later applied to events of actual necessity brought about by great calamities endangering health and safety. Thus, in *Lucas v. South Carolina Coastal Council*,[98] Justice Scalia recognized that certain restraints on property rights (in addition to the control of nuisances) were required "in cases of actual necessity," such as to prevent the spreading of a fire or to forestall other grave threats to the lives and property of others.[99]

In *Bates's Case*,[100] the Court of Exchequer upheld the king's power to levy duties on goods imported into England on the basis that import duties were related to the king's prerogative to conduct foreign affairs and regulate foreign trade. Bates refused to pay a duty upon the import of currants, imposed by James I, on

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91 *Id.* at 1142.

92 *Id.*

93 Armstrong v. United States, 364 U.S. 40, 49 (1960). *See also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978).

94 77 Eng. Rep. 1341 (K.B. 1609).

95 *Id.* at 1341–42.

96 *Id.* at 1342.

97 *Id.* at 1341–42.

98 505 U.S. 1003 (1992).

99 *Id.* at 1029 n.16.

100 An Information Against Bates, 145 Eng. Rep. 267 (Ex. Ch. 1606).

the ground that Parliament had not authorized this tax.[101] Coke considered the court's decision erroneous because it violated Chapter 30 of the Magna Carta of 1297, which provided that all domestic and foreign merchants are entitled "to buy and sell without any manner of evil tolts, by the old and rightful customs, except in time of war."[102] According to Coke, under the common law, the king's prerogative was limited to imposing import or export duties only when it was essential for the advancement of foreign trade and traffic, "which is the life of every island."[103] Coke wrote that the king cannot, at his pleasure, impose duties upon imports, stating that "the common law hath so admeasured the prerogatives of the king, that they should not take away, nor prejudice the inheritance of any: and the best inheritance that the subject hath, is the law of the realme."[104] Coke thus strictly interpreted the king's powers with respect to taxing foreign trade, contending that his prerogative to conduct foreign affairs is limited to preserving the nation's security.

The list that follows summarizes some of the important principles Coke advanced either as a legal commentator or a jurist, which have influenced jurisprudence in both England and the United States.[105] These principles included many of the rights Americans possessed in 1787 when the United States Constitution was drafted, and in 1788 when it was ratified.

1. No man shall be deprived of his life, liberty and property, including his lands, tenements, goods or chattels unless it is done pursuant to the substantive and procedural requirements of due process of law.[106]
2. A legislative enactment ought to be prospective, not retroactive, in both text and operation.[107]
3. Judges must adhere to and apply substantive and procedural due process of law in all legal proceedings.[108]

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101 *Id.*

102 COKE, THE SECOND PART OF THE INSTITUTES, *supra* note 14, at *57.

103 Calvin's Case, 77 Eng. Rep. 377, 397 (K.B. 1608).

104 COKE, THE SECOND PART OF THE INSTITUTES, *supra* note 14, at *63.

105 As is evident from the foregoing discussion, Coke utilized numerous theories to support property rights, often simply applying a general principle to this purpose. It should not be concluded from the prior discussion, however, that Coke was dedicated to free market economics. Historian Barbara Malament writes that he was highly selective in his support of a free market, although he can be regarded as much more enlightened in this respect than most of his intellectual contemporaries. According to her, Coke did not believe in the inherent value of economic freedom: "For Coke was interested in full employment and not efficiency; just prices and not competition. Far from searching for new economic concepts, he drew upon the Commonwealth ideal, arguing consistently that 'trade and traffique cannot be maintained or increased without order and government . . . .'" Barbara Malament, *The "Economic Liberalism" of Sir Edward Coke*, 76 YALE L.J. 1321, 1358 (1967).

106 COKE, THE SECOND PART OF THE INSTITUTES, *supra* note 14, at *46–47, 50.

107 *Id.* at 292.

108 *Id.* at 50.

4. When an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will adjudge such act to be void.[109]
5. Laws of the land include only general and public laws, operating equally upon every person in the community and do not include laws intended to favor or harm certain individuals or groups.[110]
6. Regulatory laws must substantially advance the purpose for which the government has imposed them.[111]
7. Exactions for public repairs and improvements should only be imposed in proportion to the benefits received.[112]
8. No person should be given the power to be a judge in his own cause.[113]
9. Every person possesses the liberty to practice the trade, occupation, or vocation of his choice.[114]
10. Monopolies violate the common law.[115]
11. The prerogative powers of the king must be narrowly construed to give effect solely to the public benefits they are intended to promote.[116]
12. Ownership of property or possessions may be limited when it is essential to protect lives or property.[117]

B. William Blackstone and his *Commentaries*

Another great English legal commentator, William Blackstone (1723-1780), was in general accord with Coke's interpretation of the property and other economic protections of Chapter 29, as subsequently enlarged by statute or judicial decision. He was a justice of the Court of Common Pleas (1770-1780), and the first Vinerian professor of English law at the Oxford University. The legal community in North America looked to Blackstone as a leading interpreter of English law. Among these was the famous Chancellor James Kent of New York, who acknowledged that "he owed his reputation to the fact that, when studying law . . . he had but one book, Blackstone's *Commentaries*, but that one book he mastered."[118] A biographer of Blackstone states that most mem-

109 Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1610).

110 COKE, THE SECOND PART OF THE INSTITUTES, *supra* note 14, at *50.

111 *Dr. Bonham's Case*, 77 Eng. Rep. at 652.

112 The Case of the Isle of Ely, 77 Eng. Rep. 1139, 1142 (K.B. 1610).

113 *Dr. Bonham's Case*, 77 Eng. Rep. at 652.

114 *See, e.g.*, Dominus Rex v. Tooley, 80 Eng. Rep. 1055, 1055 (K.B. 1613); The Case of the Tailors of Ipswich, 77 Eng. Rep. 1218, 1219 (K.B. 1610); The Case of Monopolies, 77 Eng. Rep. 1260, 1266 (K.B. 1602); Davenant v. Hurdis, 72 Eng. Rep. 769, 770–71 (K.B. 1598).

115 *The Case of Monopolies*, 77 Eng. Rep. at 1265–66.

116 *See* The Case of the King's Prerogative in Saltpetre, 77 Eng. Rep. 1294, 1295 (K.B. 1606).

117 *See* Mouse's Case, 77 Eng. Rep 1341 (K.B. 1609) (per author's own translation).

118 DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3 (1941) (quoting CHARLES WARREN, HISTORY OF THE AMERICAN BAR 187 (1911)).

bers of the Constitutional Convention of 1787 "were familiar with[,] and they were no doubt greatly influenced by[,] Blackstone's analysis of the English governmental system."[119] Many terms in the Constitution were used in the same sense employed by him.

According to Edmund Burke, the eminent English politician and commentator of the late eighteenth century, nearly as many of Blackstone's *Commentaries* (1765-1769) were sold in America as in England.[120] In *Hammond's Blackstone*,[121] a compilation of the original commentaries, William G. Hammond, its author, states that in examining twenty-five hundred volumes of American law reports covering the period from 1787 to 1890, Blackstone was referred to or quoted more than any other writer by various courts in the United States.[122] William Carey Jones, the author of *Jones's Blackstone,* another compilation, states that as of 1915 Blackstone had been cited and usually accepted in almost ten thousand cases since 1784.[123] As indicated in a 1999 decision, United States Supreme Court justices refer to Blackstone as the commentator "whose works constituted the preeminent authority on English law for the founding generation."[124]

Blackstone was an admirer of Coke and referred to him as "a man of infinite learning in his profession," noting that Coke's writings were so highly esteemed that "these are cited [as the *Institutes*] without any author's name."[125] Much of Blackstone's *Commentaries* repeated and explained the common law principles Coke had set forth a century-and-a-half earlier. In one important respect, however, many early Americans rejected Blackstone and his position that the legislature should be the supreme branch of government, favoring instead a government whose powers are separated, limited and enumerated. Understandably, Blackstone's assertion that the natural law was legally supreme was the position in his *Commentaries* that the American colonists cited most often.[126]

The difference in view between Coke and Blackstone about parliamentary supremacy may be attributable to the time when

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119 DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 174 (1938).

120 Edmund Burke, Speech on Conciliation with America (Mar. 22, 1775), *in* THE AMERICAN REVOLUTION, 1763–1783, at 154 (Richard B. Morris ed., South Carolina Press 1971) (1970).

121 WILLIAM G. HAMMOND, HAMMOND'S BLACKSTONE, at viii–xiii (1890).

122 *Id.*

123 William Carey Jones, *Preface to the Present Edition* of 1 WILLIAM BLACKSTONE, COMMENTARIES, at ix (William Carey Jones ed., 1915).

124 Alden v. Maine, 527 U.S. 706, 715 (1999).

125 1 WILLIAM BLACKSTONE, COMMENTARIES *72, 73 n.t.

126 Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 859 (1978) (citing CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC 356, 367–68 (1953)).

each wrote his commentaries. In Blackstone's day, this issue had been settled in the Glorious Revolution of 1688, while it had not been resolved in Coke's time; Blackstone's view on the "sovereignty of Parliament . . . would have amazed men of the thirteenth century."[127] Notwithstanding legislative supremacy, however, Blackstone considered the rights of life, liberty, and property to be "absolute."[128]

Blackstone stated that Chapter 29 of Henry III's 1225 Magna Carta alone would have merited the title that it bears, "of the *great* charter [because] it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."[129] Blackstone considered the rights of life, liberty, and property to be comprehended in the common law's protection of the absolute rights of "personal security, of personal liberty, and of private property."[130] "For," he wrote, "the principal aim of society is to protect individuals in the enjoyment of those absolute rights."[131]

Like Coke, Blackstone was also a staunch opponent of retroactive laws. To avoid injustice, the latter wrote, people must be aware of the laws they are expected to obey, and each law must be "'a rule *prescribed*[ ]' [b]ecause a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it."[132] Clearly rejecting retroactive laws, Blackstone stated that "[a]ll laws should be therefore made to commence *in futuro*, and [those affected should] be notified before their commencement."[133]

Yet Blackstone's view about retroactive laws was not wholly accepted in American jurisprudence. The United States Constitution prohibits Congress or the states from passing *ex post facto* laws,[134] but it is uncertain whether the framers intended to ban all retroactive laws or solely what Blackstone referred to as *ex post facto* laws. In *Calder v. Bull*,[135] the United States Supreme Court interpreted the constitutional prohibitions on *ex post facto* laws as applying only to criminal laws.[136] Although the *ex post facto* provisions are not applicable to non-criminal matters, the Supreme

127 ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 205 (Liberty Press 1985) (1966).
128 1 WILLIAM BLACKSTONE, COMMENTARIES *125, 130, 134.
129 4 *id.* at *417.
130 1 *id.* at *140.
131 1 *id.* at *120.
132 1 *id.* at *45.
133 1 *id.* at *46.
134 U.S. CONST. art. I, §§ 9, 10.
135 3 U.S. (3 Dall.) 386 (1798).
136 *Id.* at 390–91.

Court has at times applied the Due Process Clauses to strike down retroactive property laws.[137]

According to Blackstone, the absolute right of property "consists of the free use, enjoyment, and disposal of all [the owner's] acquisitions, without any control or diminution, save only by the laws of the land."[138] As the reader will recall, the words "law of the land" were interpreted by Coke to mean by the due course and "process of law," and the last expression he expounded to mean "by indictment or presentment of good and lawfull men, where such deeds be done in due manner."[139] Blackstone states it this way:

> [Pursuant to Chapter 29 a]nd by a variety of antient statutes [citing the three statutes of Edward III noted in section II. *supra*] it is enacted, that no man's lands or goods shall be seised into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.[140]

Blackstone thus reiterates and ratifies Coke's view that due process of law is a necessary precondition to government infringement on life, liberty, or property.

These safeguards were essential to maintain the integrity of private property, which for Blackstone meant "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[141] When Blackstone wrote his *Commentaries*, and at least until and including when the United States Constitution and Bill of Rights were ratified in 1780 and 1791, respectively, the common law accorded land owners almost total physical control of their properties. "So great moreover," Blackstone declared, "is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."[142] He then went on to assert the requirement of compensation for a government acquisition of private property for public use, and subsequently the pro-

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137 *See* BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 574 (1996) (applying the Due Process Clause of the Fourteenth Amendment to strike down Alabama's punitive damages rules and holding that BMW did not have notice of the severity of the penalty that the state may impose); *see also* Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069 (discussing generally retroactive taxation of property).

138 1 WILLIAM BLACKSTONE, COMMENTARIES *134.

139 COKE, THE SECOND PART OF THE INSTITUTES, *supra* note 14, at *50.

140 1 WILLIAM BLACKSTONE, COMMENTARIES *134–35.

141 2 *id.* at *2.

142 1 *id.* at *135.

tection of owners offered by the laws of trespass[143] and nuisance.[144] While Blackstone believed in the parliamentary supremacy that existed at the time he wrote, he also interpreted "law of the land" to be protective of the rights of life, liberty, and property, none of which government could rightfully limit.[145]

During the periods covered by the commentaries of Coke and Blackstone, the common law, although generally dedicated to the protection of individual liberty, did not always support freedom of the economic market. Blackstone reports that a number of "offenses against trade" were punishable, such as the offense of forestalling, regrating, engrossing, and usury.[146] The major purpose of these laws was to maintain low food prices and was not only supported by many consumers but also by holders of exclusive trade rights who feared the economic consequences of free trade.[147] The United States Constitution contains no provision authorizing Congress to pass these laws. "Not even proposed [at the Constitutional Convention] were the powers to control prices, wages, interest rates, the quality of goods, the conditions of their sale, and the allocation of labor."[148]

Although Blackstone writes that the principal aim of society is to protect individuals in the enjoyment of those absolute rights vested in them by nature, he acknowledges that in a civilized society no person can retain the freedom of doing whatever he pleases.[149] Political or civil liberty is therefore none other than natural liberty "so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick."[150] As Blackstone explained:

> Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind: but every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty . . . . [T]hat constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of

143 1 *id.*
144 3 *id.* at *209–10, 219–21.
145 1 *id.* at *120–41.
146 4 *id.* at *155.
147 4 *id.* at *158–59.
148 WILLIAM D. GRAMPP, ECONOMIC LIBERALISM 109 (1965).
149 1 WILLIAM BLACKSTONE, COMMENTARIES *120–21.
150 1 *id.* at *121.

> his own conduct, except in those points wherein the public good requires some direction or restraint.[151]

Accordingly, a restraint imposed by government pursuant to this standard would not necessarily constitute a legal deprivation in violation of Chapter 29.

Under contemporary constitutional jurisprudence, Blackstone's exposition takes the form of tests to determine whether the legislative means substantially achieves the legislative ends; whether the means and ends are legitimate; and whether when restraint is necessary, the one utilized is the least onerous to liberty.[152] Thus, Chief Justice Marshall declared that for legislation to be constitutional, the end has to be "legitimate," and the means "appropriate" and "plainly adapted to that end."[153]

IV. The United States Constitution

As the subsequent discussion will explain, a major, if not *the* major reason that led to the framing and ratification of the United States Constitution, was to protect economic freedom. In 1781, the thirteen original colonies (which, as a result of the revolution, were no longer subject to English rule) entered into the Articles of Confederation that established a confederation of states which they called the United States of America. The Articles asserted that the free inhabitants of each state were entitled to all privileges and immunities of free citizens in the several states.[154] It granted each state one vote in the Congress of the Confederation and provided very limited legislative and executive powers to that body, with each state retaining powers not expressly granted.[155] Congress had power to conduct foreign relations, establish armed services, regulate relations with Indian Tribes, and issue and borrow money.[156] It had no power to levy taxes, regulate trade and commerce, or otherwise interfere in the internal affairs of the states. Amendments could only be adopted by unanimous consent.[157] The Articles reflected the colonists' distrust of centralized government by rejecting it except when essential to the viability of the Confederation.

The most serious problem confronted by the Confederation was the prevalence in the states of economic regulations that inhibited both trade between the states and ownership and invest-

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151 1 *id.* at *121–22.
152 1 *id.* at *75–78.
153 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).
154 Articles of Confederation art. IV.
155 *Id.* art. II.
156 *Id.* art. IX.
157 *Id.* art. XIII.

ment within the states.[158] The official efforts to remove these barriers began with the Virginia General Assembly in January 1786, with its passage of a resolution proposing a meeting of commissioners from the states to consider and recommend "how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony."[159] Commissioners from New York, New Jersey, Pennsylvania, Delaware, and Virginia subsequently met in September at Annapolis and recommended a meeting of states to be held in Philadelphia in May 1787 to consider changes in the Articles of Confederation regarding commerce and other important matters.[160] On February 21, 1787, Congress adopted resolutions calling for a convention to be held in May at Philadelphia for the sole purpose of revising the Articles of Confederation.[161]

Under the Articles, each state had virtually unlimited power to regulate all traffic and trade to and from its borders.[162] Each state applied this power in its own self interest, frequently to the detriment of other states.[163] Organizers of the Constitutional Convention of 1787 sought to suppress what Alexander Hamilton referred to as the "interfering and unneighborly regulations of some States;" regulations which, "if not restrained by a national control" would result in even more "serious sources of animosity and discord."[164] A major objective was to prohibit state or municipal laws whose purpose was to institute local economic protectionism, that is, laws supporting their economic interests to the detriment of other states and a national economy.[165]

Laws regulating economic activity within the states were also of great concern. Following the revolutionary war, the economies in some states deteriorated markedly, leading to "an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations."[166] Some states passed "stay laws," extending the due date of notes, "installments laws," allowing debtors to pay their obligations in installments after they had fallen due, and "commodity payment laws," permitting payments in cer-

158 *See* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 3–31 (1928).

159 *Res. of the General Assemb. of Va., Jan. 21, 1786, Proposing a J. Meeting of Commissioners From the States To Consider and Recommend a Federal Plan For Regulating Commerce, reprinted in* H.R. DOC. No. 398, at 38, 38 (1927).

160 *Proceedings of Commissioners to Remedy Defects of the Fed. Government*, 69th Cong. 39–43, *reprinted in* H.R. DOC. No. 398, at 39, 39–43 (1927).

161 *Report of Proceedings in Congress, Wednesday, Feb.* 21, 1787, *reprinted in* H.R. DOC. No. 398, at 44, 46 (1927).

162 *See* WARREN, *supra* note 158, at 3–31.

163 *Id.*

164 THE FEDERALIST No. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

165 *Id.* at 143–44.

166 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934).

tain enumerated commodities at a proportion of actual value.[167] Some states were reluctant to pass legislation allowing the British to collect debts owed by Americans, payment of which had been suspended during the war. According to Alexander Hamilton, "creditors had been ruined or in a very extensive degree much injured; confidence in pecuniary transactions had been destroyed and the springs of industry had been proportionably relaxed" because of the failure of the states to safeguard commercial rights.[168]

In the 1780s, many expressed alarm about the economic viability and stability of the states if they remained largely autonomous.[169] Not only was social chaos and even violence feared, but so were political forces that favored policies destructive of private ownership and enterprise. According to Madison, laws infringing on property rights "contributed more to that uneasiness which produced the Convention . . . than those which accrued . . . from the inadequacy of the Confederation."[170] To the same effect, John Marshall—who later became Chief Justice of the Supreme Court—observed during the ratification debates that the Confederation took away "the incitements to industry, by rendering property insecure and unprotected."[171] "The Constitution, on the contrary, 'will promote and encourage industry.'"[172]

Marshall explained in an opinion he later wrote as Chief Justice that the union of the states was intended to create one commercial market, and that "so far as respects the intercommunication of individuals, the lines of separation between states are, in many respects, obliterated."[173] In dramatic terms, he described the creditor-debtor problems as a critical reason for creating a national government:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so- great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the peo-

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167 *Id.* at 458 (Sutherland, J., dissenting).

168 ALEXANDER HAMILTON, THE EXAMINATION NO. V (1801), *reprinted in* 25 THE PAPERS OF ALEXANDER HAMILTON 479 (Harold C. Syrett et al. eds., 1977).

169 *See* WARREN, *supra* note 158.

170 Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *reprinted in* 10 THE PAPERS OF JAMES MADISON 206, 212 (Robert A. Rutland, et al. eds., 1977).

171 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 417 (1916).

172 1 *id.*

173 Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 334 (1827) (4-3 decision) (Marshall, C.J., dissenting).

> ple, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous of this great community, and was one of the important benefits expected from a reform of the government.[174]

For Marshall, a government that privileged economic liberties was a highly acceptable paradigm.

During the Convention, Madison said that the Union must "[provide] more effectually for the security of private rights, and the steady dispensation of Justice."[175] He asked: "Was it to be supposed that republican liberty could long exist under the abuses of it practised in [some of] the States[?]"[176] The *Pennsylvania Packet* described the situation in 1786: "At the commencement of the Revolution, it was supposed that what is called the executive part of government was the only dangerous part; but we see now that quite as much mischief, if not more, may be done, and as much arbitrary conduct acted, by a legislature."[177]

Whoever was in financial distress, it seemed—whether the small farmer, large planter, or merchant—sought and frequently obtained political aid to overcome his problems. Some used the process to acquire greater riches. Such a political climate was destructive to ownership and investment. Understandably, as Albert Beveridge, John Marshall's biographer, concluded, the "determination of commercial and financial interests to get some plan adopted under which business could be transacted, was the most effective force that brought about [the Philadelphia Convention]."[178]

Although the Constitutional Convention of 1787 was convened to amend the Articles of Confederation, the Convention chose instead to frame an entirely new document which still governs this nation. For its day, this Constitution was a unique document. No nation had ever adopted a constitution separating government into three branches, substantially limiting the powers of each branch, and giving each partial or total veto powers over each of the other two branches.[179]

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174 *Id.* at 354–55.

175 James Madison, Comments at the Federal Convention of 1787 (June 6, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 29, 134 (Max Farrand ed., 1911) [hereinafter Comments at the Federal Convention].

176 Debates in the Federal Convention of 1787 as Reported by James Madison, *in* THE MAKING OF THE AMERICAN REPUBLIC: THE GREAT DOCUMENTS, 1774–1779, at 109, 162 (Charles Callan Tansill ed., 1972).

177 Isaac Kramnick, *Introduction* to THE FEDERALIST PAPERS 27 (Isaac Kramnick ed., Penguin Classics 1987).

178 BEVERIDGE, *supra* note 171, at 242.

179 *See* RONALD L. WATTS, COMPARING FEDERAL SYSTEMS 2–3 (2d ed. 1999) (discussing the existence of nations with federalism prior to the United States but without the limiting powers of different branches of government).

The original Constitution of 1787 granted limited powers to each of the three branches of government and contained very few specific restrictions on the nation's powers.[180] The federal government was limited in power so that it could not deprive citizens of their privileges and immunities, suspend the writ of habeas corpus, levy general capitation or other direct taxes, or pass bills of attainder and *ex post facto* laws; jury trials were required in all criminal matters, treason was defined and its punishment prescribed; and no religious test was required as a qualification for any office under the United States government.[181]

The Constitution was passed by delegates who had lived under and were steeped in the common law. Most terms and provisions of the Constitution are of common law origin and cannot fully be understood without reference to the common law. Thus, although there were no specific protections for the right of property or economic activity or press and speech, the United States government was given no power in the Constitution to deprive people of these common law rights. There was therefore no need for specific protections of such liberties and the Constitutional Convention voted not to include a bill of rights in the document.[182] A bill of rights was subsequently appended largely to allay fears that the United States government might some day seek to apply powers that had not been delegated.[183]

Accordingly, the United States government, at the time the Constitution was ratified, had no power to deprive people of their common law rights, as generally described in the writings of Coke, Blackstone, and other credible legal commentators. As Alexander Hamilton explained in *The Federalist Papers* No. 84, "[h]ere, [unlike in England], the people surrender nothing; and as they retain everything they have no need of particular reservations."[184] Therefore, a bill of rights was superfluous. As Hamilton aptly questioned, "For why declare that things shall not be done which there is no power to do?"[185]

For over three years, between the ratification of the original Constitution on June 21, 1788, and the Bill of Rights on December 15, 1791, Americans lived under a Constitution that enumerated relatively few rights against the national government. Three

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180 *See* U.S. CONST. arts. I–III.

181 *Id.* art. I, § 9, cls. 2–4; *id.* art. III, § 2, cl. 3; *id.* art. III, § 3, cls. 1–2; *id.* art. IV, § 2, cl. 1; *id.* art. VI, cl. 3.

182 *See* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776–1791, at 106–25 (Northeastern Univ. Press 1991) (1955).

183 *Id.* at 190–218.

184 THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

185 *Id.*

states initially refused to ratify the proposed Bill of Rights.[186] The debate about the Bill of Rights did not resonate with the American public. The absence of this constitutional protection was not considered a matter of vital concern. Americans seemed confident that they were protected under the original Constitution against any excesses or oppressions that the federal government might contemplate.

What were the "rights of Englishmen" that these Americans treasured as their birthright and believed were indelibly secured in the Constitution and Bill of Rights? England has no written constitution but, wrote United States Supreme Court Justice Joseph Bradley in 1872, "[t]he people of this country brought with them to its shores the rights of Englishmen; the rights which had been wrested from English sovereigns at various periods of the nation's history."[187] These migrants, explained Justice John Harlan in 1884, "brought with them, as their inheritance, which no government could rightfully impair or destroy, certain guaranties of the rights of life and liberty and property, which had long been deemed fundamental in Anglo-Saxon institutions."[188]

Early American courts (both federal and state) frequently utilized the commentaries of Coke and Blackstone to resolve conflicts between the government and the people. To be sure, the Americans had severed their political bonds with England, but not their reliance on its common law. For many Americans, these sources constituted an unwritten English Constitution that secured a large measure of human freedom. As historian Gordon S. Wood has put it, "what made their Revolution seem so unusual . . . [was that] they revolted not against the English constitution but on behalf of it."[189]

The legal commentaries of Coke and Blackstone concerning protection of material rights greatly influenced jurisprudence in the United States. Jurists often cited both in their opinions.. Even when not cited, doctrines attributable to these great English commentators were evident in legal opinions of federal and state courts. With respect to United States jurisprudence between the ratification of the Constitution in 1788, and ratification of the Fourteenth Amendment in 1868, the judiciary frequently accorded

186 STATE CONVENTIONS, RATIFICATION OF THE CONSTITUTION BY THE SEVERAL STATES, ARRANGED IN THE ORDER OF THEIR RATIFICATION, *reprinted in* H.R. Doc. No. 398, at 1024 n.9 (1927) (noting that New Hampshire's ratification on June 21, 1788 in accordance with Article VII of the constitution, "became binding upon the nine states that had previously ratified it."); H.R. CON. RES., 1ST CONG., RES. OF THE FIRST CONGRESS SUBMITTING TWELVE AMENDMENTS TO THE CONSTITUTION, *reprinted in* H.R. Doc. No. 398, at 1065 n.2 (1927) (noting that Massachusetts, Connecticut and Georgia did not make returns of the resolution).

187 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 114 (1873) (Bradley, J., dissenting).

188 Hurtado v. California, 110 U.S. 516, 539 (1884) (Harlan, J., dissenting).

189 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 10 (1969).

protection for property rights commensurate with the rules expressed by these Englishmen.

The ratification arguments over the protection of freedom of the press provide an illustration of powers that the judiciary could exercise in securing liberties. Hamilton wrote in *The Federalist Papers* No. 84 that there was no need to be concerned about securing freedom of the press, inasmuch as the Constitution does not grant the government any power to restrain it.[190] Does this mean, then, that as far as the national government is concerned, freedom of the press is absolute, and not subject to any restraint? James Wilson, a Framer of the Constitution and later a Supreme Court Justice, explained during the ratification debates that freedom of the press was not subject to the powers of government under the common law, which were then considerable.[191] In other words, the national government had no power to diminish freedom of the press as the term was defined under the common law.[192] However, the national government could still penalize criminal libel, which the common law did not protect.[193] Thus, in 1907 in *Patterson v. Colorado*,[194] Justice Oliver Wendell Holmes held that the common law definition of speech and press applied to the interpretation of expression guarantees of the United States Constitution. Holmes wrote that:

> the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practised by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare (citations omitted). The preliminary freedom extends as well to the false as to the true: the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all.[195]

In *Schenck v. United States*,[196] Holmes changed his interpretation of the expression guarantees and urged in dictum the adoption of the clear and present danger test, a much stronger protection than the common law offered, which the Court subse-

190 THE FEDERALIST NO. 84, *supra* note 184, at 513–14.

191 James Wilson's Speech in the State House Yard, Philadelphia, 6 October (1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 167, 167–68 (1976).

192 James Wilson, Speech in the Pennsylvania Convention (Dec. 1, 1787), *reprinted in* 1 PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 204, 308 (John Bach McMaster & Frederick D. Stone eds., 1970) (1888).

193 *Id.* at 308-09.

194 205 U.S. 454 (1907).

195 *Id.* at 462 (citations omitted).

196 249 U.S. 47 (1919).

quently accepted.[197] Applying his new test, Holmes asserted that "[t]he question in every case [challenging a restriction on expression] is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[198] This test also had its origin in the common law. As previously set forth, Blackstone wrote that a "wanton and causeless restraint" is a "degree of tyranny."[199] Hence, a law restraining advocacy of conduct on the basis that it will cause violence, when it is not likely to cause such violence, is futile and oppressive to the people who are restricted.

As of 1964, almost every state applied the common law of libel to determine liability for false publication. Until that time, a state law governing libel was not subject to the First Amendment. In a series of decisions beginning in that year, the United States Supreme Court federalized major aspects of libel law.[200]

Madison explained that the common law protected activities of the people. In *The Federalist Papers* No. 44, he asserted that "[b]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation."[201] "Very properly, therefore" did the Constitutional Convention include these protections in the original Constitution.[202] Hamilton presented such a position with respect to a statute revoking a land grant procured by fraud that was purchased by a bona fide buyer, which were the facts in the famous case of *Fletcher v. Peck*.[203] Hamilton contended that the common law governed in the absence of constitutional requirements to the contrary:

> Without pretending to judge of the original merits or demerits of the purchasers, it may be safely said to be a contravention of the first principles of natural justice and social policy, without any judicial decision of facts, by a positive act of the legislature, to revoke a grant of property regularly made for valuable consideration, under legislative authority, to the prejudice even of third persons on every supposition innocent of the alleged fraud or corruption.[204]

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197 *Id.* at 52. *See, e.g.*, Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

198 *Schenck*, 249 U.S. at 52.

199 1 WILLIAM BLACKSTONE, COMMENTARIES *122.

200 Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

201 THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

202 *Id.*

203 10 U.S. (6 Cranch) 87 (1810).

204 BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 22 (1938) (quoting Alexander Hamilton) (The opinion related to the matter subsequently litigated in *Fletcher*.).

The famous jurist and scholar James Kent explained:

> It was not to be doubted that the constitution and laws of the United States were made in reference to the existence of the common law . . . . In many cases, the language of the constitution and laws would be inexplicable without reference to the common law; and the existence of the common law is not only supposed by the constitution, but it is appealed to for the construction and interpretation of its powers.[205]

Kent applied this interpretation of the common law in his role as Chancellor of the New York Court of Chancery. In 1816, in the widely quoted case of *Gardner v. Village of Newburgh*,[206] after asserting that to divert or obstruct a watercourse is a private nuisance at common law, subject to remedy by injunctive relief, Chancellor Kent elevated an aggrieved owner's common law rights to constitutional status.[207] Combining the common law rules of eminent domain and nuisance, he reasoned that a government improvement supplying the village residents with water, which diverted water from flowing over the plaintiff's land, had violated his due process rights by depriving him of his property because the stream of water was part of his freehold.[208]

Relying on Blackstone, eminent European legal commentators, and English cases, Kent asserted that the payment of compensation "is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses."[209] Although this case arose in New York whose constitution then contained no Just Compensation Clause,[210] Kent held the statute at issue was invalid unless it was amended or interpreted to provide for compensation to indemnify the owner for his loss. Kent stated "I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property."[211]

While state courts varied on subscribing to *Gardner*, as of 1870 the United States Supreme Court was clearly supportive of Kent's position, as disclosed in *Yates v. Milwaukee*[212] decided that year and *Pumpelly v. Green Bay Co.*[213] decided the following year. In *Yates*, the Supreme Court unanimously upheld Yates's common

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205 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 315–16 (Da Capo Press 1971) (1826).

206 2 Johns. Ch. 162 (N.Y. Ch. 1816).

207 *Id.* at 164–66.

208 *Id.* at 166–67.

209 *Id.* at 166.

210 *Id.* at 167.

211 *Id.* at 168.

212 77 U.S. (10 Wall.) 497 (1870).

213 80 U.S. (13 Wall.) 166 (1871).

law right as a riparian property owner to construct a wharf extending from the front of his lot on the bank of a river to the edge of a navigable stream despite Milwaukee's adoption of an ordinance declaring this wharf to be a nuisance because it obstructed river traffic.[214] The Court ruled that for the city to prevail it would have to provide compensation to Yates.[215] In *Pumpelly*, Wisconsin authorized the construction of a dam which caused the water level of a lake to rise, inundating Pumpelly's fields.[216] Construing Wisconsin's Takings Clause, which was similar to that in the United States Constitution, the Supreme Court again unanimously held that a taking had occurred requiring payment of compensation.[217] The court cited as support *Gardner* and the New Jersey case of *Sinnickson v. Johnson*,[218] which also relied in part on *Gardner*.[219] The common law thus significantly informed the judiciary's interpretation of constitutional guarantees.

There were also many instances when the common law determined the meaning of Congressional legislation. A noteworthy example is provided by antitrust regulation. In his dissenting opinion in the *Slaughter-House Cases*,[220] Justice Bradley asserted that the granting of monopolies was regarded at common law as an invasion of the right of others to choose a lawful calling and consequently made the grant of such privileges illegal.[221] Many years later, Senator John Sherman, the author of the famous antitrust law bearing his name, confirmed Bradley's observation; the law he proposed was not intended to destroy all combinations "but all those which the common law had always condemned as unlawful."[222] A considerable amount of opposition to the Sherman Act came from lawyers who believed that the Act was unnecessary since the common law would itself achieve the objectives of the proposed statute.[223]

Indeed as Alexander Hamilton put it in *The Federalist Papers* No. 84, the United States Constitution was a bill of rights. It did not grant the national government any power to deprive the people of their common law rights. In Hamilton's opinion, expressed

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214 *Yates*, 77 U.S. (10 Wall.) at 507.

215 *Id.*

216 *Pumpelly*, 80 U.S. (13 Wall.) at 175–76.

217 *Id.* at 174, 182.

218 17 N.J.L. 129 (N.J. 1839) (holding that New Jersey cannot abrogate right to compensation for a taking, and noting that "statutes in derogation of common law rights, are to be strictly construed"). *Id.* at 144.

219 *Id.* at 139.

220 83 U.S. (16 Wall.) 36 (1873).

221 *Id.* at 111, 119–21 (Bradley, J., dissenting).

222 WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 91 (Random House, Inc. 1965) (1954) (quoting Senator Sherman's statement to the 21st Congress in 1890).

223 *Id.* at 77–78.

after the Convention, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS," prescribing the limits of governmental authority.[224]

In the ratification debates, the Federalists pointed out that the constitutional text itself showed that the authority of the national government was limited. If the national legislature was to be all powerful, they asked, why does Article I, Section 8 carefully spell out the powers of Congress? They denied that the Necessary and Proper Clause at the end of Section 8 was open ended, or that it modified the severe limitations on Congress previously expressed. Accounts of the Constitutional Convention show the Framers engaged in extensive and sometimes vitriolic debate on whether certain powers should be authorized.[225] These exercises would have been without purpose had Congress enjoyed broad, undefined powers.

The delegates actually turned down an effort to give Congress immense powers. The Committee of Detail recommended that Congress be given the sweeping power to provide "for the well managing and securing the common property and general interests and welfare of the United States," but this proposal did not appear in any drafts of the Constitution.[226] The Convention refused to empower the national government to act in many areas: to set up temporary governments in new states; to grant charters of incorporation; to create seminaries for the promotion of literature and the arts; to establish public institutions; to issue rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures; to regulate stages on the post road; to establish a university; to encourage, by property premiums and provisions, the advancement of useful knowledge and discoveries; to provide for opening and establishing canals; to emit bills of credit (which then meant printing unbacked paper for circulation as currency); and to make sumptuary laws. Each of these proposals was introduced, and was either voted down or not further considered outside of the committee.[227] In sum, the Framers privileged common law rights and rejected the idea that the national government would have broad power to infringe on these rights.

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224 THE FEDERALIST NO. 84, *supra* note 184, at 515.

225 CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787, at 254–64 (1966). Three prominent delegates refused to sign the Constitution for a variety of reasons, including their concern about powers of the central government. The author quotes James Madison as listing Mr. Randolph, Mr. Mason, and Mr. Gerry as "declin[ing] [to give the Constitution] the sanction of their names." *Id.* at 263.

226 IRVING BRANT, THE FOURTH PRESIDENT: A LIFE OF JAMES MADISON 186 (1970). *See also* BOWEN, *supra* note 225.

227 *See* BRANT, *supra* note 226, at 181–89.

A. Common Law Interpretations of the Due Process Clauses

By 1868, three-quarters of the states had ratified the Fourteenth Amendment, making it a binding document.[228] Section 1 contains broad guarantees for liberties in the states, as secured by the Privileges and Immunities, Due Process, and Equal Protection Clauses.[229] The language of each of these clauses is comprehensive and embodies the meanings previously accorded these concepts by the American and English judiciary. The importance of judicial precedent in construing the Clauses is evident from the debates of the Thirty-Ninth Congress, which framed the amendment in 1866. Representative John Bingham of Ohio was the principal author of the protective Clauses of Section 1 of the Fourteenth Amendment.[230] When asked about the meaning of "due process of law," he replied: "[T]he courts have settled that long ago, and the gentleman can go and read their decisions."[231] Senator Jacob Howard introduced in the Senate the legislation creating the Fourteenth Amendment and stated that prior judicial interpretations of the meaning of privileges and immunities give "some intimation of what probably will be the opinion of the judiciary."[232]

The common law provided meaning for the Due Process of Law clauses that are contained in the Fifth and Fourteenth Amendments of the Constitution. When the Fourteenth Amendment was framed, the Constitution of the United States and the constitutions of most states contained a Due Process or Law of the Land Clause, with both intended to have the same meaning.[233] Under the rule of *stare decisis*, only the decisions in which the United States Supreme Court construed the Fifth Amendment's Due Process Clause are relevant to ascertaining the meaning of the Fourteenth Amendment's Due Process Clause. During the years when the Fourteenth Amendment was framed and ratified (1866 and 1868), any judge, lawyer, or private individual who wanted to know the meaning of the Due Process Clause of the Fifth Amendment would have to read and be guided by *Murray's Lessee v. Hoboken Land & Improvement Co.*, decided unanimously by the Supreme Court in 1856.[234]

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228 HANNIS TAYLOR, THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION app. XX at 644 n.2 (Fred B. Rothman & Co. 1998) (1911).

229 U.S. CONST. amend. XIV, § 1.

230 *See* HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE: EQUALITY AND JUSTICE DEFERRED, THE HISTORY OF THE FOURTEENTH AMENDMENT 58 (Madison Books 2000) (1973).

231 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

232 *Id.* at 2765.

233 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).

234 *Id.* at 272, 274.

The case was actually about an exception to the due process concept. It concerned the constitutional validity of a law granting officers of the United States Treasury the power to enforce without recourse to judicial proceedings payment of delinquencies they found in the account of a collector of Customs.[235] The United States Supreme Court denied the Collector's claim that he had been deprived of due process of law.[236] According to the Court, the process employed by the treasury officers did not differ in principle from those employed in England from the time of the Magna Carta and in many of the states at the time the Constitution was framed.[237] In passing the law the Court reasoned Congress was in part exercising its legislative powers with respect to the collection of taxes and was not limited by the requirements of due process.[238]

The Court then held that due process of law meant the same as law of the land, and went on to construe the meaning of due process.[239] *Murray's Lessee* was not an isolated decision on the meaning of due process; it generally conformed to most jurisprudence in the state courts. In that case, the Court's interpretation of the due process guarantee was based on an impressive list of authorities which it cited: Coke's *Institutes of the Laws of England*;[240] *Greene v. Briggs*,[241] a Federal Circuit Court of Appeals decision; and five state high court decisions, *Hoke v. Henderson*[242] from North Carolina; *Taylor v. Porter*[243] from New York; *Vanzant v. Waddel*,[244] *Bank of the State v. Cooper*,[245] and *Jones' Heirs v. Perry*[246] from Tennessee. The circuit court and the five state cases also relied on Coke.

Justice Curtis wrote the opinion in *Murray's Lessee*,[247] and confirmed that the rights of Americans included those accorded protections by the common and statutory law in England when the Constitution was framed.[248] With respect to due process, the sources of these rights were the "settled usages and modes of proceeding," that were then extant in England.[249] He conditioned the acceptance of these English rights in America to those "shown not

235 *Id.* at 275–76.
236 *Id.* at 275.
237 *Id.* at 276.
238 *Id.* at 274–75.
239 *Id.* at 276–77.
240 1 COKE, THE FIRST PART OF THE INSTITUTES, *supra* note 15.
241 10 F. Cas. 1135 (C.C.D. R.I. 1852) (No. 5,764).
242 15 N.C. (4 Dev.) 1 (1833).
243 4 Hill 140 (N.Y. Sup. Ct. 1843).
244 10 Tenn. (2 Yer.) 260 (1829).
245 10 Tenn. (2 Yer.) 599 (1831).
246 18 Tenn. (10 Yer.) 59 (1836).
247 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 274 (1856).
248 *Id.* at 276.
249 *Id.* at 277.

to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country,"[250] a qualification which meets the common law requirement that laws be of "common right and reason." If prior to the framing of the Constitution these English distinctions had been rejected in America, they surely should not have been secured in the Constitution.

The opinions in all six cases that Curtis cited are based on interpretations of English common law. Each sets forth substantive rights of property owners consistent with views expressed by Coke and Blackstone. The courts in the said six cases together entered opinions that applied due process or law of the land to strike down a considerable amount of legislation. *Hoke v. Henderson*[251] threw out a law that deprived an elected officeholder of his position during a prescribed term of office because there was no judicial finding that he had violated an existing law warranting such action.[252] *Taylor v. Porter*[253] invalidated a law for the creation of private roads because due process prohibited a forced transfer of property from one private person to another private person even when payment of compensation was made.[254] To be constitutionally valid, the transfer must be for a public purpose and just compensation must be paid. An owner cannot otherwise be deprived of his property unless he had engaged in wrongdoing that required a forfeiture. *Greene v. Briggs*[255] voided a law that made a trial by jury in a criminal case dependent on the accused person giving a bond, with surety for the payment of penalty and court costs.[256] The court held that a legislature could not deprive an accused of a right essential to prove his innocence.[257]

The three Tennessee courts cited in *Murray's Lessee* cited Coke's interpretation of the Magna Carta as requiring that every law must be a general public law, operating equally upon all members of the community. In *State Bank v. Cooper*,[258] a Tennessee act created a special tribunal, composed of existing judges, for the disposition of lawsuits commenced by a named bank against its officers, their sureties, and customers of the bank who had overchecked, and from whose decision there was no appeal.[259] The Supreme Court of Tennessee held this provision to be unconstitu-

250 *Id.*
251 15 N.C. (4 Dev.) 1 (1833).
252 *Id.* at 16.
253 4 Hill 140 (N.Y. Sup. Ct. 1843).
254 *Id.* at 147–48.
255 10 F. Cas. 1135 (C.C.D. R.I. 1852) (No. 5,764).
256 *Id.* at 1141.
257 *Id.* at 1140.
258 10 Tenn. (2 Yer.) 599 (1831).
259 *Id.* at 605-08, 615, 621-23.

tional as special legislation in violation of the state constitution's Law of the Land Clause.[260] In *Jones' Heirs v. Perry*,[261] the Tennessee Supreme Court held invalid a private act passed upon application of court appointed guardians of infants, authorizing the guardians to sell land inherited from the parent to pay his debts.[262] In *Vanzant v. Waddel*,[263] however, the court upheld a law authorizing a holder of the notes of two named banks, at their election, to summon persons as garnishees when the original writ was issued against the bank, instead of waiting until the judgment is recovered as in ordinary cases.[264] The Court found that the Act did not deprive the garnishees of an existing right.[265]

Each of these six cases was based in part on Coke's interpretation of the Magna Carta that prohibited termination of an existing right without either due process of law or in violation of the law of the land. The variety of rights protected in these cases discloses the wide coverage of the due process of law concept and its general applicability for securing liberty. Although the United States Supreme Court refers to the Due Process clauses as "process" and "proceeding" in its *Murray's Lessee* opinion,[266] the cases reported relate to substantive and procedural due process, as is evident from its citation of both substantive[267] and procedural[268] due process. According to the Court, due process of law means the same as law of the land, which Coke interpreted as a general protection against governmental oppression.[269]

Accordingly, due process of law as interpreted by the United States Supreme Court in the period when the Fourteenth Amendment was ratified, shields persons from laws depriving them of their rights. In all but one of the cases, a state supreme court or a federal appeals court upheld the aggrieved person's complaint that he had been deprived of liberty or property without any finding of wrongdoing. In the sixth case, *Vanzant*, the Tennessee Supreme Court agreed that this was the law but found it unnecessary to apply it in the case.[270]

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260 *Id.*

261 18 Tenn. (10 Yer.) 59 (1836).

262 *Id.* at 69, 78.

263 10 Tenn. (2 Yer.) 260 (1829).

264 *Id.* at 269, 271.

265 *Id.* at 271.

266 59 U.S. (18 How.) 272, 274–87 (1856).

267 Taylor v. Porter, 4 Hill 140, 147–48 (N.Y. Sup. Ct. 1843); Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 16 (1833); Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 59, 69, 83–84 (1836); Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 599–600 (1831); Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260, 269, 271 (1829).

268 Greene v. Briggs, 10 F. Cas. 1135, 1141–44 (C.C.D. R.I. 1852) (No. 5,764).

269 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).

270 10 Tenn. (2 Yer.) at 271.

The Due Process Clause or Law of the Land Clause each served an important role in American jurisprudence prior to the Civil War. Consider in this respect some of the reasoning of the high courts in the previously discussed cases cited in *Murray's Lessee*.[271] In *Taylor v. Porter*,[272] Judge Bronson held:

> The words "due process of law," in this place, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation. There must be "due process of law."[273]

In *Hoke v. Henderson*,[274] Chief Justice Ruffin stated:

> Those terms "law of the land" do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer, than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life," without crime? . . . In reference to the infliction of punishment and divesting of the rights of property, it has been repeatedly held in this State, and it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually "laws of the land," for those purposes.[275]

In *Greene v. Briggs*,[276] United States Supreme Court Justice Benjamin Curtis (sitting as circuit justice) explained:

> Natural right requires that no man should be punished for an offence, until he has had a trial, and been proved to be guilty; and a law which should provide for the infliction of punishment, upon a mere accusation, without any trial, if the accused should

271 59 U.S. (18 How.) 272 (1856).
272 4 Hill 140 (N.Y. Sup. Ct. 1843).
273 *Id.* at 147.
274 15 N.C. (4 Dev.) 1 (1833).
275 *Id.* at 13–14.
276 10 F. Cas. 1135 (C.C.D. R.I. 1852) (No. 5,764).

> fail to furnish two sureties to pay the penalty which might, after the trial, be adjudged against him, would be viewed, by all just minds, as tyrannical; for it would treat the innocent, who are unable to furnish the required security, as if they were guilty, and would punish them, while still presumed innocent, for their poverty, or want of friends. And it is equally clear, that such a law would not be "the law of the land," within the settled meaning of that important clause in the constitution. Certainly this does not mean any act which the assembly may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty, or property, without a trial. The exposition of these words, as they stand in Magna Charta, as well as in the American constitutions, has been, that they require "due process of law;" and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it, unless it is proved.[277]

Judge John Catron, later appointed a justice of the United States Supreme Court, wrote in his concurring opinion in *Vanzant* that:

> The clause "LAW OF THE LAND," means a general and public law, equally binding upon every member of the community. . . . The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or "LAND," under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies, would be governed by one rule, and the mass of the community who made the law, by another. The idea of a people through their representatives, making laws whereby are swept away the life, liberty and property of *one* or a *few* citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name.[278]

Similarly, the Framers of the Fourteenth Amendment also sought great protection of life, liberty, and property. Considering the substance of the debates in the Thirty-Ninth Congress,[279] which framed the Fourteenth Amendment, I conclude that most of its members sought to remove the power of the states to oppress law-abiding persons. The Congressmen believed the most effective tool for this purpose was the Privileges and Immunities Clause of the Fourteenth Amendment.[280] They thought that both the Due Process and Equal Protection Clauses of the Fourteenth

277 *Id.* at 1140.
278 Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260, 270–71 (1829) (Catron, C.J., concurring).
279 *See supra* notes 230–32 and accompanying text.
280 *See supra* note 232 and accompanying text.

Amendment also served this purpose but to a somewhat lesser degree. As it happens, the United States Supreme Court largely destroyed the Privileges and Immunities Clause in the *Slaughter-House Cases*,[281] leaving the Due Process and Equal Protection Clauses to secure liberties in the states.

B. James Madison's View of Government and Property Rights

The most influential Framer of both the United States Constitution and the Bill of Rights was James Madison, a delegate to the Constitutional Convention from Virginia and later a member of the First Congress.[282] He spent considerable time preparing for the Convention by studying the writings of leading authorities on government, particularly the Scottish philosopher and historian David Hume, who advocated freedom for commerce as essential to the viability and progress of a nation.[283] As a result of his three years experience as a Virginia legislator, and his extensive review of literature on the subject of government, Madison concluded that for a nation to be politically and economically successful considerable limitation of government powers was required, enabling the productive, inventive, and competitive talents of the people to flourish.[284] He believed that the welfare of a nation mandated the creation of a commercial republic that would depend on freedom of the markets and not on the authority of the state.[285] He was very critical of legislators.[286] Far from being dedicated to the public good, he believed most legislators were pursuing their own political and financial interests.[287] Unhappily, he lamented, men seek public office to achieve ambition, personal interest or public good.[288]

> Hence the candidates who feel them, particularly, the second, are most industrious, and most successful in pursuing their ob-

281 83 U.S. (16 Wall.) 36, 74–80 (1873) (clarifying that "privileges and immunities" in the Constitution refers only to federal privileges and immunities, not to those of the individual states, thus greatly diluting its perceived reach). *See also* BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM THE MAGNA CARTA TO THE FOURTEENTH AMENDMENT 261–67 (2001) (discussing the *Slaughter-House Cases* and their effect on the "privileges and immunities" Clause).

282 BRANT, *supra* note 226, at 138, 222–25.

283 DOUGLASS ADAIR, *"That Politics May be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist*, *in* FAME AND THE FOUNDING FATHERS 132, 138, 148, 150–51 (Trevor Colbourn ed., Liberty Fund, Inc. 1998) (1974). The author analyzes James Madison's writings and demonstrates that the source of some of James Madison's political philosophies was David Hume.

284 *Id.* at 150–51.

285 *Id. See also* THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

286 James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 1 THE FOUNDERS' CONSTITUTION 166, 167–69 (Philip B. Kurland & Ralph Lerner eds., 1987).

287 1 *id.* at 168–69.

288 1 *id.* at 168.

> ject: and forming often a majority in the legislative Councils, with interested views, contrary to the interest, and views, of their Constituents, join in a perfidious sacrifice of the latter to the former. A succeeding election it might be supposed, would displace the offenders, and repair the mischief. But how easily are base and selfish measures, masked by pretexts of public good and apparent expediency? How frequently will a repetition of the same arts and industry which succeeded in the first instance, again prevail on the unwary to misplace their confidence?
> How frequently too will the honest but unenlightened representative be the dupe of a favorite leader, veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the glowing colours of popular eloquence?[289]

Madison was understandably critical of pure democracies because they rendered personal and property rights precarious:

> A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.[290]

In a subsequent essay, he viewed these inherent problems of representative government as especially perilous in times of public instability because:

> [of] the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth that laws are made for the *few,* not for the *many.*[291]

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289 1 *id.* at 168–69.

290 THE FEDERALIST NO. 10, *supra* note 285, at 81.

291 THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961).

As can be gleaned from his views on government, Madison showed particular interest in the protection of property rights. In an essay in the *National Gazette* of March 29, 1792, Madison offered two meanings for property.[292] The first was—and here he paraphrased Blackstone—"that domination which one man claims and exercises over the external things of the world, in exclusion of every other individual," while the second "embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantages*."[293] Thus, "a man's land, or merchandize, or money is called his property."[294] A man also has property in his opinions, religious beliefs, safety and liberty of his person. "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."[295]

"Government is instituted," he wrote, "to protect property of every sort . . . that which lies in the various rights of individuals," as well as that which refers to his material possessions.[296] "This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*. . . ."[297] Madison was also critical of excessive regulation. "Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinion, his person, his faculties or his possessions."[298]

> That is not just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. . . .
> A just security to property is not afforded by that government under which unequal taxes oppress one species of property and reward another species; where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor . . . .
> If there be a government then which prides itself on maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to

292 James Madison, *Property and Liberty*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* THE COMPLETE MADISON: HIS BASIC WRITINGS 267, 267 (Saul K. Padover ed., 1953).

293 *Id.* Blackstone wrote: "[t]here is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic *dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual* in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES *1–2 (emphasis added).

294 *See* Madison, *supra* note 292, at 267.

295 *Id.*

296 *Id.* at 267–68.

297 *Id.* at 268.

298 *Id.* at 267.

> the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the inference will have been anticipated, that such a government is not a pattern for the United States.
>
> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights.[299]

Madison voiced apprehensions about what would occur in the absence of protections for property rights:

> An increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, [and] secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this Country, but symptoms of a leveling spirit . . . have sufficiently appeared in . . . certain quarters to give notice of the future danger.[300]

Madison briefly summarized his position on economic freedom in a speech to the First Congress on April 9, 1789:

> I own myself the friend to a very free system of commerce, and hold it as a truth, that commercial shackles are generally unjust, oppressive, and impolitic; it is also a truth, that if industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened Legislature could point out.[301]

C. From 1897 to the late 1930s: United States Supreme Court Protection of Economic Liberties[††]

In *Allgeyer v. Louisiana*,[302] *Lochner v. New York*,[303] *Adair v. United States*,[304] and *Coppage v. Kansas*,[305] the United States Supreme Court applied concepts that frequently guided its substantive due process decisions between 1897 and the mid-1930s.

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299 *Id. at* 268–69.

300 Comments at the Federal Convention, *supra* note 175, at 422–23.

301 Madison, *supra* note 292, at 269.

†† The language and ideas in Sections IV.C. and IV.D. are largely drawn from BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 110–49 (1980).

302 165 U.S. 578 (1897).

303 198 U.S. 45 (1905).

304 208 U.S. 161 (1908).

305 236 U.S. 1 (1915).

These decisions applied both the common law and general constitutional law principles to protect individual rights. The last three cases, which concern labor disputes, are probably the most controversial and should not necessarily be considered representative of the period, since the Court sustained most labor legislation.[306] The expansion of the due process concept during the late nineteenth century occurred in the fashion of the common law to progressively extend its coverage. In each of the four decisions, the justices stated they were not intruding on the legislative function, but were enforcing constitutionally guaranteed rights.[307] They held that the Constitution's Due Process or Equal Protection Clauses limited the power of government to diminish the right of contract.[308] The decision that gave constitutional status to liberty of contract is *Allgeyer v. Louisiana*, an 1897 unanimous opinion which aroused few passions.[309]

A Louisiana statute made it illegal for any person, firm, or corporation to obtain marine insurance on property in Louisiana from an out-of-state company that had not been licensed to carry on such business in the state.[310] The Allgeyer company was charged with violating the statute by entering into a contract for marine insurance with a New York insurance company that had not complied with Louisiana's law.[311] The company objected that the law violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[312]

Justice Peckham, writing for the United States Supreme Court, held that the statute violated the Fourteenth Amendment by depriving the defendant of its liberty to contract for insurance under the Due Process Clause:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to em-

306 *See* Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era, in* Y.B. 1983 SUP. CT. HIST. SOC'Y, 53, 61–63, 69–70. *See also* WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 38–39, 41–44 (1994). The author discusses the Supreme Court's decisions regarding labor in this era. He also discusses the positive trend towards labor legislation within the context of labor's hostility to the courts. "[T]he Supreme Court upheld far more state and federal legislation than it struck down . . . . While the willingness of the Court to uphold so much reform legislation helped to mute that chorus . . . [it] reminded progressives that all reforms had to run the gauntlet of judicial review." *Id.* at 44.

307 Coppage v. Kansas, 236 U.S. 1, 13–14 (1915); Adair v. United States, 208 U.S. 161, 177, 179–80 (1908); Lochner v. New York, 198 U.S. 45, 53, 56–57 (1905); Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897).

308 *Coppage*, 236 U.S. at 17–18; *Adair*, 208 U.S. at 174–75; *Lochner*, 198 U.S. at 53, 64; *Allgeyer*, 165 U.S. at 589, 591.

309 *Allgeyer*, 165 U.S. at 589.

310 *Id.* at 579.

311 *Id.* at 584–85.

312 *Id.* at 579–80.

> brace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[313]

Peckham cited two sources to support this holding: (1) Justice Bradley's concurring opinion in the second New Orleans *Slaughter-House* case;[314] and (2) Justice Harlan's majority decision in the oleomargarine case.[315] Justice Bradley had asserted:

> The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and *the pursuit of happiness*." This right is a large ingredient in the civil liberty of the citizen. . . . I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.[316]

Justice Harlan amplified these observations:

> The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law.[317]

Thus, the right to make contracts must be included in the right to pursue an ordinary calling or trade and to acquire, hold, and sell property. Every individual and corporate entrepreneur could now claim the protection of the Federal Constitution against local and state restrictions that limited economic opportunity. Thus, economic due process arrived officially for a long stay at the nation's highest judicial level. Pursuant to the police power, government could seek to impose regulation, but its authority had to be justified in each situation as not being an arbitrary exercise of power.

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313 *Id.* at 589.

314 Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring).

315 Powell v. Pennsylvania, 127 U.S. 678, 684 (1888).

316 *Butchers' Union Co.*, 111 U.S. at 762, 764 (Bradley, J., concurring).

317 *Powell*, 127 U.S. at 684.

The technique by which liberty of contract was established was neither unique nor extraordinary in American jurisprudence. The declarations of Justices Peckham, Bradley, and Harlan had been reiterated in substance, in one form or another, at various times by American and English jurists and legal commentators. Rights do not have to be named in the Constitution to be accorded the full authority of that document.

1. *Lochner v. New York*: Limitations on Work Hours

In 1895, New York had enacted, as part of a measure establishing sanitary and other working conditions for bakeries and confectioneries, a provision limiting the number of hours an employee in such establishments could "be required or permitted" to work each week to sixty, with a maximum of ten hours a day.[318] Lochner, the defendant employer, had been indicted for a violation of this provision and found guilty by the trial court.[319] His conviction was upheld by both the appellate division of the New York Supreme Court in a three-to-two decision and the New York Court of Appeals in a four-to-three decision.[320] Lochner appealed his conviction chiefly on the ground that the law violated his liberty under the Due Process Clause.[321] Again, Justice Peckham delivered the opinion of the United States Supreme Court, but this time he spoke for only a bare majority.[322]

The statute, the Justice explained, was an absolute prohibition upon the employer permitting more than ten hours' work, even if the employee desired to earn the extra money that came along with those longer hours. As in all cases involving regulatory legislation adopted pursuant to the police power, the Court could pursue one of three alternative inquiries. First, it could have selected the approach, set forth in Justice Holmes's dissent, that would usually allow the legislative judgment to prevail in socio-economic matters.[323] Legislation would be upheld "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[324] Second, the Court could have accepted the thesis of another dissenter, Justice Harlan—grandfather of the Warren Court's Justice Harlan—that the law's benefit to the workers' health was debatable and that, therefore, allowing for an honest

318 Lochner v. New York, 198 U.S. 45, 52 (1905).
319 *Id.* at 64.
320 *Id.* at 58.
321 People v. Lochner, 69 N.E. 373, 374 (N.Y. 1904).
322 198 U.S. at 52 (5-4 decision).
323 *Id.* at 74–76 (Holmes, J., dissenting).
324 *Id.* at 76 (Holmes, J., dissenting).

difference of opinion, the Court should not interfere with the legislative determination.[325] The third alternative, the one the majority used, required the state to show beyond question the legitimacy of the restraint.[326]

Applying this alternative, the Court had to determine which power would prevail—the state's police power or the individual's right to contract.[327] Justice Peckham articulated the test for answering this question, and rejected the notion that a state could prevail by simply claiming that a regulation related to the public health.

> The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[328]

Justice Peckham was applying what is referred to as a means-ends test, which can be traced back to Coke's famous decision in *Dr. Bonham's Case*[329] and Blackstone's *Commentaries*.[330] Coke found that a law prohibiting any person—even graduates of the most prestigious medical schools—from practicing medicine in London for a month or more without obtaining the approval of the London College of Physicians did not advance the public health.[331] The law was both underinclusive because it allowed anyone to practice medicine for a month, and overinclusive because it barred highly trained persons from the practice without permission of the college. Similarly, Blackstone rejected futile and oppressive laws: "[E]very wanton and causeless restraint of the will of the subject . . . is a degree of tyranny."[332] Justice Peckham's test is currently widely applied in constitutional jurisprudence.[333]

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325 *Id.* at 68 (Harlan, J., dissenting).

326 *Id.* at 56–58.

327 *Id.* at 57.

328 *Id.* at 57–58.

329 Dr. Bonham's Case, 77 Eng. Rep. 646 (K.B. 1610).

330 1 WILLIAM BLACKSTONE, COMMENTARIES *75-78. *See also supra* note 152 and accompanying text.

331 77 Eng. Rep. at 651–52.

332 1 WILLIAM BLACKSTONE, COMMENTARIES *126.

333 *See supra* text accompanying note 153. In addition, the Supreme Court scrutinizes both the means and ends for which legislation is enacted in a variety of Fourteenth Amendment contexts. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66, 83–84 (2000) (requiring ADEA age classification (the "means") to be rationally related to a legitimate state interest of preventing age discrimination (the "end")); United States v. Virginia., 518 U.S. 515, 523, 532–33 (1996) (requiring a public institution's gender discrimination (the "means") achieve an "exceedingly persuasive" objective (the "end")); United States v. Carlton, 512 U.S. 26, 35–36 (1994) (noting that retroactive aspects of economic legislation must "meet the test of due process: a legitimate legislative purpose furthered by rational means") (quoting Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992)). In the takings context, the Supreme Court may also require a means-end test. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 507 (1977). The *Moore* court affirmed the application of this test, reiterating

The means-ends test places the burden of showing the legitimacy of the regulation on the state. For example, in the case of *Whitney v. California*,[334] Justice Brandeis recognized this perspective in support of the clear-and-present-danger test:

> Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.[335]

Justice Peckham asserted that the right to contract for the purchase and sale of labor is protected by the Due Process Clauses unless the legislature proves that the law it has passed will achieve a legitimate legislative purpose justifying limitation of these rights.[336] According to Justice Peckham, the state must demonstrate to the Court's satisfaction the existence of such circumstances.[337] "There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty."[338] Laws tending to make people healthier were not necessarily valid as health laws enacted under the police power.[339] Although the state argued that the law was a legitimate exercise of police power, intended to preserve the health of workers, the proclaimed purpose of the law was not controlling, and more than speculative conclusions and paternalism had to be shown.[340] New York had not proven that a material danger to the employees' or the public's health would exist if working hours were not curtailed pursuant to the legislation.[341] Unless the courts restrained the legislatures, all individual actions would in time be at the mercy of majorities, and none could escape this all-pervading power.[342]

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that their "cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose"). *Id.* at 498 n.6; Dolan v. City of Tigard, 512 U.S. 374 (1994) (requiring rough proportionality); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (requiring an essential nexus).

334 274 U.S. 357 (1927).

335 *Id.* at 378–79 (Brandeis, J., concurring). Under the clear-and-present-danger test, a state may not forbid speech except where such advocacy "is likely to incite or produce" lawless action. *See also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

336 Lochner v. New York, 198 U.S. 45, 53–54, 56–57 (1905).

337 *Id.* at 61.

338 *Id.* at 59.

339 *Id.* at 60–61.

340 *Id.* at 61.

341 *Id.* at 64.

342 *Id.* at 60–61.

Justice Peckham observed that the Court had previously upheld a Utah law limiting employment in underground mines and smelters to eight hours a day, except in cases of emergency.[343] The New York law, however, could be distinguished from the Utah law because it covered a situation considered by the majority far less perilous, and because it allowed no exceptions.[344] As Justice Harlan noted, the Court would have come to an opposite conclusion had the law limited employment to eighteen hours a day, for working a longer period would indeed be detrimental to health.[345]

Considerable precedent existed at the state level for the majority decision, and Justice Peckham cited five state cases invalidating legislative "interferences" with ordinary trades and occupations.[346] Three cases struck down the regulation and licensing of the horseshoeing trade on due process or equal protection grounds.[347] These laws required that the person practicing the trade be examined and certified for competency by an administrative board.[348] In one of the cases, New York sought unsuccessfully to justify such a law as a health regulation.[349] Justice Peckham also included, as an example of legislative interference, a Nebraska holding that invalidated a maximum-hours law that required substantial pay increases for work in excess of eight hours a day, and a Pennsylvania decision that outlawed a statute that fixed the rate of wages for puddlers.[350] "In these cases," Peckham stated, "the courts upheld the right of free contract," including the purchase and sale of labor upon mutually acceptable terms.[351]

That the Court in the period under discussion was not averse to welfare measures is demonstrated by the fact that it sustained many challenged labor laws. Its upholding of the Utah law limiting hours of work has already been noted. For example, in 1908, the Court accepted a statute imposing a ten-hour workday on women employed in a factory or laundry.[352] Similarly, in 1917, the Court found valid a regulation that limited the working day of any person employed in any mill, factory, or manufacturing establishment to ten hours, but provided some exceptions, including a

343 *Id.* at 54 (citing Holden v. Hardy, 169 U.S. 366 (1898)).

344 *Id.* at 55, 59.

345 *Id.* at 71 (Harlan, White, & Day, JJ., dissenting).

346 *Id.* at 63. Justice Peckham cited the following five cases: *People v. Beattie*, 89 N.Y.S. 193 (N.Y. App. Div. 1904); *In re Aubry*, 78 P. 900 (Wash. 1904); *Bessette v. People*, 62 N.E. 215 (Ill. 1901); *Godcharles & Co. v. Wigeman*, 6 A. 354 (Pa. 1886); *Low v. Rees Printing Co.*, 59 N.W. 362 (Neb. 1894).

347 *Lochner*, 198 U.S. at 63 (citing People v. Beattie, 89 N.Y.S. 193, 194, 198–99 (N.Y. App. Div. 1904); *In re* Aubry, 78 P. 900, 900–01, 903 (Wash. 1904); Bessette v. People, 62 N.E. 215, 217, 220 (Ill. 1901)).

348 *Lochner*, 198 U.S. at 63.

349 *Id.*

350 *Id. See also Low*, 59 N.W. at 363; *Godcharles*, 6 A. at 355–56.

351 *Lochner*, 198 U.S. at 63–64.

352 Muller v. Oregon, 208 U.S. 412, 416–17, 423 (1908).

three-hour overtime period with time-and-a-half pay.[353] In the *Lochner* decision, the Court implied that the remaining parts of the New York law that imposed strict sanitation and working conditions were valid regulations.[354] Professor David Bernstein has listed a large number of United States Supreme Court cases decided in the *Lochner* period that upheld federal and state welfare laws.[355]

According to the *Lochner* majority, a legislature could circumscribe liberty of contract to purchase or sell labor if the measure clearly secured workers' health.[356] In his dissent in *Lochner*, Justice Harlan cited considerable professional support for the legislative determination that the hours limitation accomplished this result.[357] Even if correct in this respect, however, such evidence does not completely resolve the issue. A means-ends analysis requires consideration of the tightness of the fit between the means and the ends.[358] Justice Harlan's dissent fails to consider that the mandated reduction in working hours might create appreciable health problems for many workers (the cost of doctors, drugs, and hospitals, and for food, clothing, and shelter, especially for families). New York's law was overinclusive because it applied not only to workers whose health benefited from a shorter workday, but it also applied to workers who suffer health problems from the loss of earnings that accompanies a cut in working hours.[359] Justice Peckham noted that limitations upon hours "might seriously cripple the ability of the laborer to support himself and his family."[360] Indeed, the hours limitation exacerbated workers' poverty.[361]

The *Lochner* majority asserted the Supreme Court's power and responsibility to scrutinize legislative limitations of important rights. In addition to protecting an employer's right to contract, the *Lochner* court also secured the contract rights of many workers who would be adversely affected by the limitation of their working hours. The United States Supreme Court has at various

353 Bunting v. Oregon, 243 U.S. 426, 433–34, 438–39 (1917).

354 *Lochner*, 198 U.S. at 64.

355 David E. Bernstein, Lochner's *Legacy's Legacy*, 82 TEX. L. REV. (forthcoming Oct. 2003) (on file with Chapman Law Review).

356 198 U.S. at 53, 61.

357 *Id.* at 70–71 (Harlan, J., dissenting).

358 For example, few people would urge passage of a law to prohibit driving of automobiles even though such a law would likely save thousands of lives lost annually from automobile accidents.

359 *See* PAUL H. DOUGLAS, REAL WAGES IN THE UNITED STATES, 1890–1926, at 6–7 (1930) [hereinafter REAL WAGES] (discussing generally the effect total work hours may have on actual wages).

360 *Lochner*, 198 U.S. at 59.

361 As far back as *Tooley's Case*, Coke asserted that "a man is not to be restrained that he shall not labor for his living." 80 Eng. Rep. 1055, 1059 (K.B. 1613) (per author's own translation). *See* discussion *supra* Part III.A.2.a.

times invalidated such legislative overinclusiveness. Thus, Justice Douglas writing for the majority in the famous case *Griswold v. Connecticut*,[362] which struck down a Connecticut law banning use of contraceptives because it applied to married persons, stated that "[s]uch a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"[363]

Bakery workers dissatisfied with the loss in income could, of course, seek employment in another industry or part-time work at another bakery. Most employees in a *Lochner*-type bakery would find it difficult to exercise either of these options because they were recent immigrants, not fluent in English and probably not knowledgeable about the job market.

Shortening long working hours generally tends to increase labor productivity and thereby operates to benefit employers. The *Lochner* statute would have reduced average working hours by roughly fifteen percent—from about seventy-two hours a week to about sixty.[364] Labor experience suggests that a like increase in the productivity of workers would be extraordinary.[365] The extent to which this will occur in any specific situation is, however, speculative.

Professor William Panschar has described the nation's turn-of-the-century baking industry as a "study in contrasts."[366] The largest segment of the industry was the small-scale bakeries, which differed little from their colonial counterparts.[367] *Lochner* involved this kind of enterprise. The other portion consisted of industrial bakers using the more mechanized baking techniques and distribution methods familiar to contemporary society.[368] The trend was clearly toward greater industrialization.[369] New York's law, aimed at regulating structural, sanitary, mechanical, and working conditions, would have only hastened the process by adding to the small owners' costs.[370]

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362 381 U.S. 479 (1965).

363 *Id.* at 485 (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

364 *See supra* text accompanying note 318.

365 *See* 1 WILLIAM G. PANSCHAR, BAKING IN AMERICA 68–70 (1956). In the early 1900s most bakeries were small. Small bakeries were known for their pride in craftsmanship and were highly resistant to change. 1 *id.* They also tended to have less than four workers and were characterized by labor intensive, non-mechanized processes. 1 *id.* Thus, it is doubtful that decreasing their hours would have had such a substantial increase in productivity.

366 1 *id.* 45.

367 1 *id.*

368 1 *id.*

369 1 *id.* at 46–47.

370 Lochner v. New York, 198 U.S. 45, 61–62 (1905). *See* Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered,* 103 HARV. L. REV. 1363, 1371–72, nn.70–73 (1990) (discussing how government regulations tend to increase prices).

Kyrk and Davis supply national statistics showing the industry's changing structure.[371] "In 1899 only 2 per cent of the baking establishments were owned by corporations, as compared with 7 per cent in 1919 . . . ."[372] During this period the corporate portion of the industry's output rose from 28.7 to 51.8 percent.[373] Between 1909 and 1919, the average number of wage-earners in corporate-controlled bakeries was about forty-four, as contrasted with an average work force of fewer than three people in the bakeries under other forms of ownership.[374]

In New York, as elsewhere, the baking industry was split between sizeable bakeries whose plants had been specifically built or fully converted for such purposes, and small bakeries, operating out of limited, often subterranean quarters not originally intended for such use. The Bureau of the Census reports that in 1905, there were 3,164 bakeries in New York State, of which 2,870 were owned by individuals, 228 by firms, and 64 by corporations.[375] In that year, the individuals employed 10,804 workers, the firms 1,672, and the corporations 5,232, averaging 3.76, 7.33, and 81.75 workers per enterprise, respectively.[376] Percentages of total bakery output maintained by each group was 62.5, 9.7, and 27.8.[377] The New York trend was also toward bigger operations: in 1900, individuals had owned 2,767, firms 188, and corporations 44 bakery establishments.[378] These figures indicate that during the periods studied, the baking industry was very competitive; it was virtually impossible for employers to control wages.

A survey by the State Labor Bureau in 1896 of eight New York cities disclosed that the bakers' average working time per week was seventy-two and two-thirds hours.[379] Many workers in the small bakeries of New York City—and probably elsewhere in the state—were recent immigrants unable to speak English, who were attracted to owners speaking their language.[380] The small

371 HAZEL KYRK & JOSEPH S. DAVIS, THE AMERICAN BAKING INDUSTRY 1849–1923 AS SHOWN IN THE CENSUS REPORTS 26 (1925).

372 *Id.* at 36.

373 *Id.*

374 *Id.* at 37, 97.

375 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE AND LABOR, BULLETIN NO. 59, CENSUS OF MANUFACTURERS: 1905, NEW YORK 30 (1906).

376 *Id.* at 33. Workers per enterprise equals the number of worker in each category of enterprise divided by the total number of enterprises for that category.

377 *Id.*

378 *Id.* at 726, 729.

379 *The Statistics of the Journeyman Bakers of the State of New York*, BAKERS J., June 3, 1896, at 1.

380 Even the defendants admitted that the statute was created to control the new immigrant population attracted to the bakeries. "Another consideration for this class of legislation in the State of New York is the fact that there have come to that State great numbers of foreigners with habits which must be changed so that in due course of time there may be that assimilation which has made so successful our previous immigrations." Brief for Defendant at 14, Lochner v. United States, 198 U.S. 45 (1905) (No. 292).

owners frequently provided their laborers with sleeping quarters, enabling them to spend long hours on the job.[381] The time limitation on working hours would have caused the small owners to hire additional help.[382] It might be difficult to hire someone at the existing rate of pay because the reduction in hours might be less than a day's work.[383] As for current employees, it is unlikely that weekly wages—which were already very low—could be cut proportionately to approximate the decrease in working hours, or that worker productivity would increase sufficiently to compensate for this difference.[384] Consequently the restrictions on working hours meant higher labor costs for the small bakers, who, due to competition from the corporate bakers, were limited in the amount they could pass on in the form of higher prices. A number of the small bakers would have to terminate their businesses.[385]

The effect on the larger bakeries would be far less adverse. They were much closer to the hour standard and, unlike the small bakeries, might sustain only a modest increase in costs if they had to hire more workers.[386] Extra production costs, however, would be offset by the lessened competition from the small bakeries, which could lead to higher prices.[387]

Contemporary articles in the New York Times reported that sanitary, health, and working conditions in the small bakeries were far below those in the large ones. Referring to the statute in question, Frederick Endres, secretary of a journeyman bakers' and confectioners' union, explained: "Of course the bill was not aimed at the big bakeries, for they invariably comply with sanitary regulations, but it was directed against the small bakeries, where every sanitary consideration is disregarded."[388] The same sentiment was echoed by Edward Thimme, editor of the Bakers' Journal, who argued, "The cause of this trouble is that the small bakeries are owned by ignorant persons. The large bakeries are

381 For example, the New York Times noted that bakers "sometimes leave the bakeshops only once a week." *War on Filthy Bakeries*, N.Y. TIMES, Apr. 8, 1896, at 6. The article also graphically described the inadequacies of sleeping accommodations. *Id.*

382 Given the low probability of a significant shift in productivity from decreased work hours, more workers would be needed to fill in the lost hours of work. *See infra* text accompanying note 421.

383 The reduction of approximately twelve hours per worker for a six-day week would have resulted in two hours of work daily. The total time required to fill in lost time would be dependent on the total number of workers the bakery contained. Ultimately, the market for part-time workers would have affected the wage this worker received.

384 *See* KYRK & DAVIS, *supra* note 371, at 48 (discussing the lower wage scale in the baking industry as compared to manufacturing in general); PANSCHAR, *supra* note 365, at 84 (noting the prevalence of small bakeries in the baking industry and their resistance to change).

385 *See* PANSCHAR, *supra* note 365, at 79–81 (discussing the nature of competition caused by the changing industrial landscape).

386 *Id.* at 64–66 (discussing the efficiency of the larger bakeries).

387 *Id.* at 81 (discussing competition generally).

388 *Bakery Inspection Law*, N.Y. TIMES, May 16, 1896, at 9.

conducted in an exemplary manner."[389] Conrad Moll, president of a small bakery owners' association, complained "[i]t is impossible for small bakeries to comply with all the laws. The laws are all in favor of the large bakeries, and the aim seems to be to drive the small bakeries out of business."[390] It is likely that the more modern bakeries did not oppose or even supported working restrictions that would adversely affect their less modern competitors.

Working hours were much longer in the small bakeries than in the large ones, and the maximum-hours provision affected employers and employees of the former much more. In a report dated January 27, 1896, almost seven months after the effective date of the law, state factory inspectors reported that workers in some small bakeries—"found in noisesome cellars and unfit surroundings"—remained on the business premises (if not actually on the job) from twelve to as many as twenty-two hours a working day.[391] The workday in the larger firms, "those conducted on a modern plan, with improved appliances and proper workrooms," met or was close to the statutory maximum of ten hours.[392]

Presumably, the bulk of the workers in the small bakeries were engaged in the most remunerative employment they could find.[393] This was particularly true for the new immigrants, whose knowledge of English and their new country was limited. The question arises of how the health and welfare of the people who worked long, arduous hours for relatively small wages would be helped by substantially lowering their working time and wages, leaving them with more leisure but much less to spend on the necessities of life. Perhaps worst of all, those employed by bakeries driven out of business by the added costs would lose their jobs. Nor could a law under these circumstances be very effective as violations—prior to the law being declared unconstitutional—were probably extensive. The law could not alleviate the needs of

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389 *War on Filthy Bakeries*, *supra* note 381, at 6.

390 *Bakery Inspection Law*, *supra* note 388, at 9.

391 FACTORY INSPECTORS, STATE OF NEW YORK, TENTH ANNUAL REPORT 42 (1896).

392 *Id.*

> The length of time which is considered a day's labor in bakeries varies greatly—those conducted on a modern plan, with improved appliances and proper workrooms, rarely work their men more than ten hours a day; while in those which were found in noisesome cellars and unfit surroundings the men were compelled to work twelve to twenty-two hours.

Id.

393 According to the *New York Times*, the bakers endured the conditions because others were willing to take their place at the same wage. "When workmen in these small shops complain or tell of existing conditions, they are discharged, and plenty of men can be found to take their places." *War on the Filthy Bakeries*, *supra* note 381, at 6. Thus, it follows that these workers took these positions not because of work conditions, but because it was likely the best money they could make. *See* REAL WAGES, *supra* note 359, at 96 (listing bakeries' hourly wage as the lowest of "union" manufacturing industries); KYRK & DAVIS, *supra* note 371, at 26 (stating that bakery wages were lower than those in manufacturing).

an ever-increasing flood of immigrants eager to satisfy their wants and ambitions.

The reaction to *Lochner* might have been less harsh had the critics recognized that the law probably would have reduced considerably the wages of many low-paid workers, and caused others to lose their jobs. Commentators may still insist that, from the workers' perspective, health and safety with less pay is preferable to long hours in an unpleasant environment.[394] This is far more true for workers in underground mines and smelting than, say, clerks in commercial offices. Bakery workers are somewhere in between, and for the *Lochner* majority, the evidence in this regard, given prevailing labor conditions, was not sufficient to allow for legislative interference.[395]

Nor was the legislative mandate essential to achieve shorter working hours.[396] The average length of the workday for bakery employees nationally declined from about ten hours in 1909, to nine hours in 1914, to eight hours in 1919, lengthening slightly in 1921.[397] A survey of working hours for union workers in various industries shows that on the average, union bakers worked 64.5 hours per week in 1890; 59.3 in 1905; 52.5 in 1915; and 47.8 in 1926.[398]

2. *Adair v. United States* and *Coppage v. Kansas*: The Union Cases

Although demanding more than sixty hours of labor a week seems exploitative to modern sensibilities, even more anguish surrounds the thought of an employer firing an employee for engaging in union activity. Today, a great many people would favor a law forbidding employers from requiring a person, as a condition of employment, to agree not to become or remain a member of a labor union. Proponents of such a law probably would include most of the Supreme Court Justices appointed by President Franklin Roosevelt and his successors.[399] It is doubtful that these jurists could ever be persuaded that such legislation is unconstitu-

394 Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 10–12 (2001). *See also* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner: *Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 2 (1996) (discussing workers' preference for more government control of industry).

395 Lochner v. New York, 198 U.S. 45, 58 (1905).

396 After *Lochner*—which made legislation of maximum hours unconstitutional—weekly hours continued to decline. KYRK & DAVIS, *supra* note 371, at 60–61, 108.

397 *Id.* at 61.

398 REAL WAGES, *supra* note 359, at 112.

399 *See* Joseph L. Rauh, Jr., *Historical Perspectives: An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 218, 220 (1990) (discussing the effects of President Franklin Roosevelt's Supreme Court appointments and the positions taken by his appointed justices).

tional. In this regard, adverse reaction to the *Adair* and *Coppage* decisions is understandable. This position fails, however, to perceive the wisdom of an earlier day concerning the sanctity of contractual arrangements.

Both of these cases involved anti-union promises that the unions called "yellow dog" contracts.[400] The constitutionality of a federal statute outlawing such contracts in the railroad industry was at issue in the 1907 case of *Adair v. United States*.[401] There, a railroad agent had been convicted of violating the statute by firing an employee for belonging to a union.[402] The United States Supreme Court reversed.[403] A six-to-two majority found that the law in question invaded both the personal liberty and right of property protected by the Fifth Amendment.[404] Seven years later, a majority of six justices took a similar position in *Coppage v. Kansas*,[405] setting aside, pursuant to the Fourteenth Amendment, the conviction under a Kansas statute of a railroad agent for discharging an employee who would neither sign an agreement to withdraw from a union nor resign from it.[406]

These cases presented essentially the same issue as *Lochner*: Is there sufficient reason for the legislation to qualify as an exception to the prevailing doctrine of liberty of contract? The laws in these cases were advanced as promoting the growth of unionism, which, it was argued, was essential for the public welfare. The court viewed the controversy in much narrower terms, as Justice Harlan explained in *Adair*:

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé.[407]

In *Coppage*, Justice Pitney asserted that the anti-union requirement is no more onerous than the condition that an employee work full time exclusively for a single employer.[408] He wrote that whenever the right of private property exists, "there must and will be inequalities of fortune; and thus it naturally happens that par-

400 Coppage v. Kansas, 236 U.S. 1, 6–7 (1915); Adair v. United States, 208 U.S. 161, 168–69 (1908).

401 *Adair*, 208 U.S. at 166–69.

402 *Id.* at 169–71.

403 *Id.* at 180.

404 *Id.* at 180, 190 (McKenna & Holmes, JJ., dissenting).

405 236 U.S. at 13–14, 26–27 (Holmes, Day, & Hughes, JJ., dissenting).

406 *Id.* at 6–7, 26.

407 208 U.S. at 174–75.

408 236 U.S. at 13.

ties negotiating about a contract are not equally unhampered by circumstances."[409] Accordingly, to deprive a negotiating party of the advantage of a superior situation, brought about by such circumstances, is to deprive that party of a property right.[410] The quest for economic equality is constitutionally limited.[411] Justice Pitney continued:

> This applies to all contracts, and not merely to that between employer and employé. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.[412]

Such passages do not endear the Court to reformers determined to use the judiciary and legislatures to reduce social and economic inequalities. These reformers see *Adair* and *Coppage* as maintaining, if not augmenting, the superior powers of employers. Serious questions exist, however, about the effectiveness and desirability of laws intended to offset or ameliorate inequalities. Both decisions came at a time when unions were still highly controversial institutions in this country.[413]

Moreover, unions raised philosophical problems for judges. In his analysis of the antislavery movement's impact upon judicial reasoning, William Nelson explains that judges who had received their education or commenced their professional careers during the Civil War era viewed labor and unions much differently than does our modern society.[414] Freedom of contract for both employer and employee was strongly espoused by the antislavery movement.[415] It was accepted that the right of the individual to bestow his labor as he pleased was among the rights for which the Civil

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409 *Id.* at 17.

410 *Id.*

411 *Id.*

412 *Id.*

413 CHESTER WHITNEY WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 618–19 (2d ed. 1949). Union membership grew to a peak of 17.5 percent in 1920 following the war, but declined to 9.3 percent in 1930. *Id.*

414 William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America,* 87 HARV. L. REV. 513, 557 (1974).

415 *Id.* at 532, 537–38, 556–57.

War had been fought.[416] Many judges of the period feared that unions would obliterate these and other legal and natural rights.[417] Given the values that emerged triumphantly from the war, some judges found it simply "preposterous" that unions replace slaveholders and "attempt to issue orders that free men are bound to obey . . . ."[418]

Labor union practices greatly disturbed adherents of the widely followed individualist philosophy.[419] Those joining unions had to subordinate themselves to the will of the organization. Workers who went on strike insisted that they had not given up their jobs and claimed a right to those positions over other workers eager to work.[420] Enforcing this "right" required picket lines, threats, and at times violence directed not only at employers but also at other workers. Moreover, union policies encouraged inefficiency.[421] In 1869, John Stuart Mill wrote: "Some of the Unionist regulations go even further than to prohibit improvements; they are contrived for the express purpose of making work inefficient; they positively prohibit the workman from working hard and well, in order that it may be necessary to employ a greater number."[422]

Accordingly, Justice Pitney's contention in *Coppage* that government has no legitimate interest in encouraging unions was far less controversial than contemporary generations might suppose. The Court believed that the labor market itself would operate to support the welfare of both workers and employers.[423] The fact that today a large majority of workers do not belong to unions may suggest that they do not contest this conclusion.

Despite *Adair* and *Coppage*, unions did organize thousands of workers, and their existence aided numerous others.[424] Many workers received compensation for pledging not to join unions, the amounts depending on the fluctuations of the labor market.[425] These promises would have been costlier to obtain when unemployment was relatively low, as it frequently was during the first

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416 *Id.* at 557.

417 *Id.*

418 *Id.* at 557 (citing *In re* Higgins, 27 F. 443, 445 (C.C.N.D. Tex. 1886)).

419 *See* David Montgomery, *Workers' Control of Machine Production in the Nineteenth Century*, *in* THE LABOR HISTORY READER 107, 115–18 (Daniel J. Leab ed., 1985) (discussing how union work rules were not individualistic and did not promote the autonomy of the craftsman).

420 HENRY HAZLITT, THE CONQUEST OF POVERTY 133 (1973).

421 *Id.* at 139.

422 *Id.* (quoting John Stuart Mill).

423 Coppage v. Kansas, 236 U.S. 1, 16–17 (1915).

424 WRIGHT, *supra* note 413, at 613–19 (discussing the history of the labor movement in the United States).

425 CHARLES O. GREGORY & HAROLD A. KATZ, LABOR LAW: CASES, MATERIALS AND COMMENTS 122 (1948).

quarter of the century.[426] That *Adair-Coppage* kept workers from flocking to unions is most doubtful. As of 1976, about forty years after legislation turned favorable to their growth, labor organization membership constituted less than twenty-one percent of the entire labor force.[427] Total union membership peaked in the middle 1950s, reaching about twenty-five percent.[428]

In the era of *Lochner*, *Adair*, and *Coppage*, real wages were rising, working hours decreasing, and the country's wealth growing.[429] "By 1914, the national income exceeded that of the United Kingdom, Germany, France, Austria-Hungary, and Italy combined[,] and per capita income was well above that of any other great nation."[430] Between the end of the Civil War and beginning of World War I, real gross national product grew at a historically high rate.[431] It is estimated that the purchasing power of wages (exclusive of agriculture), measured by the relationship of wages either to wholesale or to retail prices, trebled between 1840 and 1914-15.[432] Working hours declined substantially; and the average daily scheduled work hours in manufacturing and mechanical establishments decreased from 11.5 in 1850, to 9.8 in 1900, and then to 8.5 in 1920[433]—a reduction of about twenty-five percent for the entire period. The average work hours per week in all manufacturing industries declined from 60 in 1890 to 50.3 in 1926.[434]

Because relatively few welfare laws or unions existed in those decades, the betterment of life must be attributed to the success of the economic system. It was not difficult to conclude that this success could be undermined by limiting entrepreneurial freedom—that which harms businesses also injures the livelihoods of the

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426 U. S. BUREAU OF CENSUS, THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 121–22, 124, 135 (1976) [hereinafter STATISTICAL HISTORY]. National unemployment in the first quarter of the century remained below 8%, except for highs of 11.7% in 1921 and 8.5% in 1915). *Id.* at 135, tbl.D 85–86.

427 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS, BULLETIN NO. 2070, at 412 tbl.165 (1980). *See also* News Release for Labor Day Weekend, Labor Union and Employee Association Membership—1976, Bureau of Labor Statistics, United States Dep't of Labor (1977) (on file with author).

428 BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS, BULLETIN NO. 2070, at 412 tbl.165 (1980).

429 *See infra* notes 430–34 and accompanying text.

430 Wright, *supra* note 413, at 429, 889.

431 STATISTICAL HISTORY, *supra* 426, at 224 tbl.F 1–5.

432 GEORGE F. WARREN & FRANK A. PEARSON, GOLD AND PRICES 316–17 (1935) (wages and wholesale prices); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HISTORY OF WAGES IN THE UNITED STATES FROM COLONIAL TIMES TO 1928, at 521 (wages); STATISTICAL HISTORY, *supra* note 426, at 211 tbl.E 135–66 (wages and consumer prices). According to these sources, wholesale and consumer prices were virtually the same in 1914–15 as in 1840, while wage rates per hour for all industries other than agriculture rose threefold for this period. On this basis, the purchasing power of nonagricultural wages increased between 1840 and 1915 at an average annual compound rate slightly in excess of 1.5%.

433 CARROLL R. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 192 (5th ed. 1941).

434 REAL WAGES, *supra* note 359, at 116.

people they employ and the quantity of goods they produce. The Supreme Court's concept of liberty enabled the economy to continue providing a great measure of material benefits. The Supreme Court also considered the scope of economic freedom and limitations on government regulation in areas such as entry into business, regulation of prices, and wage rates.

a. Entry into Business

New State Ice Co. v. Liebmann[435] concerned a 1925 Oklahoma statute that declared that the manufacture of ice for sale and distribution is a "public business" and conferred upon the corporation commission powers of regulation customarily exercised in connection with public utilities. The act made it a misdemeanor to engage in this business without obtaining a certificate of public convenience and necessity from the commission.[436] The agency was given wide discretion in issuing the certificate; the law allowed a denial whenever the existing facilities "are sufficient to meet the public needs."[437] The ice industry strongly backed passage of the legislation.[438] New State had for some time been engaged in the manufacture, sale, and distribution of ice in Oklahoma City, and had invested $500,000 in the business.[439] Liebmann purchased land in the city and commenced construction of an ice plant that would compete with New State.[440] Liebmann never applied for a certificate from the commission, and New State sued to enjoin his operation.[441]

In response to Liebmann's constitutional challenge, two philosophical opponents squared off—Sutherland for the majority of six, and Brandeis for the minority of two[442] (one Justice not participating). The majority said that Oklahoma had not presented justification to warrant infringing Liebmann's liberty to enter the market.[443] The facts did not disclose a natural monopoly or threats to public health or safety.[444] Brandeis's dissenting opinion, which outweighed (32-10 pages) and outpointed (57-0 footnotes) his opponent's, also dealt much more with economic theory than did Sutherland's.[445] Yet Brandeis's opinion reflected a perspective that would find limited favor among economists today.

435 285 U.S. 262 (1932).
436 *Id.* at 271.
437 *Id.* at 272.
438 *Id.* at 278–80 (discussing how the legislation prevented small ice distributors from competing with the larger distributors).
439 *Id.* at 281 (Brandeis, J., dissenting).
440 *Id.*
441 *Id.*
442 *Id.* at 271, 280.
443 *Id.* at 278–79.
444 *Id.*
445 *Id.* at 280–311 (Brandeis, J., dissenting).

He wrote that the statute was not unreasonable or arbitrary and that it should therefore prevail. According to Brandeis, Oklahoma should at least be allowed to experiment with this effort to provide a solution to a pressing problem.[446]

The main points and crucial language from Justice Sutherland's analysis are as follows: First, although ice is a necessity, ice-making is a private business, no different from other necessary but non-regulated businesses.

> It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less[er] extent, the community is dependent upon and is interested in having maintained. . . . It may be quite true that in Oklahoma ice is, not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home.[447]

Second, entry into the ice business was costly, but this fact applies to numerous other businesses in which competition exists. Moreover, appliances to make ice could be purchased "for a comparatively moderate outlay," providing a competitive restraint on price.[448] Third, the practical tendency of the restrictions was to shut out new enterprises and thus to create and foster a monopoly in the existing establishments.[449]

> The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed. We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. . . . There is nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition, subject, of course, to reasonable regulations prescribed for the protection of the public and applied with appropriate impartiality.[450]

Moreover, Justice Sutherland asserted that Justice Brandeis's contention that Oklahoma should be allowed to engage in

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446 *Id.* at 311.
447 *Id.* at 277.
448 *Id.* at 277–78.
449 *Id.* at 278–79.
450 *Id.* at 279.

this experiment to ascertain the desirability and feasibility of the law would deny constitutional protection to would-be entrepreneurs. Justice Sutherland declared:

> [T]here are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. . . . The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection [than freedom of the press].[451]

Justice Brandeis's lengthy dissent constitutes an engaging explanation of the regulatory process. The Justice sought to explain how regulation could prevent the needless "waste" and "destructiveness" of competition, provide for an equitable return to producers, and allow for a wider and less costly distribution of goods to the consumer.[452] He cited the ice industry's aversion to competition and its approval of the law to support his argument.[453] Justice Brandeis was not concerned that competition would be eliminated.

> It is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design. The certificate of public convenience and invention is a device—a recent social-economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest. To grant any monopoly to any person as a favor is forbidden, even if terminable. But where, as here, there is reasonable ground for the legislative conclusion that, in order to secure a necessary service at reasonable rates, it may be necessary to curtail the right to enter the calling, it is, in my opinion, consistent with the due process clause to do so, whatever the nature of the business. The existence of such power in the Legislature seems indispensable in our ever-changing society.[454]

Despite his extensive analysis, Justice Brandeis did not probe the legislative conclusion that regulation would provide greater service at more reasonable rates than does the market. He willingly accepted the legislature's contentions in this regard. Yet, possibly even under Justice Brandeis's own standards for review, the law would have to fail if such an outcome were remote or unlikely. At the time he wrote, the country had little experience with economic regulation, and theory thus had to substitute for practice.

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451 *Id.* at 280.

452 *Id.* at 282, 292.

453 *Id.* at 291–93.

454 *Id.* at 304.

b. Regulation of Prices

In 1931, milk prices in New York State declined drastically, and by 1932 the prices farmers received for milk were below the cost of production.[455] A joint committee of the state senate and assembly was created to investigate this situation and to recommend solutions.[456] The committee was organized in May 1932, and its activities lasted almost a year.[457] Responding to the committee's request to impose regulation, the state legislature, in April 1933, adopted a statute, to expire in March 1934, effectively making the milk industry a public utility and establishing a three-member Milk Control Board with vast powers to regulate the industry, including setting prices at the retail level.[458] In fixing prices, the Board had to consider the amount necessary to yield a "reasonable return" to the milk producers and dealers.[459] The primary object of the legislation was to improve the farmers' economic position.[460]

The Board made it a crime to sell milk below nine cents a quart in a retail store.[461] Nebbia, who owned a small store in Rochester, sold two bottles of milk and a loaf of bread for eighteen cents and was subsequently convicted of committing a misdemeanor for violating the milk control law.[462] Prices at which producers could sell were not then prescribed, nor was production in any way limited. In *Nebbia v. New York*,[463] the United States Supreme Court, in a five-to-four decision, upheld the conviction against a challenge that it violated the seller's rights under the Fourteenth Amendment's Due Process and Equal Protection clauses.

The *Nebbia* opinion was historically significant in that it signaled the approaching end of economic substantive due process.[464] Rejecting the standard that had previously applied, the majority held that the due process guarantee demands only that the law be not unreasonable or arbitrary and that it have a substantial relation to the objective sought to be achieved.[465] The Justices repudiated the exception that the Court had previously reserved, in determining the validity of economic regulations, for businesses

455 Nebbia v. New York, 291 U.S. 502, 515 (1934).
456 *Id.* at 516.
457 *Id.*
458 *See* Milk Control Act, ch. 158, §§ 300–19, 1934 N.Y. Laws 558 (repealed 1934).
459 *Id.* § 312(a).
460 *Nebbia*, 291 U.S. at 550–51.
461 *Id.* at 515.
462 *Id.*
463 291 U.S. 502, 539 (1934).
464 *See* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (upholding economic due process but later overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).
465 *Nebbia*, 291 U.S. at 525.

affected with a public interest.[466] Under substantive due process, price restraint had been sanctioned only in such unique circumstances.[467] The majority, however, set forth a new rule embodying much more limited scrutiny of legislative action. Through Justice Roberts, the majority ruled that under existing circumstances, it was not unreasonable for New York to enact legislation that deprived Nebbia of the liberty to sell milk at a price of his own choosing.[468] Justice Roberts opined that price controls were subject to the same standard of review as any other form of economic regulation.[469]

The four dissenters totally rejected this standard of review. Writing for the dissenting justices, Justice McReynolds contended that the only question presented by the case was whether justification existed for depriving Nebbia of his rights under the Fourteenth Amendment.[470] Justice McReynolds sought to determine whether the legislation could be upheld because it was a temporary response to an emergency, or because the milk business bears such a special relationship to the public that the price of milk may be prescribed irrespective of emergency conditions—because it is a business affected with a public interest.[471]

The minority opinion denied that either condition existed or that the statute could meet a means-ends test of validity. Justice McReynolds wrote that the state had not met the burden of establishing the presence of an emergency whose magnitude justified the law.[472] The Justice found that requiring the grocer to disprove its existence was neither fair nor appropriate: "If necessary for appellant to show absence of the asserted conditions, the little grocer was helpless from the beginning—the practical difficulties were too great for the average man."[473] Moreover, the legislative findings and report should not be deemed conclusive:

> May one be convicted of crime upon such findings? Are federal rights subject to extinction by reports of committees? Heretofore, they have not been. . . . The exigency is of the kind which inevitably arises when one set of men continue to produce more than all others can buy. The distressing result to the producer followed his ill-advised but voluntary efforts. Similar situations occur in almost every business. If here we have an emergency sufficient to empower the Legislature to fix sales prices, then whenever there is too much or too little of an essential thing—

466 *Id.* at 531.
467 *Id.* at 534–35.
468 *Id.* at 539.
469 *Id.*
470 *Id.* at 543 (McReynolds, J., dissenting). Justice McReynolds wrote for Justices Van Devanter, Sutherland, and Butler. *Id.* at 559.
471 *Id.* at 544.
472 *Id.* at 548.
473 *Id.*

> whether of milk or grain or pork or coal or shoes or clothes—constitutional provisions may be declared inoperative . . . .[474]

Justice McReynolds found that the industry was a private calling not affected with a public interest.[475] He questioned the wisdom of the regulation and denied that the means proposed would achieve the legislative purpose.[476] The Justice could not fathom how the imposition of higher prices at the retail level—an imposition that would reduce consumption—could raise prices at the production level. He contended that it would not accomplish the proposed aim of increasing farmers' incomes because the legislation would compound rather than relieve the problem of excessive production.[477] Nevertheless, the public was being forced to assume a heavy burden:

> Not only does the statute interfere arbitrarily with the rights of the little grocer to conduct his business according to standards long accepted . . . but it takes away the liberty of 12,000,000 consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others. To him with less than 9 cents it says: You cannot procure a quart of milk from the grocer although he is anxious to accept what you can pay and the demands of your household are urgent! A superabundance; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters! And this is true although the storekeeper himself may have bought from a willing producer at half that rate and must sell quickly or lose his stock through deterioration. The fanciful scheme is to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold![478]

Justice McReynolds concluded:

> The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public. . . . Grave concern for embarrassed farmers is everywhere; but this should neither obscure the rights of others nor obstruct judicial appraisement of measures proposed for relief. The ultimate welfare of the producer, like that of every other class, requires dominance of the Constitution. And zealously to uphold this in all its parts is the highest duty intrusted to the courts.[479]

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474 *Id.* at 548–49, 551.
475 *Id.* at 552–55.
476 *Id.* at 556.
477 *Id.* at 556–57.
478 *Id.* at 557–58.
479 *Id.* at 558–59.

Justice Roberts chose to ignore this argument, citing the numerous instances when regulation has been upheld under what he asserted amounted to a reasonableness standard.[480] The majority also failed to seriously probe the effectiveness of the law. Yet, everyone on that Court likely would have agreed that any senseless and needless restraint is an unreasonable, arbitrary invasion of individual freedom that a court is obligated to overturn. Justice McReynolds put it this way: "If a statute to prevent conflagrations, should require householders to pour oil on their roofs as a means of curbing the spread of fire when discovered in the neighborhood, we could hardly uphold it."[481]

That the means—setting minimum retail prices—was unlikely to accomplish the objective—increasing the farmers' income—is evident from an analysis of the background of the legislation. First, the New York Assembly adopted the statute in question in a crisis atmosphere. Farmers were striking and news reports told of violence.[482] Legislators from farm areas called for passage as a means of terminating the strike and the bloodshed, and of restoring calm.[483] They pleaded with their colleagues to do something, even if the results were far from perfect.[484] The original draft of the bill allowed the board to fix minimum prices for producers and maximum prices for consumers.[485] Changes were subsequently made to satisfy both the large milk dealers and farm representatives.[486] Noticeably absent from the discussions and negotiations were representatives of the small retail stores. Although the Nebbias were vitally affected, they appear to have had virtually no input into the legislative deliberations. Second, establishing a retail minimum price would not lead to the increased consumption upon which the farmers had to depend for improved revenues.[487] Minimum price requirements impede market-clearing processes.[488] While the precise impact of fixing minimum prices depends on the severity of the controls and the elasticity of demand, it is likely to cause a reduction in consumption, thereby exacerbating, not alleviating, the milk producers' woes.[489] Per capita consumption in New York City had already dropped, as a result of the Depression, from four-fifths of a pint each day in 1930

480 *Id.* at 524–27, 536–37.

481 *Id.* at 556 (McReynolds, J., dissenting).

482 *Pass Bill to Fix Prices for Milk*, N.Y. TIMES, Apr. 1, 1933, at 1.

483 *Id.* at 1, 3.

484 *Id.*

485 *The Milk Bill*, N.Y. TIMES, Apr. 6, 1933, at 16.

486 *Id.*

487 *No Milk Strike*, N.Y. TIMES, May 12, 1933, at 16.

488 *Id.*

489 *Id.*

to three-quarters in 1933.[490] This data suggests a significant causal relationship between consumption of milk and its price.

The large retailers, however, argued otherwise. They asserted that their existence was threatened by price-cutting and that if they were forced out of business, milk distribution would be disastrously impaired to the serious detriment of the producers.[491] The lower and upper court opinions are devoid of any evidence substantiating these assertions, both of which are difficult to accept, especially because of the relatively short period the law was to be in effect. The large retailers could hardly be ruined within one year. Changes in economic conditions may affect entrepreneurs differently, and usually this does not justify preserving the existence or profits of those adversely affected. Any other policy would support inefficient enterprise. The large retailers' legislative success explains more about politics than economics. The price-cutters seem to have been sacrificed for political rather than economic reasons.

The legislation aroused much opposition in New York City. Within a month after passage of the statute, the Milk Board raised prices by one cent a quart.[492] Mayor La Guardia, officials of the largest milk distributors in the city, and the health commission, among others, condemned the increase.[493] The mayor sought federal help to protect consumers: if the city could obtain milk from the Department of Agriculture, this supply would not be subject to the price-fixing powers of the Milk Board .[494] The small dealers also protested the increase and other board policies. Approximately fifty members of an organization representing retail grocers accompanied their spokesman to city hall to complain that the Board was "in league with the large milk distributers to discriminate against the small retailer," and that "gorilla tactics" were employed by the authorities against small retailers accused of violating the law.[495] The Milk Board subsequently issued a directive to dealers to pass along to the producers any profits accruing from the fixed minimum prices.[496]

The milk price control law was inspired by public passions and pressures, and its final form was dictated by lobbyists for farmers and large milk dealers.[497] Only by accident can measures conceived under these circumstances justify the restraints they impose on people. The situation is precisely the type that war-

490 *Id.*
491 Nebbia v. New York, 291 U.S. 502, 518 (1934).
492 *La Guardia Fights Rise in Milk Price*, N.Y. TIMES, Apr. 21, 1934, at 17.
493 *Id.*
494 *Id.*
495 *Grocers Accuse State Milk Board*, N.Y. TIMES, Apr. 26, 1934, at 18.
496 Milk Control Act, ch. 158, § 312(c), 1934 N.Y. Laws 558 (repealed 1934).
497 *See supra* notes 492–93 and accompanying text.

rants the kind of judicial oversight that the Supreme Court repudiated in this case.

The minority views in *Nebbia* did not mollify the critics of economic due process. By then the die had already been cast. Small entrepreneurs work long hours, and their returns resemble wages more than profits. At the time of *Nebbia,* "Ma and Pa" stores required very lengthy hours of labor weekly by at least one family member.[498] The commentators were not prone to empathize with shopkeepers who labor for the sake of profits.

Indeed, *Nebbia* had all the trappings of radical drama: powerful interests, depression, exploitation, excessive milk prices, and criminal sanctions. Still it has received no recognition from those who condemn the wickedness of substantive due process. Surely McReynolds's dissent would have been described as powerful, eloquent, and moving in a setting more to the liking of the critics. His prose is scarcely in keeping with the image of old-guard reactionaries and those who tread on the rights of the masses. For lawyers, this language should be very provocative. The questions remain, however, why have so many legal commentators missed the point of economic due process? Were Holmes and Brandeis really the heroes of that Court?

3. Wage Rates

In 1918, Congress enacted a statute for the District of Columbia, establishing a board to fix minimum wages for women and minors in various industries.[499] Two suits filed to restrain the board from prescribing wages were consolidated for the decision of the United States Supreme Court.[500] One was brought by the corporate owner of a children's hospital that employed a large number of women in different capacities and paid some less than the minimum wage specified by the board.[501] Lyons, a twenty-one-year-old woman employed as an elevator operator in a hotel, brought the other action.[502] She alleged that she would be fired because her employer would not pay the designated minimum wage,[503] and she stated that her pay was the highest that she was able to obtain for any work she was capable of performing.[504] In 1923, in *Adkins v. Children's Hospital*,[505] the Supreme Court, per Justice Sutherland, held the law unconstitutional on a vote of five

498 *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 143, 353 n.50 (1980).

499 Minimum Wage Act of 1918, ch. 174, 40 Stat. 960 (1918).

500 Adkins v. Children's Hosp., 261 U.S. 525 (1923).

501 *Id.* at 542.

502 *Id.*

503 *Id.*

504 *Id.* at 542–43.

505 *Id.* at 525.

to three, with Justice Brandeis not participating. Sutherland concluded that no exceptional circumstances existed to warrant this abridgment of freedom of contract.[506]

Justice Sutherland saw the D.C. statute as mandating employers to pay wages for which they received nothing in return.[507] To the extent that the wage exceeded the fair value of the services rendered, it amounted to a compulsory exaction from the employer for the support of a partially indigent person, for whose situation the employer was not responsible.[508] Therefore, the law arbitrarily shifted to the employer a burden that, if it belonged to anybody, belonged to society as a whole.[509] A comparable purpose could be applied to govern other transactions; for example, the purchase of goods likewise burdening entrepreneurs and the economy.[510] In fact, if such legislation were to be held legally justified, the police power would have been substantially increased so that it would admit even the imposition of maximum wage controls.[511] Thus, the arguments urged in this case to the disadvantage of the employer could later be invoked to the detriment of the employee.

Sutherland rejected the position that women require restrictions that could not lawfully be imposed on men under similar circumstances.

> [W]hile the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances. To do so would be to ignore all the implications to be drawn from the present day trend of legislation, as well as that of common thought and usage, by which woman is accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships.[512]

In addition, the majority believed that the wage restriction would subject business to a substantial burden, especially because it applied both to big business and to small, weak employers, without taking into account periods of economic difficulties or crippling losses, both of which could leave the employer without adequate

506 *Id.* at 561–62.
507 *Id.* at 558–59.
508 *Id.* at 557–58.
509 *Id.*
510 *Id.* at 558–59.
511 *Id.* at 560–61.
512 *Id.* at 553.

means of livelihood.[513] To the contention that the law would serve the public interest, Sutherland replied:

> It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable, but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and, when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.[514]

Chief Justice Taft and Justice Holmes each wrote dissents.[515] Both accepted the differentiation of the sexes.[516] The former argued that the law could be upheld on the basis of prior decisions and because sufficient reason existed for the congressional action.[517] Chief Justice Taft believed that although some hardships would result, "the restriction will inure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large."[518] Holmes denied that the Court had any power in this area, for the Constitution leaves such matters entirely to the wisdom of the legislators.[519] He wrote that "th[e] statute did not compel anybody to pay anything," and that "women [would] not be employed at even the lowest wages allowed unless they earn[ed] them, or unless the employer's business [could] sustain the burden."[520] The legislature could differentiate between men and women and Holmes claimed that he would not hesitate to take such differences into account if he thought "it necessary to sustain this Act."[521]

In 1937, the United States Supreme Court, by a five-to-four majority, explicitly overruled *Adkins* by sustaining a Washington State statute that established minimum wages for women and mi-

513 *Id.* at 557.
514 *Id.* at 561.
515 *Id.* at 562, 567 (Taft, C.J., & Holmes, J., dissenting).
516 *Id.* at 566, 569–70.
517 *Id.* at 563–64. (Taft, C.J., dissenting).
518 *Id.* at 563.
519 *Id.* at 567–68. (Holmes, J., dissenting).
520 *Id.* at 570.
521 *Id.*

nors.[522] Employing the *Nebbia* standard, the majority determined that the law was a reasonable exercise of legislative discretion.[523] Chief Justice Hughes authored the opinion in the case, *West Coast Hotel v. Parrish*,[524] which involved an adult hotel worker. This case marks the formal termination of economic due process. The same Justices who had dissented in *Nebbia* also dissented in *Parrish*.[525] The Chief Justice explained the decision in part was based on the difficult economic conditions of the time and "the unparalleled demands for relief."[526] Chief Justice Hughes' decision contains a perspective about the role of government that had not often appeared in majority opinions. Rejecting Justice Sutherland's belief that the common good is predicated on individual freedom, Chief Justice Hughes equated liberty with the application of the police power.

> [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[527]

Conversely, many feminists of the period saw dangers inherent in protective legislation.[528] Like feminists of today, they decried all attempts at encouraging the paternalism that for centuries had "protected" and harmed them.[529] In fact, the Women's Party filed a brief in *Adkins* urging the Supreme Court to strike down the D.C. minimum wage law for women.[530] An odd coalition of radical feminists and libertarian/conservative Justices triumphed—for a short time and in a small area—over the combined forces of liberals and unions.

Equal rights advocates now appear to agree that laws limiting a woman's hours and types of work constrict her employment opportunities. Consequently, women employees challenged a California statute limiting the number of hours women could work in enumerated industries to an eight-hour day and a forty-eight-hour week.[531] These women, who were employees of North American

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522 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 386, 400 (1937).

523 *Id.* at 397–99.

524 *Id.* at 386.

525 *See* Nebbia v. New York, 291 U.S. 502, 558 (1934) (McReynolds, J., dissenting); *West Coast Hotel*, 300 U.S. at 400 (Sutherland, J., dissenting).

526 *West Coast Hotel*, 300 U.S. at 399.

527 *Id.* at 391.

528 WILLIAM HENRY CHAFE, THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920–1970, at 124 (1973).

529 *Id.* at 125–26.

530 *Id.* at 127.

531 Mengelkoch v. Indus. Welfare Comm'n, 442 F.2d 1119, 1120–21 (9th Cir. 1971).

Aviation, Inc., complained that the law gave male employees an unfair advantage because it denied women overtime employment and certain positions with the company.[532] They alleged that the act violated their rights under the Due Process and Equal Protection Clauses and the Civil Rights Act of 1964.[533] A lower court dismissed the case on the theory that prior decisions had foreclosed examination of the issue.[534] A circuit court sent the case back for consideration, observing that circumstances and understanding of the problem had changed over the years.[535]

In another post-*Parrish* case, the employer refused to promote a female employee solely because she would have to engage in duties prohibited under the California Labor Code that limited the hours and work of women.[536] A federal court found that the statute discriminated against women on the basis of their sex and therefore violated the provisions of the Federal Civil Rights Act of 1964.[537]

Justice Hughes' comments in *Parrish* quoted above stand the concept of liberty on its head. They are at variance with a fundamental idea of our society that the state's power over people is limited, and are more nearly in keeping with those political philosophies that subordinate the individual to the authority of the community. Justice Hughes was similarly wrong in his economics. Imposition of higher wages brings unemployment and reduces the economy's flexibility, thereby impeding economic recovery. The *Adkins* majority did not have the economic data that were later to emerge, and it probably did not sympathize with feminist ideology. At that stage in our history, however, the *Adkins* law appeared to be a serious imposition on the employment relationship. Employers and employees could claim disadvantages to offset contentions that workers would generally benefit. Thus, the government's argument was not persuasive for a court majority that believed "the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."[538]

D. The United States Supreme Court's Contemporary Record On Economic Rights

Three United States Supreme Court decisions covering the period from 1938 to 1993 present the Court's current position on

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532 *Id.* at 1122.

533 *Id.*

534 *Id.*

535 *Id.*

536 Rosenfeld v. S. Pac. Co., 293 F. Supp. 1219, 1222–23 (C.D. Cal. 1968), *aff'd*, 444 F.2d 1219 (9th Cir. 1971).

537 *Id.* at 1224.

538 Adkins v. Children's Hosp., 261 U.S. 525, 561 (1923).

the protection of economic liberties: *United States v. Carolene Products Co.*,[539] *Minnesota v. Clover Leaf Creamery Co.*,[540] and *FCC v. Beach Communications, Inc.*[541]

1. *United States v. Carolene Products Co.*

The United States Filled Milk Act[542] prohibited the shipment in interstate commerce of any product consisting of skimmed milk and a fat or oil other than milk fat, which resembled milk or cream.[543] The defendant manufactured and distributed "Milnut," a compound of condensed skimmed milk and coconut oil and was indicted under the Act on the ground that this product "is an adulterated article of food, injurious to the public health."[544] The statute was directed at compounds which, although safe for consumption, might be substituted for milk, denying the consumer the nutrients contained in milk.[545] Congress rejected efforts to limit the legislation solely to requiring that the Milnut containers fully disclose their contents.[546]

Milnut presented a serious problem for the dairy industry because it sold for much less than milk.[547] In an analysis of the Filled Milk Act, Professor Geoffrey Miller considers it "an utterly unprincipled example of special interest legislation."[548] Miller writes that proponents of the legislation were various farmer associations: breed groups; county, state, and national political organizations; dairy newspapers; agricultural colleges and universities; granges; and dairy promotional organizations.[549] Broadly speaking, these members of the "dairy industry" were threatened by the low price for the filled milk products compared to pure dairy products.[550] The purpose of the statute was to drive small producers out of the market, which in the main it accomplished, disadvantaging working and poor people deprived of a "healthful, nutritious, and low-cost food."[551]

The United States Supreme Court upheld the Act on the basis of a newly created standard of minimal scrutiny applicable in eco-

539 United States v. Carolene Prods. Co., 304 U.S. 144 (1938).
540 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).
541 F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993).
542 21 U.S.C. §§ 61–63 (1952).
543 *Carolene Prods.*, 304 U.S. at 145–46.
544 *Id.*
545 *Id.* at 148–49.
546 *Id.* at 148 n.2 (summarizing the House and Senate Reports).
547 Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 402 (1987).
548 *Id.* at 398.
549 *Id.* at 404.
550 *Id.*
551 *Id.* at 399.

nomic matters under which a legislature will inevitably prevail.[552] Ironically, the occasion for the application of this new standard was one where judicial review under a separation of powers system was most appropriate: Congress, responding to politically powerful forces, had deprived people of their liberty to manufacture and distribute a legitimate article of commerce. The decision also introduced into constitutional jurisprudence the celebrated footnote four, which provided a new and highly controversial theory of constitutional interpretation.[553]

According to footnote four, the extent to which legislation should be subject to judicial scrutiny depends on the legislative relief available to the complainants.[554] The theory of the footnote was that those who are denied meaningful access to the political process and have little realistic chance of influencing lawmakers should be accorded preferential treatment by the judiciary.[555] If a group has a reasonable opportunity to avail itself of the electoral and legislative processes to accomplish change in its behalf, judicial aid is not required.[556]

According to the footnote, racial, religious, and some ethnic groups are "discrete and insular minorities" that require judicial intervention on their behalf.[557] Producers and sellers do not come within this category. Yet, in a representative government premised on majority rule, many people engaged in economic activities do not have the resources to protect their interests, either at the ballot box or in the legislative halls. They too can be victims of perverse, arbitrary, and capricious measures. Under our constitutional system, however, the judiciary's responsibility is to protect and to not provide special dispensations on the basis of class.

The filled-milk case concerned a denial of liberty with little resulting benefits to society. The defendant was the producer of a new product, cheaper than, and a substitute for, milk, and therefore a serious competitive threat to the farm and dairy interests. In time, however, these interests lost their persuasiveness with the federal judiciary. In 1972, a federal district court invalidated a filled-milk statute as arbitrary and capricious, and in the absence of any contrary ruling by a higher court, Milnut-type products may now be marketed freely.[558]

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552 United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (stating that legislation need only have a rational basis and that facts proving rational basis are assumed).

553 *Id.* at 152 n.4.

554 *Id.* at 146.

555 *Id.*

556 *Id.*

557 *Id.*

558 *See* Milnot Co. v. Richardson, 350 F. Supp. 221 (S.D. Ill. 1972).

2. *Minnesota v. Clover Leaf Creamery Co.*

This case involved a 1977 Minnesota law prohibiting the retail sale of milk in plastic, nonreturnable, nonrefillable containers.[559] The sale of milk in paperboard cartons was not affected by the law.[560] The legislature's stated purposes were to promote resource conservation, ease solid waste disposal problems, and conserve energy.[561] Plastic bottle manufacturers and retailers sued to have the law declared unconstitutional on the basis that it denied them the liberty to produce and distribute plastic milk bottles, a legitimate item of commerce.[562]

Applying its version of the minimal scrutiny test, the trial court initially considered whether the law served important government objectives.[563] Legislatures impose economic regulation for one or both of the following reasons: first, to cause the economic system to function better—that is, to remedy or remove the excesses or limitations of the private market; and second, to secure an economic advantage for a person, corporation, or group by legally limiting the rights of competing businesses, occupations, products, or services.

A law passed to achieve the second reason serves private interests and not important governmental objectives. In addition to denying liberty to some person or group, such a law also tends to reduce production and competition, and thereby increases costs, which disadvantages many persons while benefiting only a few. It takes from A and gives to B for the benefit of B. In the Minnesota plastic bottle case, the state trial court found that, contrary to the stated purposes, the "'actual basis' for the Act" was to promote the interests of certain parts of the local dairy industry and the pulpwood industry, and to harm the interests of other segments of the dairy industry and the plastics industry.[564] It held the law unconstitutional.[565]

Suppose, however, that the court found that the law sought to increase competition and productivity, to eliminate waste, or to improve the environment. These are important governmental objectives. The next question is whether the law will substantially achieve these objectives, in order to satisfy what is usually referred to as a means-ends test. The Minnesota Supreme Court assumed that the articulated purposes motivated the legislature,

559 Act of May 26, 1977, ch. 268, 1977 Minn. Laws 440.
560 *Id.* § 2.
561 *Id.* § 1.
562 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 458 (1981).
563 *Id.* at 460.
564 *Id.*
565 *Id.*

but held that the law would not achieve these purposes.[566] Therefore, the restraint on liberty was futile and oppressive.[567]

The United States Supreme Court reversed.[568] It found that the Minnesota Supreme Court wrongfully "did not reverse on the basis of . . . [the District Court's] patent violation of the principles governing rationality analysis under the Equal Protection Clause."[569] The trial court had not been sufficiently deferential to the legislature.[570] The Supreme Court held that the determining factor under the minimal review test is whether the legislative means is "rationally related to achievement of the statutory purposes."[571] The parties had agreed at the final level of litigation that the legislature had truthfully articulated its purposes.[572]

The state identified four reasons why the distinction between the plastic and non-plastic nonreturnables was rationally related to the articulated statutory purposes.[573] The Unites States Supreme Court stated that if any one of the four substantiates the state's claim, the Act must be sustained.[574] The Minnesota Supreme Court upheld the invalidation of the law, rejecting the stated reasons on an empirical basis.[575] The legislature's conclusions were "speculative and illusory," not sensible, or totally wrong.[576] Nevertheless, the United States Supreme Court reversed each ruling on the ground that it is not the function of the Court to substitute its evaluation of legislative facts for that of the legislature.

Justice Brennan, writing for the Court, stated:

> Respondents apparently have not challenged the *theoretical* connection between a ban on plastic nonreturnables and the purposes articulated by the legislature; instead, they have argued that there is no *empirical* connection between the two. They produced impressive supporting evidence at trial to prove that the probable consequences of the ban on plastic nonreturnable milk containers will be to deplete natural resources, exacerbate solid waste disposal problems, and waste energy, because consumers unable to purchase milk in plastic containers will turn to paperboard milk cartons, allegedly a more environmentally harmful product.

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566 Clover Leaf Creamery Co. v. Minnesota, 289 N.W.2d 79, 85 (Minn. 1979).
567 *Id.* at 86.
568 *Clover Leaf Creamery*, 449 U.S. at 474.
569 *Id.* at 464.
570 *Id.* at 469.
571 *Id.* at 461–63.
572 *Id.* at 462–63.
573 *Id.* at 465.
574 *Id.*
575 Clover Leaf Creamery Co. v. Minnesota, 289 N.W.2d 79, 85–87 (Minn. 1979).
576 *Id.* at 86.

> But states are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[577]

Justice Brennan's decision makes it virtually impossible to limit a legislative decision because lawmakers almost invariably contend that they believe in the efficacy of the rules they impose. He thus accords carte blanche powers to legislatures, something he is reluctant to do in many other areas of the law, presumably because of his judicial obligation to protect liberties.

3. *FCC v. Beach Communications, Inc.*

The complainants in Beach Communications were operators of SMATV Cable Services.[578] A SMATV system typically receives a signal from a satellite through a small dish located on a rooftop, and then transmits the signal by wire to units within a building or complex of buildings.[579] In providing for the regulation of cable television facilities, Congress drew a distinction between facilities that serve separately owned or managed buildings and those that serve one or more buildings under common ownership or management.[580] Cable facilities in the latter category were exempt from regulation.[581] *Beach Communications* presented the question of whether there was sufficient reason to justify this distinction for purposes of the Due Process Clause of the Fifth Amendment.[582] The complainants, who serviced separately owned or managed buildings, asserted that they, like those who were exempt, were entitled to engage freely in this legitimate business activity.[583] Since the statutory classification involved economic liberties and neither implicated a suspect class nor infringed upon fundamental constitutional rights, the courts considering the matter applied the minimal scrutiny test under which the classification would be upheld if any reasonably conceivable facts could support it.[584]

Merely stating this rule suggests the answer: it is difficult to imagine a classification that would not succeed under such a broad, subjective test. Nevertheless, two members of a three judge panel of the United States Court of Appeals for the D.C. Cir-

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577 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463–64 (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).

578 F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 311 (1993).

579 *Id.*

580 *Id.* at 309.

581 *Id.*

582 *Id.*

583 Beach Communications, Inc. v. F.C.C., 959 F.2d 975, 980 (D.C. Cir. 1992).

584 *Id.* at 988–89 (Mikva, C.J., concurring in part, concurring in judgment).

cuit concluded: "We see no 'rational basis' for the distinction . . . ."[585] The concurring judge was not similarly troubled. He contended that his colleagues showed "too little reluctance to overturn complex economic legislation under the minimal rational-basis test."[586]

Under the rational-basis test, the reasons need not be persuasive, just conceivable.[587] Writing for a unanimous Supreme Court, Justice Thomas was not impressed with the Circuit Court majority's limited imagination, and the Court reversed. He noted: "Whether the posited reason for the challenged distinction actually motivated Congress is 'constitutionally irrelevant.'"[588] Thus, Justice Thomas thought that the exception was based on the small size of single owner or managed complexes. When counsel asserted that an exception on the basis of size, which prior regulations contained, was not included in the legislation being challenged, Justice Thomas replied that it did not make any difference what the legislators actually contemplated, the critical question was whether the legislators might conceivably have so intended.[589]

Justice Thomas's second conceivable basis for the statutory distinction related to the "monopoly power" the provider of cable TV for separately owned and managed buildings would obtain by the initial installation of a dish that would allow additional buildings to be connected for the small cost of a cable, an arrangement not available for single owned or managed developments.[590] Whether the difference is sufficient to warrant regulation is a matter that merits considerable inquiry, which would not be required under the minimal scrutiny test. Frequently, regulation leads to price increases. Regardless, for constitutional purposes, the distinction may be based on speculation. "Congress had to draw the line somewhere . . ." and, therefore, wrote Justice Thomas, "the precise coordinates of the resulting legislative judgment [are] virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally."[591]

V. Conclusion

The Framers of the original Constitution did not append a bill of rights or include most of the protections of such a bill in the

585 *Id.* at 977.

586 *Id.* at 988 (Mikva, C.J., concurring in part, concurring in judgment).

587 *Beach Communications*, 508 U.S. at 313–14.

588 *Id.* at 318 (quoting United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)) (internal quotation marks omitted).

589 *Id.* at 315, 318–19.

590 *Id.* at 319–20.

591 *Id.* at 316.

Constitution. They limited and enumerated the powers of the government and granted it no authority to deprive the people of their common law rights. Therefore, there was no need for protecting their rights in the Constitution. James Madison stated that the Constitution would never have been ratified if the people thought their liberties were in danger.[592] As Alexander Hamilton asserted, "For why declare that things shall not be done which there is no power to do?"[593] Since the common law secured economic rights, these would have been protected even if the Bill of Rights was not ratified.

The Framers were not despots seeking to create an authoritarian state. On the contrary, they wanted to encourage liberty as the best means to produce a free, viable, and productive society. The liberties that Edward Coke and William Blackstone identified would accomplish this purpose. Courts in the United States continued to apply common law rules long after the Bill of Rights was ratified. Thus, in 1855 in *Murray's Lessee*,[594] the United States Supreme Court interpreted due process of law consistent with Edward Coke's definition, and as late as 1907, in an opinion by Justice Holmes,[595] the Court defined protected expression consistent with Blackstone's definition.

When the Constitution was framed, separation of powers, checks and balances, and judicial review were political and economic ideas. They would safeguard the individual in his personal, business, or professional life from governmental oppression. Society would benefit because liberty was regarded as the greatest encouragement to wisdom, productivity, creativity, and contentment. The same reasoning remains applicable today. We still rely on freedom to advance understanding and culture, as well as to supply food, clothing, and shelter. Yet those constitutional concepts now operate to augment liberty in one area and not in the other.

Prior to the ratification of the Constitution, the state legislatures were the final arbiters in economic affairs—much as now. We have it on the authority of Madison, Hamilton, and Marshall that the legislatures used this power in a manner that seriously harmed individuals and the economy.[596] These practices were a leading factor prompting the framing and adoption of the Constitution.

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592 Letter from James Madison to Judge Roane (Sept. 2. 1819), *reprinted in* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 435 (Max Farrand ed., 1966) (1911).

593 *See* THE FEDERALIST No. 84, *supra* note 184, at 513.

594 Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 275–77, 282 (1855).

595 Patterson v. Colorado, 205 U.S. 454 (1907).

596 *See supra* Part IV.

The situation is little improved today. In earlier times in our history, the success of a business was dependent upon its acceptability in the marketplace. Entrepreneurs who best satisfied consumers prospered, while those less competent or efficient fared poorly and were often forced out of business. Today, this economic competition is increasingly replaced by political competition. Losers in the economic arena seek relief from legislators who have the power to make them winners. One law can offset a score of inefficiencies. The scenario is no different when it comes to occupations, trades, and professions, for here again political power enjoys supremacy over ability, talent, and competence.

The application of judicial review to economic matters will not restore laissez-faire to our economy, but we should at least expect reduction of legislative and administrative excesses and abuses. This is an outcome not to be minimized, as the rewards of liberty are vast and unpredictable.

Re-evaluating the Privileges or Immunities Clause

*John C. Eastman**

Four years ago, in *Saenz v. Roe*,[1] the United States Supreme Court relied on the Fourteenth Amendment's Privileges or Immunities Clause[2] to invalidate a California state law limiting welfare benefits for newly arrived residents to the amount payable in the state of the individual's prior residence.[3] That the Court relied upon the Privileges or Immunities Clause at all was something of a surprise; that clause had been rendered virtually a dead letter—"sapped . . . of any meaning," as Justice Clarence Thomas put it[4]—a century and a quarter earlier in the *Slaughter-House Cases*.[5] Even more of a surprise was that this revival of a long-dead constitutional provision came from the pen of Justice John Paul Stevens, widely regarded as one of the more vocal proponents of a "living constitution,"[6] rather than Justice Thomas, whose trademark on the Court has been to revive the original understanding of long overlooked or misinterpreted clauses of the Constitution.[7]

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1 526 U.S. 489 (1999).

2 U.S. CONST. amend. XIV, § 1.

3 CAL. WELF. & INST. CODE § 11450.03 (West 2001).

4 *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

5 83 U.S. (16 Wall.) 36 (1872).

6 *See, e.g.*, Dennis J. Horan et al., *Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 ST. LOUIS U. PUB. L. REV. 229 (1987). *See also* John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277 (1986). *But see* Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 836 (1997) (contending that Justice Stevens has abandoned the "living constitution" model pushed by Justice Brennan and "replaced it with a looser model of originalism . . . to combat the increasingly strict originalism espoused most forcefully by Justice Thomas").

7 *See, e.g.*, Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2481 (2002) (Thomas, J., concurring); Printz v. United States, 521 U.S. 898, 938–39 (1997) (Thomas, J., concurring); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 852–53 (1995) (Thomas, J., concurring); Adarand Constructors, Inc. v. Pena , 515 U.S. 200, 240 (1995) (Thomas, J., concurring); United States v. Lopez, 514 U.S. 549, 601 (1995) (Thomas, J., concurring).

More surprising still, perhaps, was that Justice Thomas was in dissent.[8] The Privileges or Immunities Clause is one of three or four constitutional provisions that arguably were designed to codify the natural rights views of many of our nation's leading founders,[9] and Justice Thomas is undoubtedly the most solid devotee of the founders' natural rights philosophy to sit on the Court[10] since New Deal-era Justice George Sutherland.[11] Indeed, some of the most vigorous questioning during the initial phase of Justice Thomas's confirmation hearing involved speeches the Justice had made while chairman of the Equal Employment Opportunity Commission, praising the natural rights principles of the founding fathers.[12] Yet rather than embracing Justice Stevens's revival of the long-forgotten, natural rights-based clause, Justice Thomas excoriated the majority for "attribut[ing] a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified."[13]

Why was Justice Thomas in dissent? And why did Justice Stevens apparently don the robes of originalism and breathe new life into a long-forgotten provision of the Constitution rather than simply rely on assertedly fundamental notions of fairness, emanating from various penumbras of the Bill of Rights,[14] as the Court had been doing for a generation?[15] The latter question is, I think, pretty easy to answer.

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8 *Saenz*, 526 U.S. at 521 (Thomas, J., dissenting).

9 *See, e.g.*, Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 146 (2003); Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 416–25 (1995). Other provisions arguably codifying natural rights principles include the Ninth Amendment and the Republican Guarantee Clause. *See, e.g.*, THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989); John C. Eastman, *The Declaration of Independence as Viewed From the States*, *in* THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 96 (Scott Douglas Gerber ed., 2002).

10 Justice Clarence Thomas was sworn into the Court on October 23, 1991.

11 *See, e.g.*, SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (1999); John C. Eastman, *Taking Justice Thomas Seriously*, 2 GREEN BAG 2D 425, 426 (1999) (reviewing SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (1999)); *cf.* John C. Eastman & Harry V. Jaffa, *Understanding Justice Sutherland as He Understood Himself*, 63 U. CHI. L. REV. 1347 (1996); HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994).

12 *See, e.g.*, *First Session on the Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the House Comm. on the Judiciary*, 102d Cong. 2–5 (1993) [hereinafter *Hearings*] (first round of questioning by Sen. Joseph R. Biden); *Hearings*, at 236–243 (questioning by Sen. Howell Heflin); *Hearings*, at 313–15 (questioning by Sen. Alan K. Simpson). *See also Hearings*, at 59–62 (opening statement of Sen. Alan K. Simpson) (describing that some of Justice Thomas's opponents had tried to portray him as "a promoter of wild, dramatic, and unchecked theories of natural law that will cause the U.S. Constitution to come undone").

13 *Saenz*, 526 U.S. at 521.

14 U.S. CONST. amends. I–X.

15 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 129 (1973); Eisenstadt v. Baird, 405 U.S. 438, 472 (1972) (Burger, C.J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

Existing Equal Protection jurisprudence treats non-suspect classifications, such as that between recent and long-established residents, very deferentially, subject to minimal rational basis review by the courts.[16] There is clearly a rational basis for a state law designed not to provide an incentive for indigents to come to the state merely to partake of welfare benefits more generous than were available elsewhere in the country.[17] On the other hand, under its existing "fundamental rights" jurisprudence, whether derived from the Equal Protection[18] or Due Process[19] Clauses of the Fourteenth Amendment, or more ephemerally from the Ninth Amendment,[20] the Court had never gone so far as to hold that individuals have a "fundamental right" to particular levels of welfare benefits.[21] Such a holding would have opened up a Pandora's box that apparently gave pause even to Justice Stevens.[22]

The former question is much more difficult, but in the end much more important. Justice Thomas did not bemoan the revival of the Privileges or Immunities Clause; indeed, he welcomed it. Noting his belief that "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence," he invited a reexamination of the Clause, stating that he "would be open to reevaluating its meaning in an appropriate case."[23] But his difficulty with Justice Stevens's majority opinion was that it "fail[ed] to address [the Clause's] historical underpinnings or its place in

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But see Burnham v. Superior Court of California, 495 U.S. 604, 627 n.5 (1990) (plurality opinion) ("The notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause, establishes this Court as a Platonic check upon the society's greedy adherence to its traditions can only be described as imperious.").

16 *See* Califano v. Boles, 443 U.S. 282, 296 (1979); Mathews v. Diaz, 426 U.S. 67, 83 (1976). *See also* Ambach v. Norwick, 441 U.S. 68, 80 (1979); Foley v. Connelie, 435 U.S. 291, 296 (1978); *cf.* Plyler v. Doe, 457 U.S. 202, 223–24 (1982); Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

17 *Cf.* Dandridge v. Williams, 397 U.S. 471, 486 (1970) (upholding provision of Maryland's Federal Aid to Families With Dependent Children program establishing a maximum benefit level regardless of family size, noting that the regulation "provides an incentive to seek gainful employment").

18 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Reynolds v. Sims, 377 U.S. 533 (1964); Skinner v. Oklahoma, 316 U.S. 535 (1942).

19 *See, e.g.*, Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261 (1990); Meyer v. Nebraska, 262 U.S. 390 (1923).

20 U.S. CONST. amend. IX. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965).

21 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56 (1972).

22 *See* Saenz v. Roe, 526 U.S. 489, 515 (1999) (Rehnquist, C.J., dissenting) (noting that recent cases analyzing classifications of new and old residents applied a rational basis test under the Equal Protection Clause, not heightened scrutiny of a right to travel under the Privileges or Immunities Clause).

23 *Id.* at 527–28.

our constitutional jurisprudence."[24] Instead, he claimed that any proper reevaluation should "consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence."[25] No wonder he and Justice Stevens were on opposite sides in *Saenz*!

We are, of course, not without materials with which to begin the reevaluation project invited by Justice Thomas. If the *Slaughter-House Cases* are to be overruled as flatly inconsistent with the original understanding of the Privileges or Immunities Clause, we have an opposing contemporaneous opinion to consider—the dissenting opinion by Justice Stephen Field in *Slaughter-House* itself.[26] At issue in the *Slaughter-House Cases* was a Louisiana law that essentially granted a monopoly over all butchering in the City of New Orleans to a politically well-connected butcher company.[27] The law was challenged as a violation of the Privileges or Immunities Clause of the Fourteenth Amendment, and for the first time since that Amendment's enactment, the Court had to decide just what rights were protected by that clause.[28]

The phrase, "privileges or immunities," is of course drawn from the nearly identical "privileges and immunities" Clause in Article IV of the Constitution.[29] The general understanding at the time of the adoption of the Fourteenth Amendment, as at the time of the ratification of the Constitution itself, was that the phrase, "privileges or immunities," was meant to protect the fundamental natural rights that every legitimate government was bound to respect, including the freedom of contract—specifically, the common law right to earn a living at a lawful occupation, free from unreasonable governmental interference.[30] This right was central to the Jeffersonian tradition of individual liberty and lay at the core of the "pursuit of happiness" about which Jefferson wrote so eloquently in the Declaration of Independence.[31] Jefferson was here

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24 *Id.* at 527.

25 *Id.* at 528.

26 83 U.S. (16 Wall.) 36, 83–111 (1872) (Field, J., dissenting).

27 *Id.* at 59–60. Other butchers remained free to continue their own butchering activities, but they had to do so in the monopoly's own slaughterhouse and pay for the privilege. *Id.*

28 *Id.* at 66–67.

29 U.S. CONST. art. IV, § 2, cl. 1. Contrary to the position taken by some scholars, I do not subscribe to the view that the difference between the "Privileges *and* Immunities" clause of Article IV and the "Privileges *or* Immunities" clause of the Fourteenth Amendment has any interpretive significance. The latter formulation is simply the result of the different grammatical sentence structure in which the clause appears.

30 *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (describing the freedom "to contract [and] to engage in any of the common occupations of life" as among "those *privileges* long recognized . . . as essential to the orderly *pursuit of happiness* by free men") (emphasis added).

31 *See, e.g.*, W. Colo. Power Co. v. Pub. Utilities Comm'n, 411 P.2d 785, 804 (Colo. 1966) (Frantz, J., dissenting) ("'Freedom of contract' . . . is also safeguarded by the constitutions of the states, and, by a constitutional guaranty of pursuit of happiness."); Gen. Elec.

following John Locke, who argued that "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."[32] The government had no right to interfere with that liberty except to protect the public safety, via necessary health and safety regulations.

Jefferson was not alone in following this Lockean natural rights notion. One of the most influential of the early State constitutional enactments was the Virginia Declaration of Rights,[33] drafted by George Mason and adopted by the Virginia Constitutional Convention on June 12, 1776. Section 1 of the Virginia Declaration of Rights provided:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, *with the means of acquiring and possessing property*, and pursuing and obtaining happiness and safety.[34]

The Massachusetts Declaration of Rights, adopted in 1780, similarly recognized that the right of "acquiring" property as a means of seeking happiness was one of the "unalienable" rights with which all human beings are born: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; *that of acquiring, possessing, and protecting property*; in fine, that of seeking and obtaining their safety and happiness."[35] New Hampshire included a similar provision in a Declaration of Rights when it replaced its original, pre-Declaration constitution with new constitutions in 1784 and 1792: "All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—*acquiring, possessing and protecting property*—and in a word, of seeking and obtaining happiness."[36]

All of the above provisions, and others like them, laid the natural rights foundation that I contend was ultimately codified in the constitutional language of privileges and immunities,[37] and

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Co. v. Am. Buyers Coop., Inc., 316 S.W.2d 354, 361 (Ky. Ct. App. 1958) ("'[F]reedom of contract' . . . is safeguarded by the constitutional guaranty of 'pursuit of happiness' . . . ."). *See also* Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 90–92 (1998).

32 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305–06 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

33 VA. CONST. of 1776, Bill of Rights.

34 *Id.* § 1 (emphasis added).

35 MASS. CONST. of 1780, pt. I, art. I (emphasis added).

36 N.H. CONST. of 1784, pt. I, art. II (emphasis added). *See also* N.H. CONST. of 1792, pt. I, art. II.

37 U.S. CONST. art. IV, § 2, cl. 1.

even in the constitutional guaranty of a republican form of government.[38] Because human beings are created equally free and independent, they have—inherent in their nature and endowed by their Creator—the fundamental, inalienable right to protect that free and independent nature, or, in other words, the right to life and to liberty, and the right to acquire property in things that are the fruit of their own free and independent labor and to otherwise pursue their own individual happiness.[39] These are the rights—that is to say, the "privileges" and "immunities"—that every legitimate government is bound to recognize and without which the government cannot rightly be said to be "republican" in form.[40] Indeed, in the Jeffersonian formulation, the sole purpose of government is to protect these unalienable rights.[41]

In other words, the provisions of Article IV (and later of the Fourteenth Amendment) guaranteeing the "privileges and immunities" of citizenship and a "republican" form of government simply cannot be understood apart from the natural law principles of the Declaration from which they were drawn. Although the courts have either explicitly or effectively treated these provisions as nonjusticiable,[42] they are clearly commands of the positive law, and not just some vague, philosopher's ideal of higher justice, such as is recognized in the Ninth Amendment of the United States Constitution[43] and parallel state constitutional provisions.[44]

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38 *Id.* § 4.

39 *See supra* notes 34–36 and accompanying text.

40 At first blush, the guaranty of a "republican" form of government might be thought merely to protect the form of governmental institutions—governing bodies consisting of representatives chosen by the people. *See, e.g.*, Duncan v. McCall, 139 U.S. 449, 461 (1891). But the guaranty must have a substantive component as well; a government chosen by only a favored class (such as whites in the ante-bellum South), or which did not have protections for the rights of the minority, is not "republican" in form. As Abraham Lincoln famously described, legitimate republican government must be "of the people, by the people, *for the people*." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (emphasis added), *reprinted in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953).

41 *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure [the unalienable Rights with which all men are endowed by their Creator], Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.").

42 *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 183 n.17 (1980) ("We do not reach the merits of the appellants' argument that the Act violates the Guaranty Clause, art. IV, § 4, since that issue is not justiciable."); Baker v. Carr, 369 U.S. 186, 208–10 (1962); Luther v. Borden, 48 U.S. (How.) 1, 42 (1849) (holding that a dispute over the Rhode Island elections and the status of the resulting state government vis-à-vis the Guaranty Clause of art. IV, § 4, was not a political question for Congress or a justiciable issue for the Court to decide).

43 U.S. CONST. amend. IX.

44 For a criticism of the idea that unenumerated natural rights, such as those recognized by the Ninth Amendment, are unenforceable, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44 (1990). *See also The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 100th Cong, 1st Sess. 249 (1989):

> I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it and that

While history has not been kind to this interpretation of either constitutional clause, the historical development of the Republican Guaranty Clause[45] and the notion of fundamental rights codified in the Privileges and Immunities Clause demonstrates, or at least strongly suggests, that these specific textual provisions of the Constitution were themselves designed to codify the principles of the Declaration and make them enforceable as positive law. A review of that history is therefore in order.[46]

In 1783, after years of wrangling over the disposition of the western lands, Virginia ceded to the United States her claims to all land northwest of the Ohio River, a tract of land that would eventually become the states of Ohio, Indiana, Illinois, Michigan, and Wisconsin.[47] The terms of the Virginia Act of Cession, which were scrupulously followed by Congress in the years to come, included this provision: "that the states so formed, shall be distinct *republican* states, and admitted members of the federal union; having the *same rights* of sovereignty, freedom and independence, as the other states."[48] The two ideas codified in this Act of Cession are extremely important in the historical development of the United States as one nation composed of free and equal states, rather than a nation composed of original states and a collection of colonial territories. The first would find its way into the United States Constitution of 1787, as the Republican Guaranty Clause of Article IV, Section 4.[49] The second would come to be known as the Equal Footing Doctrine,[50] pursuant to which every new state would be admitted to the Union on an "equal footing" with the original states.[51]

More importantly for present purposes, the two doctrines expressed in the Virginia Act of Cession shed a great deal of light on the role the Declaration of Independence and its principles were intended to play in the expansion of the American regime to new territories in the West.[52] The constitutional guaranty of a republican form of government, it was soon to be argued by those opposed to slavery, required Congress to deny admission to states that per-

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is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.

Id.; Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 94 (1995).

45 U. S. CONST. art. IV, § 4.

46 For a more comprehensive discussion of the argument presented here, see Eastman, *supra* note 9, at 96–117.

47 Virginia Act of Cession, *in* 26 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 115–16 (Gaillard Hunt ed., 1928) [hereinafter Virginia Act of Cession].

48 *Id.* at 114 (emphasis added).

49 U.S. CONST. art IV, § 4.

50 Pollard v. Hagan, 44 U.S. (3 How.) 212, 228–29 (1845).

51 *Id.* at 229. *See also* United States v. Alaska, 521 U.S. 1, 6 (1997).

52 Virginia Act of Cession, *supra* note 47, at 114; THE DECLARATION OF INDEPENDENCE (U.S. 1776).

mitted slavery, while those in favor of slavery argued that the Equal Footing Doctrine guaranteed to each new state the same constitutional protections of slavery as the original states enjoyed.[53] The actions taken by Congress with respect to the Northwest Territory clearly demonstrate that the former argument was more consistent with the thinking of the founders, but the latter argument would eventually prevail, placing the nation on the tragic road that culminated in the Civil War.

The Supreme Court has noted that the "distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves."[54] In other words, in an extended territory, republican government is the *means* by which the Declaration's *principle* of consent by the governed is implemented. And because the principle of consent is mandated by the self-evidence of the proposition that all men are created equal, the constitutional guaranty of a republican form of government is analytically incompatible with the existence of slavery. As James Madison, himself a slave-owner, wrote on the eve of the federal constitutional convention of 1787, "where slavery exists, the Republican Theory becomes still more fallacious."[55]

This conclusion, logically compelled by the nature of the matter, was given effect in the Northwest Ordinance, the ordinance adopted by the Continental Congress on July 13, 1787, "for the Government of the Territory of the United States north-west of the river Ohio" or, in other words, for the territory that had been ceded to the United States by Virginia in 1783.[56] Article VI of that Ordinance provided: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted . . . ."[57]

The preamble to the Ordinance makes clear that the prohibition on slavery was not adopted simply because, as some historians would later argue, the soil and climate of the region would not support a slave economy. On the contrary, the preamble demonstrates that the anti-slavery provision was mandated by the *principles* upon which the nation and existing states had been founded, namely, the principles of the Declaration of Independence:

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53 U.S. CONST. art. I, § 9, cl. 1; *Pollard*, 44 U.S. at 228–29.

54 Duncan v. McCall, 139 U.S. 449, 461 (1891).

55 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 144 (W.W. Norton & Co., 1987) (1840).

56 An Act to Provide for the Government of the Territory Northwest of the river Ohio, ch. 8, 1 Stat. 50, 51 n.a (July 13, 1787) (re-enacted Aug. 7, 1789).

57 *Id.* at 51–53 n.a.

> And for extending the *fundamental principles* of civil and religious liberty, which form the basis whereon these republics [i.e., the existing states], their laws and constitutions are erected; *to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory*: to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:
>
> *It is hereby ordained and declared, by the authority aforesaid*, That the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent . . . .[58]

In other words, the anti-slavery article, like the other of the Ordinance's six articles, was to be considered an "article of compact" that was unalterable unless by the common consent of the original states and the people and states in the new territory, because it was mandated by "the *fundamental principles* of civil and religious liberty" upon which the existing states were founded and which were to serve as the foundation of government in the new states as well.[59]

The language of the preamble also gives life to the later claim that the Equal Footing Doctrine guaranteed to new states the same right to permit slavery as existed in the original states.[60] The new states to be formed in the Northwest Territory were expressly guaranteed the right to enter the union on an "equal footing" with the original states, but the prohibition on slavery was to remain an unalterable principle, established as the basis for "all laws, constitutions, and governments" that would thereafter be formed in the territory.[61]

While the hyper-technical argument might be (and eventually was) advanced that the prohibition applied only to all territorial governments, as opposed to governments formed after admission to statehood, the word "constitutions" undermines that contention. Because the territories were governed by act of Congress until admission to statehood, they did not have separate constitutions;[62] thus, the word "constitutions" must necessarily have been intended to apply to the constitutions of state governments even after admission to the Union.

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58 *Id.* at 51–52 n.a (first and second emphasis added).
59 *Id.* (emphasis added).
60 *Id.* at 51–53 n.a.
61 *Id.* at 51–52 n.a.
62 *Id.* at 51–53 n.a.

Moreover, when the eastern portion of the territory petitioned for statehood in 1802, Congress mandated in the Ohio Enabling Act both that the new state "shall be admitted into the Union, upon the same footing with the original states, in all respects whatever" and that the new state's constitution and government "shall be republican, and not repugnant to the ordinance of the thirteenth of July, one thousand seven hundred and eighty-seven, between the original states and the people and states of the territory northwest of the river Ohio."[63]

The people of Ohio (and subsequently the people of each of the other Northwest Territory states) complied with that mandate by incorporating into Article VIII, Section 2 of their new constitution the requirement that "[t]here shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted."[64] This provision was necessary, according to the Ohio constitution, in order "[t]hat the general, great, and essential principles of liberty and free government may be recognized, and forever unalterably established."[65] Section 1 of the same article contained the litany of principles drawn from the Declaration of Independence: the equality of all men; the doctrine of inalienable rights, including the rights to life, liberty, property, and the pursuit of happiness; the requirement of consent; and the right to alter or abolish governments when necessary to affect the legitimate ends of government.[66] Moreover, Section 1 expressly tied these principles to the idea of "republican" government:

> That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, *acquiring, possessing, and protecting property*, and pursuing and obtaining happiness and safety; and every free *republican government* being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties and securing their independence; to effect these ends, they have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary.[67]

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63 An Act to Enable the People of the Eastern Division of the Territory Northwest of the River Ohio, to Form a Constitution and State Government, and for the Admission of Such State into the Union, on an Equal Footing with the Original States, and for Other Purposes, ch. 40, 2 Stat. 173–74 (Apr. 30, 1802). Congress imposed the same terms on each of the other states that were admitted to the Union from the Northwest Territory: Indiana in 1816, Illinois in 1818, and Michigan in 1837. An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 51–53 n.a (July 13, 1787) (reenacted Aug. 7, 1789).

64 OHIO CONST. of 1802, art. VIII, § 2.

65 *Id.* art. VIII.

66 *Id.* § 1.

67 *Id.* § 1 (emphasis added).

Equal footing, then, did not allow new states to avail themselves of the slavery *compromises* in the Constitution at the expense of the republican *principle*. Those compromises were to be cabined to the original states.

This conclusion is actually compelled not just by the theory of the Declaration, but by the explicit terms of both the Northwest Ordinance and the Constitution itself. The Northwest Ordinance's anti-slavery article, Article VI, contains a proviso clause, elided over above: "*Provided always*, that any person escaping into the same, from whom labour or service is lawfully claimed in any one *of the original States*, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid."[68]

As the emphasized words make clear, the obligation to return fugitive slaves expressly extended only to slaves escaping from the "original states." Article I, Section 9 of the United States Constitution contains a similar limitation: "The Migration or Importation of such Persons as any of the States *now existing* shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . ."[69] Thus, the Northwest Ordinance was a large step toward full vindication of the Declaration's principles. Moreover, the fact that the anti-slavery provisions were deemed in that document to be required by the *principles* upon which the nation was founded and also mandated by the requirement of republican government mandated by the Virginia Act of Cession bolsters the contention that those principles were themselves codified as positive law in the United States Constitution's Republican Guaranty Clause.[70]

The drafters of the Privileges or Immunities Clause of the Fourteenth Amendment[71] likewise referred to the fundamental principles of the American founding when drafting the amendment,[72] and also to the important case of *Corfield v. Coryell*.[73] In that case, Justice Bushrod Washington, riding circuit, held that

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68 An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50, 51–53 n.a (July 13, 1787) (re-enacted Aug. 7, 1789) (emphasis added).

69 U.S. CONST. art. I, § 9, cl. 1 (emphasis added). The Constitution's own "fugitive slave" clause is not textually limited to the original states, but the greater power to exclude slaves from new states altogether would render such a protection unnecessary. *Id.* art. IV, § 2, cl. 3.

70 *Id.* § 4.

71 Portions of this section are drawn from John C. Eastman and Timothy Sandefur, *Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier?*, 6 NEXUS 121 (2001) (reprinted with permission).

72 *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2764–65 (1866) (statement of Sen. Howard); CONG. GLOBE, 42d Cong., 1st Sess. app. 86 (1871) (statement of Rep. Bingham); CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872) (statement of Sen. Sherman).

73 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

the rights secured by the parallel Privileges and Immunities Clause in Article IV of the Constitution included "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."[74] The term "privileges and immunities" had long been used to describe these rights.[75]

The majority in the *Slaughter-House Cases* rejected this historical understanding of the clause and instead held that the clause merely protected a few rights of *national*, as opposed to *state*, citizenship, and therefore did not protect the old common law right to earn a living free from undue governmental burdens.[76] By its holding, the majority effectively defined the clause—which embodied the natural rights philosophy of the Declaration of Independence—into obscurity.

Justice Field, in a powerful (and correct) dissent, would have given the clause its due: "[By the first clause], [t]he fundamental rights, privileges, and immunities which belong to [citizens] as a free man and a free citizen, now belong to him as a citizen of the United States . . . . [The amendment] assumes that there are such privileges and immunities which belong of right to citizens as such . . . ."[77] Then, adopting Justice Washington's definition of the parallel phrase in Article IV as his own, Justice Field elaborated on the definition: Privileges or Immunities are rights "which belong . . . to the citizens of all free governments," which are, "in their nature, fundamental."[78] In other words, for both Justice Washington with respect to the Article IV clause (applicable to the federal government), and Justice Field with respect to the Fourteenth Amendment clause (applicable to the states), the natural law principles of the Declaration of Independence had been brought down from the heavens and made into positive law, enforceable by the courts. Indeed, Justice Field wrote that the Fourteenth Amendment

> was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator; which the law does not confer, but only recognizes. If the trader in London could plead that he was a free citizen of that city against the enforcement to his injury of monopolies, surely under the 14th Amendment every citizen of the United States should be able to plead his citizenship of the Republic as a pro-

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74 *Id.* at 551–52.

75 *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting) (explaining the history of the terms); 1 WILLIAM BLACKSTONE, COMMENTARIES *125–29.

76 83 U.S. (16 Wall.) 36, 74 (1872).

77 *Id.* at 95–96 (Field, J., dissenting).

78 *Id.* at 97 (Field, J., dissenting).

> tection against any similar invasion of his privileges and immunities.[79]

Justice Field's view of the Privileges or Immunities Clause is most assuredly *not* the view adopted by Justice Stevens's majority opinion in *Saenz*. Indeed, the view that one has a constitutional "right" to governmental benefits,[80] which is to say benefits paid from the tax revenues contributed by others, is fundamentally at odds with the natural rights principles that the Privileges or Immunities Clause was designed to protect. Instead, Justice Stevens's view is more in line with the views of the Progressives at the end of the nineteenth century, who viewed the Declaration of Independence and the natural law tradition with ultimate skepticism, if not outright hostility.[81]

As noted, Justice Field relied upon Justice Bushrod Washington's landmark ruling in *Corfield* to flush out the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment.[82] But in *Corfield*, Justice Washington actually held that the right to travel to another state in order to fish for oysters in its lakes was *not* a privilege protected by the clause.[83] In other words, the right did not include a claim to someone else's property, but it did include, as Justice Field would later argue, the right to acquire your own property by pursuing lawful employment in a lawful manner.[84] Had Justice Stevens bothered to consider the actual meaning of the clause, he would have realized that newly-arrived citizens from other states no more have a natural right—a privilege and immunity—to the common fund of welfare benefits provided by the earnings of California's laborers than the plaintiff in

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79 *Id.* at 105–06 (Field, J., dissenting). *See also* Kimberly C. Shankman and Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 11 (1998) (contending that the privileges or immunities clause "was intended essentially to constitutionalize the natural rights philosophy of the Declaration of Independence"). Of course, some contemporary positive law jurists, such as Chief Justice William H. Rehnquist, Justice Antonin Scalia, and former Judge Robert Bork, reject the claim that the natural rights principles of the Declaration are enforceable by the courts. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 705 (1976); BORK, *supra* note 44. However, in refusing to give the two privileges and immunities clauses their intended natural rights meaning, these jurists are actually rejecting the positive law mooring for natural rights intended by the framers of the clauses. For sources providing a more comprehensive treatment of this dispute, see John C. Eastman and Harry V. Jaffa, *supra* note 11, at 1355 n.23.

80 *See, e.g.*, Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31 (2003).

81 For a more complete discussion of the Progressive Era's hostility to natural law, see Thomas G. West, *The Constitutionalism of the Founders Versus Modern Liberalism*, 6 NEXUS 75 (2001).

82 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

83 *Id.* at 551–52.

84 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 109–11 (1872) (Field, J., dissenting).

Corfield had a natural right to the oyster beds held in common by the people of New Jersey.

Justice Stevens has opened the door for a renewed Privileges or Immunities Clause jurisprudence, however, and that door is likely to stay open. In what direction that open door leads remains to be seen. It could be a Justice Stevens direction, pointing the way to a new round of "rights" to entitlements of every sort, or it could be in Justice Field's and Justice Thomas's direction, towards understanding both the scope and the limits of a Privileges or Immunities Clause grounded in natural rights. Unless Justice Field's understanding can be recovered, the Supreme Court will be doomed to repeat in this century, via the Privileges or Immunities Clause, the errors of the post-New Deal substantive due process revolution of the last century.

Unfortunately, the prospects for recovering Justice Field's understanding are not particularly good. Many conservatives have what might be called a "Justice Brennan Problem." They are not willing to give any credence to a natural rights jurisprudence, even one grounded in the actual text of the Constitution such as the Privileges or Immunities Clause, lest it become the departure point for Justice Brennan's, or now Justice Stevens's, liberalism—a liberalism that purports to be grounded in natural rights but actually ignores the tenets of such rights.[85] In rejecting natural rights jurisprudence altogether, however, many conservatives have rejected the very tools that would allow them to make the kind of distinctions that Justice Field and Justice Washington made. If people would make the effort to understand Justice Field's judicial philosophy, perhaps the modern day juridical supporters of limited government would regain the jurisprudential high ground, and find in Justice Field a suitable source as they embark upon the inquiry invited by Justice Thomas in his dissenting opinion in *Saenz v. Roe*.

85 Judge Robert Bork, for example, praised the majority opinion in the *Slaughter-House Cases* as "a narrow victory for judicial moderation." BORK, *supra* note 44, at 39.

The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective

*Mark S. Kende**

I. INTRODUCTION

One of the most common assumptions about the United States Constitution is that it protects negative rights.[1] Yet the International Covenant on Economic, Social, and Cultural Rights, as well as many foreign constitutions, require governments to affirmatively provide socio-economic necessities.[2] The theory is that liberty at least presumes subsistence.

International human rights experts actually speak of three "generations" of rights.[3] First generation rights are political and civil, and are usually negative rights.[4] Second generation rights involve the government's socio-economic obligations, and are frequently positive rights.[5] Finally, third generation rights are exemplified by the right to a clean and healthy environment, and are commonly called "green" rights.[6]

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1 Judge Posner wrote that:

> [Our] Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.

Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983). Various scholars have questioned every part of Judge Posner's statement, including the date he gives for the "height of laissez-faire." *See, e.g.*, Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

2 *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1436–40 (1999) (discussing Irish, Italian, and Indian Constitutions).

3 LOUIS HENKIN ET AL., HUMAN RIGHTS 475 (1999).

4 *Id.*

5 *Id.*

6 *Id.*

Cass Sunstein said that the South African Constitution is "the most admirable constitution in the history of the world."[7] It contains a lengthy list of socio-economic rights,[8] which the drafters hoped would protect and assist those disadvantaged by Apartheid and those who are poor and vulnerable.[9] The relatively new South African Constitutional Court[10] has required the government to implement these rights. Conversely, the United States Supreme Court has been unwilling to find socio-economic rights in the United States Constitution, in part because of separation of powers concerns.[11]

This paper is divided into three parts. The first part describes some of the distinctive features of the South African Constitution, and compares these features with the United States Constitution. Part two discusses the South African socio-economic rights cases. Finally, part three critically examines American constitutional jurisprudence on socio-economic rights. This paper seeks to demonstrate that the South African Court has accomplished quite a feat: it has made clear that socio-economic rights are enforceable, but has interpreted economic rights in a way that limits separation of powers concerns. Moreover, this paper asserts that the United States Supreme Court should reconsider its separation of powers objections in light of these South African decisions.

II. Background of the South African Constitution

South Africa adopted its constitution in 1996. That year, the Constitutional Court issued the Second Certification Judgment,[12] ruling that the Constitution complied with the thirty-four Constitutional Principles agreed upon in political negotiations that took place from 1991 to 1993.[13] The new Constitution embodied the na-

7 Cass R. Sunstein, Designing Democracy: What Constitutions Do 261 (2001).

8 S. Afr. Const. ch. 2, §§ 22–23, 25–27 (adopted May 8, 1996).

9 Johan de Waal et al., The Bill of Rights Handbook 398 (3d ed. 2000). Interestingly, one of the leading proponents of the view that "freedom from want" should be considered a basic human right was American President Franklin D. Roosevelt, who articulated this principle in his famous 1941 "Four Freedoms" speech to Congress. *See* Franklin D. Roosevelt, The Annual Message to the Congress (Jan. 6, 1941), *in* 9 The Public Papers and Addresses of Franklin D. Roosevelt 663, 672 (Samuel I. Rosenman ed., 1969) (1941). The United States Supreme Court, however, has not embraced this as a constitutional norm.

10 The South African Constitutional Court was established in 1994. *See Information About the Constitutional Court*, The Constitutional Court of South Africa, *at* http://www.concourt.gov.za/about.html (last visited Apr. 12, 2003).

11 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–36 (1973); Lindsey v. Normet, 405 U.S. 56, 74 (1972); Dandridge v. Williams, 397 U.S. 471, 487 (1970).

12 *Ex parte* Chairperson of the Constitutional Assembly: *In re* Certification of the Amended Text of the Constitution of the Republic of South Africa, 1997 (2) SALR 97 (CC).

13 *Id.* at 162. The South African Constitution's adoption mechanism was unique. As the text mentions, the South African Constitutional Court had to "certify" whether the document complied with thirty-four Constitutional Principles that were agreed upon by the major groups in South African society at the beginning of the Constitution drafting process.

tion's transformation from a racist, brutal, Apartheid-based regime to a democratic, multi-cultural government. Both the Constitution's length and detail distinguish it from the United States Constitution.

The South African Constitution establishes a parliamentary structure for the national government and allocates powers to the provincial governments.[14] It also creates a Constitutional Court with eleven Justices who are appointed to serve twelve-year non-renewable terms.[15] The first group of Justices was impressive as it included an international war crimes prosecutor,[16] several former law professors,[17] and the attorney who founded the nation's leading civil rights litigation firm and represented President Nelson Mandela during his imprisonment.[18]

The South African Constitution's Bill of Rights seeks to preserve and enhance human dignity, and substantive equality, by encompassing all three generations of rights previously discussed.[19] Whereas the United States Supreme Court implies the existence of certain fundamental personal rights in the liberty provision of the Fourteenth Amendment's Due Process Clause[20] (a legacy of *Lochner v. New York*[21]), the South African Bill of Rights specifically enumerates these rights. Section 12 of the Bill of Rights addresses the "freedom and security of the person."[22] This section specifically bans torture, cruel and inhumane treatment, general violence, detention without trial, and deprivation of freedom without just cause.[23] It further provides that everyone has bodily and psychological integrity, including the right to make reproductive decisions.[24] Section 14 encompasses the right to spa-

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The Court actually refused to certify the first Constitution that was presented, by ruling that the document failed to comply with some of the fundamental principles. *In re* Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) (First Certification Judgment), *available at* 1996 SACLR LEXIS 79, at *382. For example, the Court determined that the rights provisions were not sufficiently "entrenched" because they were too easy to amend or repeal. *Id.* at *14–15. After the National Assembly made changes, the Court validated the Constitution in the Second Certification Judgment. *Ex parte* Chairperson of the Constitutional Assembly: *In re* Certification of the Amended Text of the Constitution of the Republic of South Africa, 1997 (2) SALR 97 (CC).

14 S. AFR. CONST. ch. 4, § 42 (adopted May 8, 1996).

15 *Id.* § 176.

16 Justice Richard J. Goldstone. *See* The Constitutional Court of South Africa, *at* http://www.concourt.gov.za/judges/jdgoldst.html (last visited Apr. 12, 2003).

17 Justices Yvonne Mokgoro, Kate O'Regan, and Albert Louis Sachs. *See Judges of the Constitutional Court*, The Constitutional Court of South Africa, *at* http://www.concourt.gov.za/judges/ (last visited Apr. 12, 2003).

18 Chief Justice Arthur Chaskalson. *See* The Constitutional Court of South Africa, *at* http://www.concourt.gov.za/judges/jdchask.html (last visited Apr. 12, 2003).

19 S. AFR. CONST. ch. 2, §§ 9–10 (adopted May 8, 1996).

20 U.S. CONST. amend. XIV.

21 198 U.S. 45 (1905).

22 S. AFR. CONST. ch. 2, § 12(1) (adopted May 8, 1996).

23 *Id.*

24 *Id.* § 12(2)(a).

tial privacy: privacy in one's home, of one's possessions, etc.[25] Section 21 guarantees freedom of movement and residence.[26] There is a lengthy equality provision in Section 9,[27] Section 10 protects human dignity,[28] and Section 11 says that everyone has a right to life.[29]

The South African Bill of Rights also employs the flexible proportionality analysis used in the Canadian Charter of Rights and Freedoms[30] and in Germany's Basic Law,[31] rather than the tiers of scrutiny applied in United States constitutional jurisprudence.[32] The first issue addressed in any South African rights case is whether there has been an infringement of one's constitutional rights.[33] Interestingly, state action need not always be present.[34] The next issue addressed is whether the Bill of Rights "Limitations" Clause justifies the infringement. Any limitation must be pursuant to a law of "general application."[35] The Limitations Clause requires the Court to balance several factors, including the nature of the right, the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and the possibility of employing less restrictive alternatives.[36] The Court's overall responsibility is to determine whether the infringement on the right is proportional to the resulting societal benefit.[37] This method of rights analysis is more common internationally than the American use of different degrees of scrutiny.[38]

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25 *Id.* § 14.

26 *Id.* § 21.

27 *Id.* § 9.

28 *Id.* § 10.

29 *Id.* § 11.

30 CAN. CONST. (Constitutional Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). *See also* R. v. Oakes [1986] S.C.R. 103, 135–37 (Can.).

31 GRUNDGESETZ [GG] [Constitution] (F.R.G.).

32 *See* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1998) (discussing proportionality analysis and the U.S. Supreme Court's reluctance to utilize such standards).

33 S. AFR. CONST. ch. 2, § 38 (adopted May 8, 1996).

34 Some legal scholars advocate abandoning the state action requirement. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

35 S. AFR. CONST. ch. 2, § 36(1) (adopted May 8, 1996).

36 *Id.*

37 *Id.* § 36(1)(b), (d).

38 *See* Jackson, *supra* note 32 (discussing various countries that use proportionality). Under the United States Supreme Court's Equal Protection Clause decisions, laws are subject to three possible scrutiny levels. Laws that discriminate on the basis of race receive strict scrutiny. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967). Laws that discriminate on the basis of gender receive intermediate scrutiny. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996). Most other laws, such as economic classifications, receive rational basis review. In substantive due process cases, the Court employs strict scrutiny when fundamental rights are violated and rational basis review in most other cases. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

An example of proportionality analysis can be found in the South African Constitutional Court case of *Christian Education South Africa v. Minister of Education*.[39] In that case, a Christian school association, whose parental members believed in the Biblical maxim "spare the rod, spoil the child," challenged on religious freedom grounds a national law banning corporal punishment in schools.[40] The Court assumed *arguendo* that the free exercise rights of the parents were infringed.[41] The Court then had to determine whether the government limitation was constitutional.[42]

The Court found that powerful justifications support the ban including international conventions and the South African Constitution, which outlaws any violence against children.[43] The Court also explained that, under Apartheid, the schools used corporal punishment in a brutal, degrading, and racist manner.[44] Although it acknowledged that the parents sincerely believed corporal punishment was a religious necessity,[45] the Court held that the restriction on free exercise was not sufficiently burdensome because parents could still carry out corporal punishment at home.[46] Because the law only prohibited corporal punishment at school,[47] the Court held that it was an acceptable limitation on religious freedom.[48]

Besides the Limitations Clause, the South African Bill of Rights has several other interesting provisions, such as interpretive instructions. One provision provides that courts should "promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[49] Courts are also supposed to construe legislation and the common law to promote the spirit of the Bill of Rights.[50] Moreover, courts must consider international law in rendering decisions, and may also consider foreign law.[51]

Furthermore, the South African Bill of Rights requires that the government undertake affirmative action programs.[52] It also contains a provision regarding how the government can carry out

39 2000 (10) BCLR 1051 (CC), *available at* 2000 SACLR LEXIS 79.
40 *Id.* ¶ 4.
41 *Id.* ¶ 27.
42 *Id.*
43 *Id.* ¶¶ 39–40.
44 *Id.* ¶ 49.
45 *Id.* ¶ 14.
46 *Id.* ¶ 38.
47 *Id.* ¶ 2. *See also* § 10 of South African Schools Act 84 of 1996.
48 *Christian Education South Africa*, 2000 (10) BCLR 1051 (CC) ¶ 52.
49 S. AFR. CONST. ch. 2, § 39(1)(a) (adopted May 8, 1996).
50 *Id.* § 39(2).
51 *Id.* § 39(1)(b)–(c).
52 *Id.* § 9(2).

property redistribution[53]—an important provision given the land seizures carried out under Apartheid.

III. The South African Constitutional Court's Socio-Economic Rights Rulings

The South African Constitution's socio-economic rights provisions have been celebrated internationally. Yet some South African scholars, such as Dennis Davis, argued that they were unenforceable.[54] These objections resemble the United States Supreme Court's reasoning in several cases discussed later. Socio-economic rights protected by the South African Constitution include rights to housing, health care, food, water, social security, and education, among others.[55] Several cases have interpreted these provisions.

A. The Right to Housing

The seminal socio-economic rights case in South Africa is *Government of the Republic of South Africa v. Grootboom*,[56] which involved the right to housing. Irene Grootboom was one of several hundred poor people, half of whom were children, who lived in an informal squatter settlement. The settlement lacked running water, electricity, sewage, and refuse removal services. Millions of South Africans still live in such conditions as a legacy of Apartheid's influx control policies and forcible relocations.[57]

Because of these conditions, the group moved onto vacant private land earmarked for low-income housing.[58] The group was trespassing, however, so the owner obtained an eviction order. The situation worsened when the local government bulldozed the group's shanties and then burned the wreckage before the date set for eviction. This occurred during a cold, windy, and rainy Western Cape winter.[59]

The group moved to a nearby municipal sports field and erected flimsy temporary structures. Winter rains left them unprotected under plastic sheeting, and the municipality declined to provide any assistance. The group obtained legal counsel and

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53 *Id.* § 25(2).

54 *See, e.g.*, D. M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. Afr. J. Hum. Rts. 475 (1992); Erika de Wet, The Constitutional Enforceability of Economic and Social Rights 92 (1996) (discussing future Constitutional Court Justice Ackermann's objections to the inclusion of enforceable socio-economic rights). *But see* Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. Afr. J. Hum. Rts. 464 (1992).

55 S. Afr. Const. ch. 2, §§ 26(1), 27(1), 29(1) (adopted May 8, 1996).

56 2000 (11) BCLR 1169 (CC), *available at* 2000 SACLR LEXIS 126.

57 *Id.* ¶ 7.

58 *Id.* ¶ 8.

59 *Id.* ¶ 10.

brought suit charging that the government failed to comply with the right to housing. The Constitutional Court ruled for the settlers after applying chapter 2, section 26, of the South African Constitution, which states:

> Housing
> 26. (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.[60]

Initially, the Court addressed whether socio-economic rights were justiciable by quoting from its First Certification Judgment:

> "[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in this case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion."[61]

The Court then explained the importance of socio-economic rights:

> Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [The Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[62]

The Court acknowledged that there is a nexus between the government meeting socio-economic needs and people exercising their civil and political rights. As South African scholar Pierre de Vos said, "Starving people may find it difficult to exercise their freedom of speech . . . ."[63]

The Court then examined international human rights law, but rejected an approach in which the government would be re-

60 S. AFR. CONST. ch. 2, § 26(1)–(2). *See also Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 99.

61 *Id.* ¶ 20 (quoting *Ex parte* Chairperson of the Constitutional Assembly: *In re* Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) ¶ 78).

62 *Id.* ¶ 23.

63 Pierre De Vos, *Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution*, 13 S. AFR. J. HUM. RTS. 67, 71 (1997).

quired to provide a "minimum core" level of housing, health care, etc. in order to satisfy constitutional requirements.[64] The Court noted that the "minimum core" concept lacked flexibility, and that the text of South Africa's socio-economic rights provisions differed from international covenants.[65] The Court instead asserted that the key question was "whether the measures taken by the state to realise the right afforded by Section 26 are reasonable."[66] The Court explained that "[t]he measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State's available means."[67] The Court further stated that progressive realization meant that the government had "an obligation to move as expeditiously and effectively as possible towards that goal."[68] The Court added that the program must be "reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's [positive] obligations."[69]

The Court then held:

> To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. . . . If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[70]

This statement was significant because the Court was addressing the government's worthy efforts at constructing low-income housing. Nevertheless, the Grootboom group, and many others, could not obtain such housing for years given the backlog.[71] The government simply had no policy to assist the homeless. The Court elaborated:

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64 *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 33.

65 *Id. But see* David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 117 S. AFR. L.J. 484 (2002). The Constitutional Court also rejected the argument that the government violated the rights of the children in the squatter camp. *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 79. Section 28(1)(c) of the Bill of Rights provides that children have the right "to basic nutrition, shelter, basic health care services and social services." S. AFR. CONST. ch. 2, § 28(1)(c) (adopted May 8, 1996). The Court construed this provision narrowly and held that the government only had an obligation to house the children when their parents failed to provide minimal shelter. *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶¶ 77–79.

66 *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 33.

67 *Id.* ¶ 41.

68 *Id.* ¶ 45 (quoting United Nations Committee ESCR, ¶ 9 of general comment 3 (1990)).

69 *Id.* ¶ 42.

70 *Id.* ¶ 44.

71 *Id.* ¶ 8.

> The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the State must provide relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives [rather than short term objectives]. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.[72]

This last sentence illustrates the Court's careful balancing act. Though the Court forced compliance with the Constitution, it gave the government discretion on how to comply with the law.

Grootboom demonstrates that placing socio-economic rights in a Constitution does not mean that every individual is entitled to assistance on demand. Instead, the Court analyzed whether the overall government policy was reasonable. Cass Sunstein said, "[w]hat the South African Constitutional Court has basically done is to adopt an *administrative law model of socioeconomic rights.*"[73]

B. The Right to Health Care

The South African Constitutional Court has decided two major health care cases: *Soobramoney v. Minister of Health*[74] and *Minister of Health v. Treatment Action Campaign.*[75] Chapter 2, section 27 of the Bill of Rights states:

> Health care, food, water, and social security
> 27. (1) Everyone has the right to have access to—
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
> (3) No one may be refused emergency medical treatment.[76]

1. *Soobramoney v. Minister of Health*

The first socio-economic rights case ever decided by the Constitutional Court was *Soobramoney*, not *Grootboom*. *Soobramoney*'s ruling against the claimant made some commentators

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72 *Id.* ¶ 66.
73 SUNSTEIN, *supra* note 7, at 234 (emphasis in original).
74 1997 (12) BCLR 1696 (CC), *available at* 1997 SACLR LEXIS 41.
75 2002 (10) BCLR 1033 (CC), *available at* 2002 SACLR LEXIS 26.
76 S. AFR. CONST. ch. 2, § 27 (adopted May 8, 1996).

fear the Court would render the rights provisions toothless.[77] *Grootboom* and *Treatment Action Campaign* have since alleviated that worry.

The issue in *Soobramoney* was whether a public hospital unconstitutionally failed to provide renal dialysis services to a terminally ill man who suffered from diabetes, ischemic heart disease, and cerebro-vascular disease. The hospital produced evidence that it prioritized treatment for non-terminal patients because dialysis was a scarce resource. Soobramoney brought suit claiming that the hospital's refusal to treat him violated his right to health care and to emergency medical treatment under chapter 2, section 27 of the Bill of Rights of the South African Constitution.[78]

The Court initially recited the Constitution's fundamental principles:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[79]

The Court then rejected the claimant's "emergency" assertion.[80] Relying on a case from India, the Court noted that claimant's chronic renal failure would require dialysis several times a week to prolong his life, but held: "This is not an emergency which calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant's renal function which is incurable."[81]

The Court also rejected the claimant's argument that the hospital violated his right to health care by reasoning that the hospital had a rational policy for making a scarce resource available.[82] The Court asserted that the dialysis program would collapse and

77 Emily Bazelon, *After the Revolution*, LEGAL AFF. 25, 28 (Jan./Feb. 2003), *available at* 2003-FEB Legal Aff. 25.

78 *Soobramoney*, 1997 (12) BCLR 1696 (CC) ¶¶ 5–7. The South African Constitution provides that, "[e]veryone has the right to life" and that "[n]o one may be refused emergency medical treatment." S. AFR. CONST. ch. 2, §§ 11, 27(3) (adopted May 8, 1996).

79 *Soobramoney*, 1997 (12) BCLR 1696 (CC) ¶ 8.

80 *Id.* ¶ 21.

81 *Id.*

82 *Id.* ¶ 25.

"no one would benefit"[83] in the absence of a prioritization policy. Moreover, the Court stated:

> These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[84]

The ruling illustrates, once again, that a court can take socio-economic rights seriously and yet still respect separation of powers concerns and legislative competence.[85]

2. *Minister of Health v. Treatment Action Campaign*

The recent decision in *Treatment Action Campaign* is among the most important Constitutional Court cases thus far, because it involved the South African government's unsatisfactory response to the AIDS pandemic that South Africa is currently experiencing. Indeed, one in nine South Africans is infected with HIV.[86] In the year 2000 alone, 2.4 million Africans died of HIV related causes.[87] More than 70,000 babies infected with HIV are born in South Africa each year due to mother-child transmission.[88] One ray of hope is a drug called Nevirapine, which the World Health Organization ("WHO") says can prevent the spread of HIV/AIDS from pregnant women to their fetuses and babies.[89]

Unfortunately, for several years the South African government refused to distribute Nevirapine at public health clinics.[90] Initially, President Thabo Mbeki expressed skepticism about whether HIV causes AIDS.[91] Then the government had cost concerns, which were unfounded because the manufacturer offered the pills for free.[92] The government also claimed Nevirapine had

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83 *Id.* ¶ 26.

84 *Id.* ¶ 29.

85 Frank Michelman has mildly criticized one part of the opinion, but it seems the Court resisted the temptation to make bad law in a hard case. *See* Frank Michelman, *The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik*, 14 S. AFR. J. HUM. RTS. 499 (1998).

86 *AIDS Drugs Battle Goes to Court*, CNN.com (Nov. 26, 2001), *at* http://www.cnn.com/2001/WORLD/africa/11/26/safrica.drugs/index.html.

87 *AIDS Drugs Court Battle Dropped*, CNN.com (Apr. 19, 2001), *at* http://www.cnn.com/2001/WORLD/africa/04/19/safrica.drugs/index.html.

88 Richard Calland, *A Case of Power and Who Controls It: The Constitutional Court Faces Its Most Delicate Test Yet*, MAIL & GUARDIAN ONLINE (Jan. 18, 2002), *at* http://www.mg.co.za/mg/za/features/calland/index.html.

89 Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC) ¶ 1 n.1, *available at* 2002 SACLR LEXIS 26.

90 *Id.* ¶ 10.

91 *See* Bazelon, *supra* note 77, at *28 ("President Mbeki . . . attracted worldwide criticism for questioning whether HIV causes AIDS at all.").

92 *Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC) ¶ 4 n.5.

potentially hazardous side effects.[93] The WHO ultimately dispelled these concerns.[94]

The government finally agreed to a pilot distribution program at two public health centers in each province.[95] Government health officials said a broader program was not feasible since Nevirapine only worked when infected mothers used formula to feed their newborns.[96] The government said that it lacked the capacity to insure that women all over the country used formula to feed their babies.[97]

After years of unsuccessful lobbying, a South African AIDS advocacy group, the Treatment Action Campaign ("TAC"), brought suit charging that the government violated the Constitution's right to health care by not widely providing Nevirapine to pregnant women.[98] The government responded that its pilot program was reasonable and that separation of powers required the courts to stay out of this issue.

Nevertheless, the Constitutional Court issued a unanimous opinion ordering the government to provide the free Nevirapine. Initially, the Court spoke of its standard of review:

> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[99]

The Court, nonetheless, defined the "progressive realization" obligation by noting that "[t]he State is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society."[100] The Court then decided that the government inaction was not reasonable because it "fail[ed] to address the needs of mothers and their newborn children who do not have access to these [pilot] sites."[101] The Court said the government's goal of maximizing Nevirapine's effective-

93 *Id.* ¶ 10.
94 *Id.* ¶ 12.
95 *Id.* ¶ 10.
96 *Id.* ¶ 15.
97 *Id.* ¶¶ 14–15.
98 *Id.* ¶ 4.
99 *Id.* ¶ 38.
100 *Id.* ¶¶ 35–36.
101 *Id.* ¶ 67.

ness by limiting its distribution to mothers trained in the use of baby formula did not justify refusing to distribute it beyond the pilot sites,[102] because too many babies would become infected or die in the interim.[103]

The Court also rejected the government's separation of powers defense by stating:

> There is . . . no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the *Mpumalanga* case, this Court set aside a provincial government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months. Also, in the case of *August* the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications.[104]

But the Court showed respect for separation of powers by asserting that it would be for the "government . . . to devise and implement a more comprehensive policy that will give access to health care services to HIV-positive mothers and their newborn children, and will include the administration of Nevirapine where that is appropriate."[105] The Court supported its remedial authority by citing cases from India, Germany, Canada, and the United Kingdom.[106] The decision in *Treatment Action Campaign* even relied on the United State Supreme Court's decision in *Brown v. Board of Education II*.[107]

In sum, as Heinz Klug pointed out, *Treatment Action Campaign* goes beyond *Grootboom* because *Treatment Action Campaign*'s directive to the government was quite specific.[108] The

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102 *Id.* ¶ 80.

103 *Id.* ¶ 72.

104 *Id.* ¶ 99 (footnotes omitted). The Court added that it had a duty to grant "appropriate relief" when a violation of rights occurred. *Id.* ¶ 101. Section 172(1)(b) of the Constitution states "a court may also 'make any order that is just and equitable.'" *Id.*

105 *Id.* ¶ 122.

106 *Id.* ¶¶ 108–12.

107 *Id.* ¶ 107; 349 U.S. 294 (1955). It is hard to ignore the similarity between the United States Supreme Court's efforts to eliminate segregation and the South African legal system's attempt to eliminate the remnants of Apartheid.

108 Heinz Klug, *Five Years On: How Relevant Is the Constitution To the New South Africa?*, 26 VT. L. REV. 803, 808 (2002).

government is now complying and many young lives will likely be saved.[109]

IV. Critique of the United States Supreme Court's Socio-Economic Rights Decisions

Comparing South African Constitutional Court and United States Supreme Court decisions on socio-economic rights is difficult because these courts are the products of different societies, cultures, and political and legal systems. One obvious difference is that the United States Constitution lacks explicit socio-economic rights. This helps explain why the Supreme Court rejects such claims. In *Lindsey v. Normet*,[110] the Court said: "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill." The first part of this section looks at Supreme Court decisions related to socio-economic rights. The second part relies on the above-mentioned South African cases to show the flawed nature of the Supreme Court's doubts about the judiciary's competence to enforce such rights.

A. The United States Supreme Court on Socio-Economic Rights

The United States Supreme Court has rejected socio-economic rights claims in cases with varying facts and legal grounding. In *Dandridge v. Williams*,[111] the Court ruled that Maryland did not violate equal protection by imposing a $250 cap on welfare benefits, regardless of family size.[112] The Court held that the cap was rationally related to the state's interests in preserving scarce resources, and in creating incentives for the poor to seek employment and to engage in family planning.[113] In *San Antonio Independent School District v. Rodriguez*,[114] the Court ruled that Texas' public education financing scheme was consistent with equal protection and substantive due process, despite dramatic school district disparities in per student funding.[115] The Court said the law burdened neither a suspect class nor a fundamental right.[116] Additionally, in *Harris v. McRae*,[117] the Court ruled that a federal health care program that omitted financial coverage for

109 *SA Govt Heeds Calls For Free Anti-Aids Drugs*, Mail & Guardian Online (Feb. 3, 2003), *at* http://www.mg.co.za/Content/13.asp?ao=10666.

110 405 U.S. 56, 73–74 (1972).

111 397 U.S. 471 (1970).

112 *Id.* at 474–75, 486.

113 *Id.* at 483–84.

114 411 U.S. 1 (1973).

115 *Id.* at 54–55.

116 *Id.* at 28, 38.

117 448 U.S. 297 (1980).

abortions, even when the pregnancy endangered the woman's health, did not violate substantive due process.[118]

To be fair, strong dissents were authored in these cases. Moreover, the Court has upheld socio-economic rights in a few circumstances. In *Shapiro v. Thompson*,[119] the Court ruled that a durational residency requirement for welfare recipients discriminated against a person's fundamental right to travel.[120] This was a hybrid case that implicated what has been called "equal protection fundamental interests."[121] More recently, in *Saenz v. Roe*,[122] the Court issued a similar ruling regarding welfare payments,[123] but held that the right to travel was based on the Fourteenth Amendment's Privileges and Immunities Clause.[124] This travel issue was not present in *Dandridge*.

In *Plyler v. Doe*,[125] the Court ruled unconstitutional a Texas law that required illegal alien children to pay to attend public schools.[126] Though neither a suspect class nor fundamental right was implicated, the Court asserted that the law revealed an irrational animus towards a vulnerable group not responsible for its situation.[127] This was a surprising result in light of *Rodriguez*. One distinction was that in *Rodriguez* the law provided students with a minimum education, whereas in *Plyler* certain students were denied any education unless they paid for it themselves.[128]

To sum up, the Supreme Court has rejected socio-economic rights claims under both Substantive Due Process and Equal Protection doctrines. The Court, nonetheless, has been more receptive regarding hybrid "equal protection fundamental interests" claims.[129] But even then, the Court has tried to find a hook, such as the right to travel or the right to vote.[130]

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118 *Id.* at 326.

119 394 U.S. 618 (1969).

120 *Id.* at 638.

121 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 842 (2d ed. 2002) ("[T]he right to vote is a fundamental right protected under equal protection. The right to vote is regarded as fundamental because it is essential in a democratic society.").

122 526 U.S. 489 (1999).

123 *Id.* at 510–11.

124 *Id.*

125 457 U.S. 202 (1982).

126 *Id.* at 230.

127 *Id.* at 223–24.

128 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 9–11 (1973); *Plyler*, 457 U.S. at 206.

129 *See* CHEMERINSKY, *supra* note 121.

130 Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that poll taxes which effect the rights of the poor are unconstitutional because they discriminate regarding the right to vote).

B. Socio-Economic Rights and Separation of Powers: Two Approaches

The United States Supreme Court has raised separation of powers objections to socio-economic rights. This paper responds to these objections. Of course, scholars such as Frank Michelman,[131] Peter Edelman,[132] Mark Tushnet,[133] and Charles Black[134] have challenged the United States Supreme Court's socio-economic rights decisions based on their respective views of the Fourteenth Amendment. This paper leaves the Fourteenth Amendment questions for a later day, however, because the South African cases shed light on separation of powers issues, but not on the peculiarities of American substantive due process or the Privileges and Immunities Clause. Moreover, Fourteenth Amendment theory becomes less important regarding socio-economic rights if pragmatic separation of powers objections cannot even be overcome.

The Supreme Court has raised three separation of powers concerns. First, the legislature, not courts, should make socio-economic funding allocations. Second, the judiciary lacks the competence to make such decisions. Third, separation of powers problems are minimized if the Constitution encompasses negative rights. The South African cases address these concerns.

1. The Legislature's Prerogative

The Supreme Court has made clear the legislative and executive branches should resolve socio-economic rights issues. In *Dandridge*, the Court said "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[135] The Court added that the "problems presented by public welfare assistance programs are not the business of this Court."[136] In *Lindsey v. Normet*,[137] the Court upheld Oregon's summary eviction procedures holding: "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord tenant relationships are legislative, not judicial, functions."[138]

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131 Frank I. Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 26 (1969).

132 Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 30–31 (1987).

133 Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207 (1991) [hereinafter Tushnet, *Civil Rights*].

134 Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986). George Fletcher's recent work makes similar arguments. *See* GEORGE P. FLETCHER, OUR SECRET CONSTITUTION 152–63 (2001).

135 Dandridge v. Williams, 397 U.S. 471, 487 (1970).

136 *Id.*

137 405 U.S. 56 (1972).

138 *Id.* at 74.

The majority in *Rodriguez* said that it lacked the "authority" to intervene regarding school financing decisions because it would then be a "super-legislature."[139] This objection resembles Justice Holmes's famous dissent in *Lochner*.[140] The *Rodriguez* opinion also asserted that educational decisions should be left to government entities with expertise regarding local political and economic conditions.[141] Finally, in *Harris*, the Court said, "Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement."[142]

The South African cases, however, demonstrate that the judiciary can enforce socio-economic rights without intruding into quintessentially legislative or executive functions. In *Soobramoney*, *Grootboom*, and *Treatment Action Campaign*, the Constitutional Court asserted that it would uphold government socio-economic policies so long as they were reasonable. This is a pro-government presumption. The government only lost in *Grootboom* and *Treatment Action Campaign* because it had essentially no plan for assisting people in difficult circumstances. Moreover, the Court's rejection of "minimum core" obligations in *Grootboom* and *Treatment Action Campaign* provides the government with flexibility in dealing with multiple social problems.

Finally, *Grootboom* demonstrates that a court can issue a powerful remedial order that still gives the legislature latitude on implementation. Mark Tushnet called this an "action-forcing remed[y]."[143] In the context of employment rights, Tushnet said that, "enforcement [of an order that the legislature offers plans for relief] could guarantee that legislatures make jobs policy a high or higher priority."[144] Frank Michelman said this remedy involved "a judicial mandate to legislative, executive, or administrative officers to prepare, submit, and carry out a corrective plan."[145]

Michelman further confirmed that *Grootboom* "does not as it stands seem shockingly pre-emptive of legislative and executive policy choice."[146] Other commentators have suggested that *Groot-*

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139 411 U.S. 1, 31 (1973).

140 Lochner v. New York, 198 U.S. 45, 74–78 (1905) (Holmes, J., dissenting).

141 411 U.S. at 40–41.

142 Harris v. McRae, 448 U.S. 297, 318 (1980).

143 Mark Tushnet, *What is Constitutional About Progressive Constitutionalism?*, 4 WIDENER L. SYMP. J. 19, 31 (1999).

144 William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1878 n.261 (2001) (citing Mark Tushnet, *What is Constitutional About Progressive Constitutionalism?*, 4 WIDENER L. SYMP. J. 19, 31 (1999)).

145 Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1006 (1973).

146 Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. OF CONST. L. 13, 27 (2003).

boom did not go far enough.[147] In my view, the Constitutional Court performed an impressive high wire act in *Grootboom* by vindicating the right to housing while preserving separation of powers.[148] The Constitutional Court accomplished what the United States Supreme Court has said courts cannot do.[149]

2. Competence

The United States Supreme Court has also questioned the judiciary's ability to make budgetary decisions. In *Dandridge*, the Court labeled such issues "intractable."[150] In *Rodriguez*, the Court said the judiciary lacked the "competence" to evaluate education-funding levels.[151] The *Rodriguez* Court also invoked "our federalism" by saying that the Court did not possess "the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues."[152] The Court added that its "lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."[153] The Supreme Court's concerns are overstated. *Grootboom*'s action-forcing remedy allows the legislature or local entities to wrestle with implementation despite the court's intervention. Moreover, judicial intervention is justified when the other branches violate the Constitution.

Charles Black's interesting 1997 book, *A New Birth of Freedom*, explains why lack of competency is not a valid defense against judicial action:

> About half our black children under six live in poverty, which very commonly entails malnutrition. Some helpless old people have been known to eat dog food when they could get it; it is not recorded that any Cabinet member has yet tried this out on eld-

147 Bilchitz, *supra* note 65, at 484. *See also* Bazelon, *supra* note 77, at 28–29 (discussing dissatisfaction among South African human rights bar over Constitutional Court's cautious approach to enforcing socio-economic rights).

148 *See* Pierre de Vos, Grootboom, *The Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 S. AFR. J. HUM. RTS. 258 (2001).

149 David Currie quoted a German critic of affirmative rights as saying that "notwithstanding the worldwide proliferation of constitutional provisions explicitly imposing affirmative social duties, '[n]o constitution recognizing the rule of law has yet actually succeeded in practice' in turning away from the classical negative understanding of fundamental rights." Currie, *supra* note 1, at 889 (citing Forsthoff, *Begriff und Wesen des sozialen Rechtsstaates*, *in* 12 VerÖffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 20, 33 (1954)).

150 Dandridge v. Williams, 397 U.S. 471, 487 (1970).

151 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973).

152 *Id.* at 41. It seems that the Supreme Court in *Rodriguez* was more concerned with separation of powers problems than with federalism problems. After all, the local entities that the Supreme Court assumed to be "competent" in making school budgetary decisions were school districts, not state or local courts. The basic theme is that the judiciary is ill-equipped to handle such matters, no matter the level.

153 *Id.* at 42.

> erly persons in his own extended family. Now you can bog down in a discussion about the exact perimeter of "decent livelihood," or you can cease for a moment from that commonly diversionary tactic and note that, wherever the penumbra may be, malnourished people are not enjoying a decent livelihood. In a constitutional universe admitting serious attention to the Declaration of Independence, a malnourished child is not enjoying a "right to the pursuit of happiness."[154]

3. Negative Rights

Another concern related to separation of powers is that the American constitutional tradition presumes that courts have an easier time enforcing negative political and civil rights rather than positive socio-economic rights.[155] It seems simpler for a court to order the government to stop interfering with speech than for a court to determine how much funding is needed for secondary education.

This reasoning has two problems.[156] First, it is an oversimplification. In the *First Certification Judgment*, as well as in *Grootboom* and *Treatment Action Campaign*, the Constitutional Court said that protecting socio-economic rights sometimes requires the Court to negate government actions that interfere with a right.[157] Thus, in *Treatment Action Campaign*, as Frank Michelman has pointed out, the Constitutional Court found that the government unconstitutionally interfered with the right of public doctors to distribute Nevirapine.[158] This "negative" role regarding socio-economic rights is little different from the "negative" role United States courts play when vindicating political rights.

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154 CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 137 (1997). *See also* Pierre de Vos, *supra* note 63, at 71 ("Starving people may find it difficult to exercise their freedom of speech . . . .").

155 Edelman, *supra* note 132, at 30–31. *See also* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 311–12 (1980) ("In a society that considers private incentives a primary means to economic progress, *affirmative* jurisprudence creates serious *pragmatic* problems. . . . The courts' traditional role in protecting individual rights [via a negative jurisprudence] remains the most promising judicial means of reducing the burdens of economic inequality.") (emphasis added).

156 This paper does not focus on whether the United States Constitution was intended solely to furnish negative rights. Commentators from diverse political spectrums question this view, including Philip Kurland, Lawrence Tribe, David Currie, and Michael J. Gerhardt. *See generally* Gerhardt, *supra* note 1, at 410 nn.6–7, 438 n.119 (1990). *See also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 69–71 (1993).

157 *In re* Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) (First Certification Judgment), *available at* 1996 SACLR LEXIS 79; Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC) ¶¶ 42–43, *available at* 2000 SACLR LEXIS 126; Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC) ¶¶ 30–32, *available at* 2002 SACLR LEXIS 26.

158 *Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC) ¶¶ 67–68; Frank I. Michelman, *supra* note 146. *Grootboom* also discussed how the right to housing could involve negative claims that the government is interfering with access to housing. *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 34.

Second, Mark Tushnet,[159] Cass Sunstein,[160] and others have established that enforcing negative rights also implicates budgetary matters. Sunstein wrote that:

> Even conventional individual rights, like the right to free speech and private property, require governmental action. Private property cannot exist without a governmental apparatus, ready and able to secure people's holdings as such. So-called negative rights are emphatically positive rights. In fact all rights, even the most conventional, have costs. Rights of property and contract, as well as rights of free speech and religious liberty, need significant taxpayer support.[161]

The *First Certification Judgment* is in accord with Sunstein, as quoted above.[162] American philosopher Henry Shue wrote that courts enforcing positive socio-economic rights are not performing a task "more difficult, more expensive, less practicable, or harder to 'deliver'" than protecting negative rights.[163] The United States Supreme Court's intrusive efforts to implement a remedy against segregation in *Brown v. Board of Education II* illustrate this starkly.[164]

4. New Results

The South African cases discussed above reveal how the United States Supreme Court could have decided certain socio-economic rights cases. The Court in *Dandridge* did not have to resolve "intractable" welfare budgeting questions. The Court could have ordered the government to develop a more equitable funding rule that took into account family size, which would ensure that children in bigger families would not be severely deprived.

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159 Tushnet, *Civil Rights*, *supra* note 133, at 1213–14.

160 SUNSTEIN, *supra* note 7, at 222–23, 234.

161 *Id.* at 222–23 (endnote omitted).

162 One commentary described the ruling by saying:

> The Court . . . questions the rigidity of the distinction drawn between socio-economic rights and civil and political rights on the basis that the former entail judicial imposition of positive duties on the state while the latter do not. Courts enforcing civil and political rights may on occasion impose positive duties on the state.

DE WAAL, *supra* note 9, at 400–01.

163 HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 63 (1980).

164 Stephen Holmes and Cass Sunstein critique the possibility of a libertarian low-tax minimalist state, that only protects negative liberties, by stating:

> One piece of evidence to the contrary is the amount we spend, as a nation, to protect private property by punishing and deterring acquisitive crimes. In 1992 . . . direct expenditures in the United States for police protection and criminal corrections ran to some $73 billion—an amount that exceeds the entire GDP of more than half of the countries in the world. Much of this public expenditure . . . was devoted to protecting private property.

STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 63–64 (1999).

Similarly, in *Rodriguez*, the Court could have ruled against the Texas financing scheme but left the state to devise an equitable alternative, subject to the Court's guidelines. Numerous state courts have invalidated school financing schemes.[165] The Supreme Court mistakenly assumed that it had to "direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation."[166] The South African cases suggest the remedy need not be so intrusive and inflexible.

Moreover, the Supreme Court could have ruled for the plaintiff in *Harris* by simply requiring the government to ensure that the health service was provided to these women, just as in *Treatment Action Campaign*.

It is also worth noting that the Supreme Court decisions in *Shapiro*, *Plyler*, and the "new property" entitlement case, *Goldberg v. Kelly*,[167] as well as the eloquent *Dandridge* and *Rodriguez* dissents,[168] demonstrate that the Court can address socio-economic rights issues.[169]

5. The Reaction

One possible reaction to the aforementioned arguments is that the current United States Supreme Court will not be endorsing socio-economic rights anytime soon. Indeed, Lawrence Lessig essentially suggested at a 1997 Fordham Law School constitutional law conference that Frank Michelman's welfare rights theories make Michelman look like a dreamer today, given the evolution of the Supreme Court's jurisprudence.[170]

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165 See CHEMERINSKY, *supra* note 121, at 889 n.14 for a list of these cases.

166 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

167 397 U.S. 254 (1970).

168 Justice Marshall's dissents in these cases are famous for criticizing the Supreme Court's levels of scrutiny. Marshall argued that the Court actually employed a sliding scale of scrutiny in equal protection and fundamental rights cases. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 508–30 (1970) (Marshall, J., dissenting); *Rodriguez*, 411 U.S. at 70–137 (Marshall, J., dissenting). Rutgers Law School's Suzanne Goldberg has recently authored a manuscript which takes a similar view. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 57 U. MIAMI L. REV. (forthcoming June 2003) (on file with Chapman Law Review).

169 Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 664 (1979) (noting that federal court decisions "show . . . how it is possible for courts to act on welfare-rights premises without having to . . . take on an unmanageable remedial task, or to arrogate legislative and executive functions").

170 This reference to dreaming was actually made in a colloquy between Lawrence Lessig and Frank Michelman at a 1997 conference that centered on Lessig's work concerning fidelity in constitutional interpretation. Lessig said,

> It is to remark a change in the world to note that Professor Michelman can write one of the most influential articles of the 1960s [on the right to welfare] that now is so alien. It is an odd piece—beautiful, and wonderful and we can dream about it. But still it is a piece that none of us would write anymore.

Fidelity as Translation: Colloquy, 65 FORDHAM L. REV. 1507, 1510 (1997).

Nevertheless, the South African cases illustrate that courts, acting cautiously, can enforce such rights without destroying separation of powers or taxing judicial competency.[171] Once these false concerns are eliminated, the more foundational issues about interpreting the Fourteenth Amendment,[172] and perhaps the Ninth Amendment,[173] can be addressed sensibly.

Moreover, two United States Supreme Court decisions have shown that the Court has the potential to approach socio-economic rights cases in the same manner as the South African judiciary. These two cases are *Atkins v. Virginia*[174] and *Romer v. Evans*.[175]

a. *Atkins v. Virginia*

In *Atkins*, the Court ruled that the state could not constitutionally execute a mentally retarded person.[176] *Atkins*, which was decided last term, reversed the thirteen-year-old decision in *Penry v. Lynaugh*.[177] *Atkins* relied on the fact that fourteen states had eliminated the death penalty for the mentally retarded since *Penry* was decided.[178] The majority also noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[179] Much to the chagrin of Chief Justice Rehnquist and Justice Scalia, the majority relied on a brief from the European Union for support.[180]

Atkins demonstrates that the Court no longer ignores international norms.[181] Moreover, Justice Breyer has a history of examining foreign precedents in his opinions.[182] That is exactly what the South African Constitutional Court has been doing since its

171 For more detailed discussions about the pragmatic elements of the South African Constitutional Court's progressive jurisprudence, see Mark S. Kende, *The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism*, 26 VT. L. REV. 753 (2002); Mark S. Kende, *Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation*, 117 S. AFR. L. J. 745 (2001).

172 U.S. CONST. amend. XIV.

173 U.S. CONST. amend. IX.

174 122 S. Ct. 2242 (2002).

175 517 U.S. 620 (1996).

176 122 S. Ct. at 2252.

177 492 U.S. 302 (1989).

178 122 S. Ct. at 2248–49.

179 *Id.* at 2249 n.21.

180 Justice Scalia in dissent said, "Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people." *Id.* at 2264 (Scalia, J., dissenting).

181 In a related vein, the Court recently upheld the Copyright Term Extention Act against constitutional challenge in part because the Act meshed American copyright protections with those of Europe. Eldred v. Ashcroft, 123 S. Ct. 769, 775–76, 781 (2003).

182 *See, e.g.*, Printz v. United States, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting). Writing for the majority, Justice Scalia vigorously objected to Justice Breyer's citation to foreign sources. *Id.* at 921 n.11.

founding. If applied more frequently, this approach could lead the Court to rely on international norms in other areas, such as socio-economic rights.

b. *Romer v. Evans*

The majority in *Romer*[183] also adopted a South African style approach. The Court ruled that Colorado violated equal protection when its citizens enacted, by referendum, a state constitutional amendment removing all anti-discrimination protections for homosexuals.[184] The Court held that the amendment was based on animosity towards homosexuals and therefore failed rational basis review.[185]

The Court's analytical starting point was significant. The Court rejected the argument that Colorado had the legal right to repeal statutory protections it enacted. Instead, the Court assumed Colorado had a positive constitutional obligation to continue protecting all of its citizens—including homosexuals. The South African Constitution embraces just this kind of positive constitutional obligation.

As Kimberlé Crenshaw and Gary Peller noted, "The majority's construction of a baseline of general protection against discrimination for everyone is based on an outright reversal of the common law construction."[186] Louis Seidman said, "*Romer* seems to impose an affirmative constitutional requirement on jurisdictions to protect gay people from private discrimination, at least so long as they maintain comprehensive protection for other groups."[187] Seidman asserted that *Romer* would have "potentially far-reaching consequences," particularly in its use of a heightened form of rational basis review.[188] Jefferson Powell said that *Romer*'s recognition that the government has affirmative duties to

183 517 U.S. 620 (1996).

184 *Id.* at 635–36.

185 *Id.* at 632.

186 Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1709 (1998). *See also Leading Cases*, 110 HARV. L. REV. 155, 165 (1996).

187 Louis Michael Seidman, Romer's *Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 82. He also added:

> The collapse of the ideal of constitutional neutrality is painfully obvious on even a superficial reading of *Romer*. Because government nonintervention is not a natural state of affairs, the Court, in good liberal activist fashion, takes the general regime of government-mandated antidiscrimination as a baseline. It claims that it is enforcing the neutrality requirement by insisting that gay people receive the same benefits from antidiscrimination policy accorded to other groups.

Id. at 100–01.

188 *Id.* at 84–85.

protect citizens is consistent with longstanding equal protection doctrine.[189]

Moreover, *Romer* is not unique. There is case law from the anti-*Lochner*, post economic substantive due process era, which assumed government has affirmative obligations. For example, in *West Coast Hotel v. Parrish*,[190] the Court suggested that if the government lacked a minimum wage law, taxpayers would have to help more destitute people, which would essentially amount to a subsidy for low paying businesses.[191]

Romer's view that the government has an affirmative duty to aid subordinated groups, and *Atkins*' reliance on international norms, sound more like South African Constitutional Court decisions than like the United States Supreme Court's decisions in *Dandridge*, *Rodriguez*, and *Harris*.

V. CONCLUSION

The United States Constitution is the oldest written nation-governing charter in the world. Many Americans probably assume it is the best constitution possible.[192] Yet perhaps it is time that we Americans become less self-centered. Many countries, like South Africa, have adopted truly modern constitutions. These documents typically contain a comprehensible, detailed list of enumerated rights based on generally accepted international human rights norms, unlike the United States Constitution. The judiciary in these countries has been entrusted with interpreting these new provisions. The United States Supreme Court and American scholars could learn much from the South African Constitutional Court's socio-economic decisions. Now seems like a particularly good time for the Court to open itself to well reasoned foreign jurisprudential approaches.

189 H. Jefferson Powell, *The Lawfulness of* Romer v. Evans, 77 N.C. L. REV. 241, 243 (1998).

190 300 U.S. 379, 399 (1937) ("The community is not bound to provide what is in effect a subsidy for unconscionable employers.").

191 *Id.*

192 This may reflect a certain inability to see the problems being created by the current United States Supreme Court's constitutional jurisprudence in numerous areas. For example, federal appellate judge, and former law professor, John Noonan has harshly criticized the Court's recent federalism decisions as betraying conservative jurisprudential principles. JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER, THE SUPREME COURT SIDES WITH THE STATES (2002). Moreover, *Bush v. Gore*, 531 U.S. 98 (2000), left the Court vulnerable to criticisms that the decision was political in nature, rather than legal. *See, e.g.*, VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001).

The Strange Career of Commercial Speech

*Earl M. Maltz**

I. INTRODUCTION

The evolution of the constitutional doctrine of commercial speech[1] is unique among economic rights. Throughout our constitutional history, conservative justices on the Supreme Court have been the guardians of expansive reading of the Takings Clause,[2] the Contracts Clause,[3] and economic substantive due process generally.[4] When judicial restraint has been the hallmark of conservative jurisprudence, the scope of these rights has been greatly diminished.

The course of the development of commercial speech doctrine has been quite different. The initial impetus for the strong constitutional protection of commercial speech came from the more liberal members of the Burger Court. During this period, the more conservative justices sought to either limit that protection or exclude regulations of commercial speech from First Amendment[5] protection altogether. In the last decade, by contrast, the dynamic has become more complicated. While voting patterns have not been entirely uniform, the conservative members of the Court have become the more vigorous champions of commercial speech.

This article will discuss and analyze the changing dynamic of the Court's commercial speech jurisprudence. It will begin with a brief overview of the development of commercial speech doctrine generally, focusing particularly on the problems associated with advertisements of socially undesirable products. Using the changing views of Chief Justice William H. Rehnquist as an exemplar, this article will then examine the evolution of the conservative approach to commercial speech cases. Finally, it will situate the

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1 While the Court has not clearly defined commercial speech, it has noted that an advertisement for a specific product, motivated by the economic interest of the speaker, is almost certainly commercial speech. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983).

2 U.S. CONST. amend. V.

3 *Id.* art. 1, § 10, cl. 1.

4 *Id.* amend. XIV, § 1.

5 *Id.* amend. I.

changing dynamic of commercial speech doctrine in the more general evolution of conservative constitutional jurisprudence.

II. An Overview of Commercial Speech

At the time Warren Burger was appointed Chief Justice,[6] the decision in *Valentine v. Chrestensen*[7] was generally viewed as having established the rule that the First Amendment did not impose any significant restrictions on government regulation of commercial speech.[8] Indeed, constitutional challenges to such restrictions often were not conceptualized in First Amendment terms at all. *Williamson v. Lee Optical Co.*[9] is a classic example from the Warren era.[10] *Lee Optical* involved a constitutional challenge to a state prohibition on the advertisement of eyeglass frames.[11] Viewing the claim in substantive due process terms, the Court unanimously rejected the challenge, applying the most lenient version of the rational basis test.[12]

By the mid-1970s, however, two quite different developments combined to undermine the continued vitality of the *Valentine* principles. The first of these developments was a change in the political climate surrounding limitations on commercial speech. At the time they were adopted, regulations such as those challenged in *Lee Optical* were seen as serving the public interest by enhancing professionalism and preventing inappropriate competition. However, as the twentieth century progressed, regulations like those in *Lee Optical* were increasingly viewed as devices by which special interests shielded themselves from the rigors of the marketplace, thereby depriving the public of the benefits of competition.

The second development was doctrinal. During the Warren era, the liberal justices had developed an increasingly libertarian view of free speech.[13] In particular, these justices evinced an increasing hostility to the exclusion of specific categories of speech

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6 Chief Justice Warren E. Burger was sworn into the Court on June 23, 1969, and retired on September 26, 1986.

7 316 U.S. 52 (1942).

8 Robert E. Riggs, *The Burger Court and Individual Rights: Commercial Speech as a Case Study*, 21 Santa Clara L. Rev. 957, 971 (1981) (surveying the early development of the law of commercial speech).

9 348 U.S. 483 (1955) (upholding an Oklahoma statute prohibiting the advertising or sale of eyeglass frames and lenses without a prescription).

10 Chief Justice Earl Warren was sworn into the Court on October 5, 1953, and retired on June 23, 1969.

11 348 U.S. at 484–85.

12 *Id.* at 491. Under rational basis review, the challenged classification must be rationally related to a legitimate government purpose. Laws evaluated under this level of review are presumptively constitutional.

13 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (extending constitutional protection to defamatory speech directed at government officials).

from First Amendment protections.[14] A blanket exception allowing government regulation of commercial speech ran counter to this trend.

These themes came together in the watershed decision of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[15] In that case, with only Justice Rehnquist dissenting, the Court invalidated a state statute that prohibited pharmacists from advertising the prices they charged for prescription drugs.[16] Writing for the Court, Justice Blackmun first observed that in other contexts, the First Amendment had been held to protect speech that is carried in a form that is sold for profit.[17] The only question remaining, therefore, was whether purely commercial speech was entitled to First Amendment protection. In concluding that the First Amendment did protect the advertising in *Virginia Pharmacy*, Justice Blackmun focused primarily on the interest of the consumer in receiving product information, declaring:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[18]

He sounded a similar theme in rejecting the claim that the prohibition was necessary to preserve the professionalism of pharmacists and to protect the public from those who would offer inferior service at low prices:

> There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . [T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.[19]

Virginia Pharmacy clearly sounded the death knell for the theory that commercial speech lacked all First Amendment pro-

14 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447, 449 (1969) (holding that a Ku Klux Klan leader's racist remarks were protected by the First Amendment unless intended to incite imminent unlawful acts and likely to do so).

15 425 U.S. 748 (1976).

16 *Id.* at 773.

17 *Id.* at 761.

18 *Id.* at 765.

19 *Id.* at 770.

tection. However, the majority also suggested that states might have wider latitude to regulate commercial speech than other types of communication, specifically noting that states could take steps to suppress false or misleading commercial advertising.[20] Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[21] the Court established a four prong standard of review for regulations of commercial speech:

> For commercial speech to come within [the protection of the First Amendment] it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[22]

In the wake of *Virginia Pharmacy* and *Central Hudson*, the Burger Court was often sympathetic to First Amendment challenges to restrictions on commercial speech. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[23] was a prominent exception. *Posadas* involved a dispute over the application of the *Central Hudson* test to a Puerto Rican statute that prohibited local casinos from advertising their facilities to residents of Puerto Rico.[24] A closely-divided Court rejected a First Amendment challenge to this restriction.[25] The majority opinion began by arguing that the Puerto Rican government had a substantial interest in limiting demand for gambling among its citizens and that the inhibition on advertising directly served that interest.[26] The majority then rejected claims that the legislature could serve its interest without restricting speech by either financing a counter-advertising campaign or banning casino gambling altogether. The Court asserted, "[w]e think it is up to the legislature to decide whether or not . . . a 'counterspeech' policy would be as effective in reducing the demand for casino gambling"[27] and observed that "it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising."[28] Noting that government regulation of socially undesirable prod-

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20 *Id.* at 771.

21 447 U.S. 557 (1980) (striking down as overly restrictive a state's ban on an electrical utility's promotional advertising).

22 *Id.* at 566.

23 478 U.S. 328 (1986); *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (allowing states to limit in-person solicitation by attorneys).

24 *Id.* at 332–33.

25 *Id.* at 344.

26 *Id.* at 341–42.

27 *Id.* at 344.

28 *Id.* at 346 (emphasis in original).

ucts had historically ranged from outright prohibition to restrictions on the stimulation of demand, the Court likened the regulation in *Posadas* to limitations on the promotion of alcohol and tobacco, and concluded that "[t]o rule out the latter, intermediate kind of response [reflected in the restriction on advertising] would require more than we find in the First Amendment."[29]

Posadas was the high water mark of attempts to limit the scope of the protection for commercial speech in the post-*Virginia Pharmacy* era. However, its vitality as precedent proved fleeting. The process of eroding the authority of *Posadas* began in 1995, with the decision in *Rubin v. Coors Brewing Co.*[30] *Rubin* was a challenge to the constitutionality of a provision of the Federal Alcohol Administration Act that prohibited beer labels from displaying alcohol content.[31] A unanimous Supreme Court held that this provision violated the First Amendment.[32] In defending the statute, the federal government argued that the restriction was justified by the need to prevent beer manufacturers from engaging in "strength wars"—competition in the beer market on the basis of the alcoholic content.[33] Such a competition, the government reasoned, would lead to an increase in alcoholism and its attendant social costs.[34] Writing for the Court, Justice Clarence Thomas conceded that this interest was sufficiently weighty to satisfy the second prong of the *Central Hudson* analysis.[35] However, noting that the other aspects of the regulatory scheme allowed, and in some cases required, manufacturers to indicate the strength of alcoholic beverages, Justice Thomas contended that "the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve [the purpose of curtailing strength wars]."[36] He also argued that the government could have adopted less intrusive means to achieve this goal.[37] Thus, he concluded that the labeling ban failed to satisfy both the third and fourth prongs of *Central Hudson*.[38]

Given that the holding in *Rubin* was, at least on its face, based on the idiosyncrasies of the Federal Alcohol Administration Act,[39] Justice Thomas did not feel constrained to make more than a passing reference to *Posadas*.[40] However, the following year,

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29 *Id.* at 347.
30 514 U.S. 476 (1995).
31 *Id.* at 480–81.
32 *Id.* at 491.
33 *Id.* at 483.
34 *Id.* at 485.
35 *Id.*
36 *Id.* at 489.
37 *Id.* at 491.
38 *Id.* at 490–91.
39 *Id.* at 491.
40 *Id.* at 485.

Posadas met its demise in *44 Liquormart, Inc. v. Rhode Island*.[41] *44 Liquormart* was a challenge to a pair of Rhode Island statutes that, taken together, essentially prohibited advertising the prices of alcoholic beverages.[42] The state asserted that the limitations were justified as a means of limiting the demand for alcoholic beverages—an interest that the Court once again conceded was sufficiently weighty to satisfy the second prong of the *Central Hudson* analysis.[43] Against this background, eight justices agreed that the case was analogous to *Posadas*. Nonetheless, the justices unanimously held that the Rhode Island statutes were unconstitutional, overruling *Posadas*.[44] While disagreeing on the precise standard of review to be applied to the Rhode Island statutes, all of the justices concluded that the Court should not defer to the state's claim that its regulations directly furthered the asserted interest and that the statutes were no more restrictive than necessary to serve that interest.[45] Instead, the Court conducted a more searching inquiry and determined that the ban on price advertising unduly restricted the First Amendment rights of the beer merchants.[46]

In 2001, the principles underlying the decision in *44 Liquormart* were reiterated and strengthened in *Lorillard Tobacco Co. v. Reilly*.[47] In *Lorillard*, the Court was faced with a First Amendment challenge to Massachusetts regulations that prohibited all outdoor advertising of tobacco products within 1,000 feet of any school or playground. The statutes also prohibited point of sale advertising of such products placed lower than five feet from the ground within that same radius.[48] The majority conceded that "'tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States'"[49] and that there was clear evidence of a link between advertising and an increase in the use of tobacco products by young people.[50] Thus, the majority concluded that the restrictions on outdoor advertisements at least passed muster under the third prong of the *Central Hudson* analysis.[51] Nonetheless, a deeply divided Court struck down both regulations, with the majority observing that in some urban areas the regulations would ban virtually all outdoor advertisements of tobacco products. The

41 517 U.S. 484 (1996).
42 *Id.* at 489.
43 *Id.* at 504.
44 *Id.* at 489, 509–10.
45 *Id.* at 507, 516.
46 *Id.* at 507–08, 516.
47 533 U.S. 525 (2001).
48 *Id.* at 534–35.
49 *Id.* at 570 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000)).
50 *Id.* at 561.
51 *Id.*

majority faulted the state Attorney General for failing to make "a careful calculation of the speech interests involved [in the advertising ban]."[52]

III. The Dynamic of Commercial Speech Jurisprudence

On one level, the evolution of the law from *Virginia Pharmacy* through *Central Hudson* and *Posadas* to *44 Liquormart* and *Lorillard* is a fairly prosaic story. When the Court breaks new ground, as it did in *Virginia Pharmacy*, it is not unusual for there to be some hesitancy and even reversal of course before the doctrinal analysis takes on a firm, lasting structure. In the case of commercial speech doctrine, however, the evolution of the Court's approach was accompanied by a dramatic ideological shift. Initially, the rejection of the *Valentine* analysis was a product of liberal constitutional jurisprudence, with conservatives being far more likely to accept limitations on commercial speech, particularly in cases involving the regulation of attorney advertising. The conservative justices have generally remained skeptical of First Amendment challenges to the regulation of advertising by attorneys.[53] More recently, however, the conservatives on the Court have emerged as champions of robust protection for commercial speech—not only in *Lorillard*, but also in other cases involving advertising[54] and cases challenging the constitutionality of government-mandated contributions for the promotion of specific products.[55] By contrast, outside of the area of attorney advertising,[56] the more liberal members of the Court now generally oppose the expansion of protection for commercial speech.

A. The Views of Chief Justice Rehnquist

The changed political dynamic of the Court in commercial speech cases can be traced through the evolution of Chief Justice Rehnquist's approach to the issue.[57] In 1976, then-Justice Rehnquist's views were seen as epitomizing conservative jurisprudence. He also stood alone in rejecting the result in *Virginia Pharmacy*.[58] Analogizing the commercial speech issue to more general problems of substantive due process, Rehnquist attacked the rea-

52 *Id.* at 562.

53 *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

54 *See, e.g.*, Edenfield v. Fane, 507 U.S. 761 (1993) (striking down a state statute prohibiting in-person solicitation by certified public accountants).

55 *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405 (2001).

56 *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding a Florida bar rule prohibiting direct solicitation of prospective personal injury clients within thirty days of their accident).

57 Justice William H. Rehnquist was sworn in on January 7, 1972 as an Associate Justice of the Supreme Court. He was elevated to Chief Justice on September 26, 1986.

58 425 U.S. 748, 790 (1976) (Rehnquist, J., dissenting) (citation omitted).

soning of the majority in language that echoed Oliver Wendell Holmes' famous statement, "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics":[59]

> The Court speaks of the importance in a "predominantly free enterprise economy" of intelligent and well-informed decisions as to allocation of resources. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the [government] to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.[60]

Rehnquist's dissents in cases such as *Bates v. State Bar of Arizona*[61] and *Central Hudson* sounded similar themes. In *Bates*, the Court held that the same principle underlying the holding in *Virginia Pharmacy* required states to allow attorneys to advertise their fees for routine legal services.[62] The three most conservative members of the *Virginia Pharmacy* majority dissented in *Bates*,[63] insisting that legal services could not be standardized in the same manner as pharmaceuticals and that stringent limitations on advertising were justified as a means of preserving the professionalism of lawyers.[64] Rehnquist, while agreeing with these observations, went further and reiterated his objections to *Virginia Pharmacy* asserting that "once the Court took the first step down the 'slippery slope' in *Virginia Pharmacy Board* the possibility of understandable and workable differentiations between protected speech and unprotected speech in the field of advertising largely evaporated."[65] Dissenting in *Central Hudson* three years later, Rehnquist reiterated his view that "the Court unlocked a Pandora's Box when it 'elevated' commercial speech . . . by according it First Amendment protection in *Virginia Pharmacy Board v. Virginia Citizens Consumer Counsel*."[66] He found the holding in *Central Hudson* particularly offensive, contending that "New York's order . . . is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court"[67] and that "by labeling economic regulation of business conduct as a restraint on 'free speech,' [the Court has] gone far to

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59 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

60 *Virginia Pharmacy*, 425 U.S. at 783–84 (Rehnquist, J., dissenting) (citation omitted).

61 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting).

62 *Id.* at 384.

63 Chief Justice Burger, Justice Stewart, and Justice Powell.

64 *Bates*, 433 U.S. at 386–88 (Burger, C.J., concurring in part and dissenting in part); *id.* at 389–405 (Powell, J., concurring in part and dissenting in part).

65 *Id.* at 405 (Rehnquist, J., dissenting in part).

66 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) (citation omitted).

67 *Id.* at 591.

resurrect the discredited doctrine of cases such as *Lochner* . . . ."[68] Not surprisingly, Rehnquist was also the author of the majority opinion in *Posadas*.[69]

However, by 1995, Rehnquist's position had shifted significantly. He joined the majority opinion in *Rubin* where eight justices applied the *Central Hudson* test to strike down a federal statute prohibiting the truthful display of alcoholic content on beer labels.[70] In *44 Liquormart*, Rehnquist joined an opinion by Justice Sandra Day O'Connor—the only other justice remaining from the *Posadas* majority—that, like *Rubin*, rejected the deference shown by the Court in the *Posadas* case, in favor of *Central Hudson*'s requirement that the government "show that the speech restriction directly advances its interest and is narrowly tailored."[71] O'Connor's opinion in *44 Liquormart* concluded that the state had failed to carry its burden of proof.[72] Finally, in 2001, Rehnquist cast a critical vote in support of the majority opinion in *Lorillard*.

Rehnquist's new-found affinity for the protection of commercial speech extends beyond the *Rubin/Lorillard* line of cases. For example, in *Glickman v. Wileman Bros. & Elliott, Inc.*[73] and *United States v. United Foods, Inc.*,[74] he concluded that the government could not compel producers of agricultural products to pay assessments that funded generic advertising of those products.[75] Admittedly, Rehnquist is not as zealous in protecting commercial speech as Justices Scalia and Thomas.[76] Nonetheless, from a jurisprudential perspective, his approach to commercial speech cases has clearly changed dramatically since 1986.

B. Commercial Speech and the Evolution of Conservative Jurisprudence

Chief Justice Rehnquist's changed approach to commercial speech reflects the evolution of conservative constitutional jurisprudence more generally in the late twentieth century. Even in 1976, at a purely political level, conservatives were more likely to be strong supporters of property rights and opponents of govern-

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68 *Id.*

69 478 U.S. 328, 331 (1986).

70 Rubin v. Coors Brewing Co., 514 U.S. 476, 491 (1995).

71 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 532 (1996) (O'Connor, J., concurring in the judgment).

72 *Id.*

73 521 U.S. 457 (1997).

74 533 U.S. 405 (2001).

75 *Glickman*, 521 U.S. at 477–78 (Rehnquist, C.J., joining opinion of Souter, J., dissenting); *United Foods*, 533 U.S. at 416.

76 *See* Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (Rehnquist, C.J., joining opinion of Breyer, J., dissenting).

ment regulation of the economy.[77] However, during this period, conservatives denounced nonoriginalist judicial activism in general as undemocratic and illegitimate, and often argued that the courts should generally defer to the decisions of other branches of government. For example, in 1976, Rehnquist himself asserted:

> To the extent that [nonoriginalist judicial review] makes possible an individual's persuading one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution . . . [it] is genuinely corrosive of the fundamental values of our democratic society.[78]

Even during the Burger era, Rehnquist and the other more conservative members of the Supreme Court did not entirely eschew judicial activism. For example, Rehnquist was a leader in the efforts to revivify both the Contracts Clause[79] and the Takings Clause[80] as significant restrictions on government action. Nonetheless, the philosophy of deference reflected in Rehnquist's early commercial speech opinions was plainly an important theme not only of his personal approach to constitutional adjudication, but also of conservative constitutional jurisprudence generally from the 1960s through at least the end of the Burger era.[81]

Conversely, the activism apparent in Rehnquist's current approach to commercial speech mirrors the increasingly activist tone of conservative jurisprudence that has marked his tenure as Chief Justice. Indeed, in some respects, commercial speech decisions are a better measure of the scope of changes in conservative jurisprudence than other, more widely discussed cases. When the Court is called upon to adjudicate cases that involve core ideological beliefs or have clear political ramifications, even justices with a strong commitment to judicial deference may find their resolve weakening. For example, one cannot draw accurate conclusions about the basic jurisprudential philosophy of the justices of the Taney Court from their positions in *Dred Scott v. Sandford*.[82] Similarly, taken alone, the activist posture of the conservative justices in cases such as *Bush v. Gore*,[83] the affirmative action cases,[84]

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77 *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138–53 (1978) (Rehnquist, J., dissenting).

78 William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976).

79 *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977).

80 *See, e.g.*, *Penn Cent.*, 438 U.S. at 138–53 (Rehnquist, J., dissenting).

81 Justice William H. Rehnquist was sworn in as Chief Justice on September 26, 1986, replacing Chief Justice Warren E. Burger.

82 60 U.S. (19 How.) 393 (1856).

83 531 U.S. 98 (2000) (per curiam).

84 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

or the campaign finance cases[85] could be seen as reflecting idiosyncratic political pressures, rather than indicating their wholesale abandonment of judicial restraint.

The new, aggressive activist position taken by conservative justices in commercial speech cases stands on a different footing from the higher profile political cases. To be sure, some of the commercial speech decisions have important political overtones. For example, the decision in *Lorillard* can plausibly be viewed as simply a skirmish in the long-running legislative and judicial battle over the regulation of tobacco use and advertising. Even so, the political stakes in *Lorillard* were by no means as high as those involved in *Gore*, the affirmative action cases, or the campaign finance decisions. Moreover, it is difficult to conceive of a more prosaic issue than that involved in *United Foods*, wherein Chief Justice Rehnquist and Justices Scalia and Thomas formed the core of the majority concluding that mushroom farmers could not be required to contribute to a fund for advertising mushrooms.[86] While the conservatives on the Court were obviously moved by a general distaste for government coercion of private economic actors, one can hardly imagine a case where the implications for the political and economic system were less consequential. In short, the position of the conservative justices in cases such as *United Foods* is inconsistent with any meaningful commitment to the concept of judicial restraint.

IV. Conclusion

This account of the evolution of commercial speech doctrine highlights the changing dynamic of modern constitutional adjudication. This dynamic is substantially different from that which prevailed for most of the twentieth century, when a significant number of justices generally embraced judicial restraint as an important value in constitutional analysis. For much of the century, liberal justices consistently espoused deference to other branches of government to oppose conservative judicial activism. In the latter part of the twentieth century, by contrast, it was conservatives who raised the banner of restraint as a response to the jurisprudence of the Warren Court and its successors. While conservative commitment to restraint was never complete, it nonetheless clearly influenced the decisions and approaches of some members of the Court during this period.

85 *See, e.g.*, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 626–31 (1996) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 631–48 (Thomas, J., concurring in the judgment and dissenting in part); FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985).

86 533 U.S. 405, 413 (2001).

While both conservatives and liberals continue to accuse each other of undue judicial activism, it seems clear that arguments based on restraint have become purely tactical. Thus, in the commercial speech context, the more liberal justices have no problem voting to strike down virtually all restrictions on attorney advertising,[87] while the conservatives choose to impose stringent limitations on the ability of the states to regulate the advertising of tobacco.[88] The triumph of the activists is thus complete; the only remaining question is which side will ultimately benefit from a regime in which the concept of judicial restraint is now viewed as obsolete. Only one thing is certain: our system of government will be the loser.[89]

87 *See, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (Kennedy, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) (arguing in favor of allowing attorneys to solicit accident victims by letter without regard to any thirty day waiting period).

88 *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571–72 (2001) (Kennedy, J., concurring) (arguing that the *Central Hudson* test gives "insufficient protection to truthful, nonmisleading commercial speech"); *id.* at 572–90 (Thomas, J., concurring in part and concurring in the judgment) (arguing for application of strict scrutiny to government regulation of truthful commercial speech).

89 See EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW (1994) for a more detailed description of the views presented in this paper.

Judicial Abdication and the Rise of Special Interests

*Steven M. Simpson**

The history of the human race is one long story of attempts by certain persons and classes to obtain control of the power of the State, so as to win earthly gratifications at the expense of others.
William Graham Sumner[1]

I. INTRODUCTION

Interest group politics is a problem that has plagued American government since the nation was founded. The Constitution itself was drafted and adopted in large part because of the intractable problems that interest group politics, or the problem of "faction" as James Madison described it, posed for the states under the Articles of Confederation.[2] "Complaints are everywhere heard," Madison stated in *The Federalist Papers* No. 10, "that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[3]

Madison's comment could just as easily be applied to the state of our politics today. Washington, D.C. and the state capitols are filled with lawyers and lobbyists, who work tirelessly to ensure that the special interests they represent will benefit from the myriad new laws and regulations that are passed each year.[4] In short, modern government has a lot to offer, and its constituents are increasingly all too eager to pursue it.[5] As a result, as journalist

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1 WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER 88 (Caxton Printers Ltd. 1954) (1883).

2 *See* THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

3 *Id.*

4 The number of lawyers and lobbyists in Washington, D.C. more than tripled between 1972 and 1987, the number of corporations with Washington, D.C. offices increased tenfold between 1961 and 1982, and the number of associations quadrupled. *See* JONATHAN RAUCH, GOVERNMENT'S END: WHY WASHINGTON STOPPED WORKING 42, 46, 84, 86–87 (1999).

5 *Id.* at 57–59.

Jonathan Rauch puts it, "[g]roupism has exploded, not only along ethnic lines but along all lines."[6]

The experience of the Institute for Justice confirms this state of affairs. For more than a decade now the Institute has litigated on behalf of individuals seeking to protect their rights to property and economic liberty from onerous and unreasonable regulations, and in nearly all of its cases, the Institute's clients are opposed by entrenched private interests who benefit from the laws the clients challenge.[7] Clients of the Institute have challenged laws preventing individuals from selling caskets without a funeral director's license;[8] barring African hair braiders from plying their trade without becoming licensed cosmetologists;[9] banning independent taxi cab, jitney van, and limousine companies from competing in metropolitan markets;[10] prohibiting wineries from shipping their products directly to consumers rather than through licensed wholesalers;[11] and taking private property through eminent domain and handing it over to private developers.[12] In each of these cases, the challenged laws directly benefited some powerful or entrenched private interest. In several of them, the private interests intervened in the cases to defend the laws.[13] In short, despite the efforts of the framers to combat it, faction is still a serious problem today.

The purpose of this article is to examine the role that courts have played in exacerbating the problem of faction and its modern incarnation, special interest legislation. This article argues that special interest legislation flourishes when courts refuse to play their proper role of policing the political branches of government. The problem of special interest legislation is most evident in the regulation of economic affairs and property. As Jonathan Rauch puts it, people pursue government favors for the same reason that Willie Sutton pursued banks: because that's "where the money is."[14] Yet, paradoxically, this is the area in which courts have assigned themselves the smallest role. The predictable result is that

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6 *Id.* at 40.

7 For additional information about the Institute's cases and its clients, see http://www.ij.org.

8 Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).

9 Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260 (S.D. Cal. 1997).

10 *See, e.g.*, Jones v. Temmer, 829 F. Supp. 1226 (D. Colo. 1993).

11 Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002).

12 *See, e.g.*, Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998).

13 *See, e.g.*, Swedenberg v. Kelly: *Basic Facts About the Case*, Institute for Justice, *at* http://www.ij.org/cases/economic/nyc_wine.shtml (last visited Mar. 10, 2003) (wine wholesalers immediately intervened once suit was filed); *Case Summary: Las Vegas Limousines*, Institute for Justice, *at* http://www.ij.org/cases/economic/lasvegas_text.shtml (licensed limousine companies were permitted to intervene in *Clutter v. State of Nevada*).

14 RAUCH, *supra* note 4, at 52–53.

the problem of faction and its primary manifestation, special interest legislation, has grown. One solution, this article argues, is for courts to play a more active role in striking down legislation that benefits private interests at the expense of everyone else.

While the framers may or may not have agreed with a more active role for the judiciary in dealing with special interest legislation, they certainly would have predicted the frequency with which such legislation is passed today. For Madison, wealth and property were both the primary causes of faction—because they lead to differing, and often opposing, interests in society—and one of the primary concerns of government.[15] Because government was necessarily involved in the protection and regulation of these rights and interests,[16] "the spirit of party and faction" was involved in the "necessary and ordinary operations of government."[17] In short, governments control things that a large number of people would like to see controlled for their own benefit. The potential for abuse is obvious. As Madison put it in a letter to Thomas Jefferson, "[w]herever there is an interest and power to do wrong, wrong will generally be done."[18] This indeed was the seminal problem with which the framers were concerned. As Madison famously wrote in *The Federalist Papers* No. 51:

> [W]hat is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[19]

The framers' solution was to be found in structural constraints. They divided power among three competing branches of government and provided each with important checks on the powers of the others.[20] Power was also divided between state and fed-

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15 THE FEDERALIST No. 10, *supra* note 2, at 78–79. *See also* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* JAMES MADISON: WRITINGS 142, 150 (Jack N. Rakove ed., 1999) [hereinafter Madison, 1787 Letter] (factions form around interests relating to wealth and property).

16 *See* James Madison, Property, *in* JAMES MADISON: WRITINGS 515, 515 (Jack N. Rakove ed., 1999) [hereinafter Madison, Property] ("Government is instituted to protect property of every sort . . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.").

17 THE FEDERALIST No. 10, *supra* note 2, at 78–79.

18 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* JAMES MADISON: WRITINGS 418, 421 (Jack N. Rakove ed., 1999) [hereinafter Madison, 1788 Letter]. *See also* Madison, 1787 Letter, *supra* note 15, at 151–52 (neither honesty nor character can be relied upon to prevent majorities from oppressing minorities).

19 THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

20 *Id.* at 321–23. *See also* James Madison, Government of the United States, *in* JAMES MADISON: WRITINGS 508, 508 (Jack N. Rakove ed., 1999) [hereinafter Madison, Govern-

eral governments, and the whole scheme was spread over an area that encompassed a variety of diverse interests that would tend to cancel one another out, decreasing the likelihood that any one faction would gain a foothold.[21] Finally, the framers included a secondary level of protection for liberty in the form of a Bill of Rights.[22]

In the twentieth century, these structural constraints have broken down, largely as a result of the courts' refusal to enforce them. The original constitutional plan gave Congress narrow and discrete regulatory powers.[23] Today, courts interpret the limitations on power as narrow and discrete, and Congress's powers to regulate as virtually plenary.[24] State regulatory power has grown as well.[25] The impact of the growth of government power on individual rights has been profound. Today there are few areas of life that government regulation does not affect in some way, and fewer still that government regulation is barred in principle from affecting.

One result is the political spoils system. Give government a great deal of power to control wealth and property, and people will soon be seeking benefits for themselves. Indeed, the modern view of government, with its emphasis on providing goods and services and solving problems, virtually ensures this.[26] Government is often viewed as a gigantic private services organization with the voters and taxpayers as its customers.[27] It should not be surprising that the customers constantly clamor for more and better services and politicians constantly clamor to provide them. In a democracy, it is the politicians' job to react to voters' concerns, and, like anyone, politicians want to remain employed.[28] Thus, the modern campaign finance movement, in its efforts to remove

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ment] ("Power being found by universal experience liable to abuses, a distribution of it into separate departments, has become a first principle of free governments.").

21 THE FEDERALIST NO. 10, *supra* note 2, at 83–84.

22 U.S. CONST. amends. I–X.

23 U.S. CONST. art. I, § 8. *See also infra* notes 59–69 and accompanying text.

24 *See infra* notes 70–76 and accompanying text.

25 *See infra* note 71 and accompanying text.

26 RAUCH, *supra* note 4, at 3, 47–48.

27 GORDON TULLOCK ET AL., GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 71 (2002).

28 *See* Todd R. Overman, *Shame on You: Campaign Finance Reform Through Social Norms*, 55 VAND. L. REV. 1243, 1249–50 (2002) (stating that public choice theory argues that legislative behavior is motivated by the desire to get reelected, and that interest group politics play a key role in this process). Further, as public choice economists have reminded us, if it is cost effective for businesses to gain a competitive advantage through government favors rather than by hard work, that is what they will often do, especially if that is what their competitors are doing. *See* TULLOCK, *supra* note 27, at 45–51.

money from politics, has it exactly backwards.[29] The problem is not that money controls politics, but that politics controls money.

Modern reform efforts, to the extent they focus on the demand for government favors, as campaign finance laws do, are thus doomed to fail.[30] As Madison recognized, the causes of faction are "sown in the nature of man"[31] and a few new laws are not likely to change this. The solution to interest group influence lies not in attempting to resist the natural desire of human beings to influence the political process, much less their right to do so, nor to rely on legislators to resist that influence, but to control the results of that influence. We cannot, as Madison understood, control the causes of faction, but we can control its effects.[32] To do so, we must recall the framers' original plan. We must, if not actually return to first principles, at least start paying attention to them.

One way to do that is to reexamine the role of courts. The framers envisioned the courts as a significant check on the power of legislatures, yet in the area of property and economic rights, they have for much of the twentieth century been largely absent. While courts still accord substantial protection for certain civil rights such as rights to free speech and privacy,[33] they give short shrift to economic and property rights.[34] Today, it is extraordinarily difficult to convince a court to overturn laws that infringe such rights. As Bernard Siegan has put it, the rational basis review by which the Supreme Court has instructed such laws to be judged requires a law to be upheld unless the legislature was "in a complete state of lunacy" when the law was passed.[35] State courts have by and large followed the same approach.[36]

This article seeks to make the case that a large and active government requires an active judiciary to counter its excesses—or, at the least, to urge recognition of the fact that without an active judiciary, politics will be ruled by faction and special interest legislation. Part II introduces two cases the Institute for Justice

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29 *See* Tom Delay, Remarks at a Policy Forum for the Future of Campaign Finance Reform (July 20, 2000), Cato Institute (transcript discussing how to effectively reform campaign finances) (on file with Chapman Law Review).

30 Overman, *supra* note 28, at 1246–47.

31 THE FEDERALIST No. 10, *supra* note 2, at 79.

32 *Id.* at 80.

33 *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990); Katz v. United States, 389 U.S. 347 (1967).

34 *See infra* notes 72–84 and accompanying text.

35 BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 121, 265–66 (1980) [hereinafter SIEGAN, ECONOMIC LIBERTIES].

36 *See, e.g.*, Aviation W. Corp. v. Wash. State Dep't of Labor & Indus., 980 P.2d 701 (Wash. 1999) (en banc) (holding that the Department of Labor was not required to explain its rationale in passing a regulation against smoking in private workplaces since the regulation could have been passed for a rational reason); Yeoman v. Commonwealth, 983 S.W.2d 459 (Ky. 1998) (holding that a tax provision in a health care reform bill was rationally related to a state interest). *See also* cases cited *infra* note 84.

has litigated that place the limitations of the courts' extremely deferential approach to economic and property rights in sharp relief. Part III then reviews in greater detail the changes in constitutional law that led to this extremely deferential approach, as well as its rationales, and argues that it is inconsistent with the framers' constitutional plan. Part IV examines the consequences of judicial abdication and argues that it adversely impacts not only the political process, by increasing the likelihood of special interest legislation, but the judicial process as well. Lastly, Part V suggests a better approach that would limit the ability of legislatures to pass laws that benefit particular private parties at the expense of everyone else.

II. A Case Study in Special Interest Legislation

Nathaniel Craigmiles did not set out to make a political point or to take on entrenched interests in his community. Neither did Kim Powers. Both are entrepreneurs who saw a need for a product for which there is obvious demand but little affordable supply and they attempted to fill it. They sell caskets. Craigmiles operates the Casket Supply in Chattanooga, Tennessee.[37] Powers, along with her business partner, Dennis Bridges, operates Memorial Concepts Online out of Ponca City, Oklahoma.[38] Both sell caskets for substantially less than funeral homes, which are their primary competitors. This sounds like a viable business, except for one thing. Laws in both Tennessee[39] and Oklahoma[40] prevent anyone other than licensed funeral directors from selling caskets. Becoming a licensed funeral director is not cheap. Potential licensees in Tennessee and Oklahoma must devote two years to a combination of schooling and apprenticeship at a cost of roughly $10,000 in tuition and more in lost income.[41] The result was that neither Craigmiles nor Powers could afford to go into business offering a product for which there was an obvious market. Both decided to challenge these laws in court.

Craigmiles and Powers were up against an industry with a long history of attempting to consolidate economic power through the use of licensing laws. Like many industries in this country, the funeral industry organized in the late nineteenth century and supported professional licensing laws.[42] The putative rationale for licensing laws was, of course, public health, but the funeral indus-

37 Craigmiles v. Giles, 110 F. Supp. 2d 658, 660 (E.D. Tenn. 2000).

38 Powers v. Harris, No. CIV-01-445-F, slip op. at 4 (W.D. Okla. Dec. 12, 2002).

39 Tenn. Code Ann. §§ 62-5-101(3)(A)(ii), 62-5-303 (Michie 1997 & Supp. 2002).

40 Okla. Stat. Ann. tit. 59, §§ 396.2.2(d), 396.2.10, 396.3(A), 396.6(A) (West 2000).

41 *See Craigmiles*, 110 F. Supp. 2d at 660; Tenn. Code Ann. § 62-5-305 (1997 & Supp. 2002); *Powers*, slip op. at 5, 9–10; Okla. Stat. Ann. tit. 59, §§ 396.3(B) (West 2000), 396.11(B) (West 2000 & Supp. 2003); Okla. Admin. Code § 235:10-3-1 (2000).

42 Lawrence M. Friedman, A History of American Law 455–56 (1985).

try, like many industries at the time, seems to have been much more interested in self-protection.[43] According to historian Lawrence Friedman, licensing "was all part of one general movement, to give tone and economic strength to the occupation, in short, to 'professionalize' these doctors of the dead."[44]

Laws restricting casket sales to licensed funeral directors are a more recent phenomenon, but their benefit to funeral directors is clear. Casket sales are extremely lucrative for funeral directors. They are by far the most expensive item in a funeral and offer the highest profit margin for the funeral director.[45] It is not uncommon for markups to run as high as 500 percent, meaning that funeral directors can charge as much as $3000 for a casket that wholesales for around $600.[46] Casket retailers, by contrast, offer the same types of caskets for substantially less.[47] Not surprisingly, funeral directors are not terribly fond of this competition. This is nothing new. In 1884, the National Funeral Directors Association resolved to "condemn the manufacture of covered caskets at a price less than fifteen dollars for an adult size."[48] What is relatively new is that funeral directors have managed to get this sentiment enacted into law.[49]

This is not to say there are never good reasons for licensing laws or that there are not at least arguable health and safety or

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43 According to Lawrence Friedman, the point of much professional licensing was "to protect local merchants and drive away . . . pesty [sic] competitors." FRIEDMAN, *supra* note 42, at 455. While the justification was often public health, "the real motivation, or part of it, was economic. Trade groups were anxious to control competition." *Id.* at 456. Thus, regulatory boards were usually made up of members of the licensed profession whose "aim was to drive out marginal competition, to raise the prestige of the trade, and to move toward the status of a self-perpetuating guild, made up of respectable professionals." *Id.* at 456–57. For further historical, economic, and legal analysis of occupational licensing, see DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001) and S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA (1987).

44 FRIEDMAN, *supra* note 42, at 456.

45 Miriam Horn, *The Deathcare Business: The Goliaths of the Funeral Industry Are Making Lots of Money Off Your Grief*, U.S. NEWS & WORLD REP., Mar. 23, 1998, *available at* 1998 WL 8126504.

46 *Id.*

47 Craigmiles v. Giles, 110 F. Supp. 2d 658, 664 (E.D. Tenn. 2000).

48 JESSICA MITFORD, THE AMERICAN WAY OF DEATH REVISITED 158 (Alfred A. Knopf, Inc. 1998) (1963).

49 Many of the legislators who sponsored the bill that restricted sales of caskets in Tennessee to licensed funeral directors were themselves funeral directors. At least one argued during the debates on the bill that the purpose of the restriction was to prevent funeral directors from losing income from casket sales. *See* Transcript of taped floor debates of the Tenn. Legis. on S.B. 1452, Pub. ch. 553 (Mar. 14, 1972), at 22 (comments of Rep. Coffey) (on file with Chapman Law Review). In a similar vein, one of the members of the Tennessee funeral board, himself a licensed funeral director, testified for the State during the trial in *Craigmiles* that competition from unlicensed casket retailers would cause licensed funeral directors to try to increase prices of services to make up for their losses. *See* Transcript of Proceedings in *Craigmiles v. Giles*, No. 1:99-CV-304 (E.D. Tenn. Aug. 9, 2000), at 286 (testimony of Robert Gribble). Alternatively, the same premise is expressed in the Tennessee floor debate transcript, without reference to the *Craigmiles* case.

consumer protection rationales for licensing funeral directors. But having a rationale for licensing funeral directors is not the same as having a rationale for granting them the exclusive right to sell caskets. Shorn of all the fancy trimmings, a casket is really just a box. It is essentially a consumer item the purchase of which, like many consumer items, is governed by considerations of price and style.[50] Neither Oklahoma nor Tennessee regulates the manufacture or use of caskets. It is permissible in both states to use any casket one wants or no casket at all, to have one built by a friend or to build one yourself.[51] About the only thing a person may not do with a casket in Tennessee or Oklahoma is sell it without a license.

It is probably safe to say that there is less specialized knowledge and less danger to consumers involved in a casket purchase than there is in the purchase of a toothbrush or a mattress. Unfortunately, the reasons states have not restricted sales of the latter to licensed dentists or chiropractors have less to do with inherent limitations on the power of government than on political reality. At any given moment, toothbrushes and mattresses have a broader constituency of consumers than caskets, and dentists and chiropractors are probably doing fine without monopolizing trade in these items. But that doesn't mean there aren't equally plausible reasons, in theory anyway, for restricting the sale of toothbrushes and mattresses in the same manner that sales of caskets are restricted in many states. That is, one can certainly imagine that the threat of having one's chiropractic or dentistry license revoked might help to ensure minimum standards of conduct in selling mattresses or toothbrushes and perhaps even motivate sellers to inform consumers about the problems of gum disease or back pain. One can imagine the same remedial considerations applying to the sale of caskets. Indeed, the states and the funeral directors imagined precisely this in defending such laws.

The problem, as both Craigmiles and Powers discovered when they challenged these laws, is that the constitutional standard for judging them allows—indeed requires—courts to imagine rationales for the laws right along with those who defend them.[52] Their lawsuits reveal much about the problems with the courts' approach to economic liberty. Before we turn to their cases, though, it is useful to examine this approach and its genesis in a bit more detail.

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50 Powers v. Harris, No. CIV-01-445-F, slip op. at 5, 9–10 (W.D. Okla. Dec. 12, 2002); *Craigmiles*, 110 F. Supp. 2d at 662–63.

51 *See* Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002); *Craigmiles*, 110 F. Supp. 2d at 662–63; *Powers*, slip op. at 11.

52 *Craigmiles*, 110 F. Supp. 2d at 662; *Powers*, slip op. at 15.

III. The Genesis of Judicial Abdication

Other than in a few limited circumstances—where states attempt to regulate interstate commerce, for instance, or where a particular activity can be characterized as free speech—modern courts have essentially committed the regulation of economic activity and property to legislative discretion. As the Supreme Court stated in *Nebbia v. New York* nearly seventy years ago:

> [A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.[53]

A few years after the decision in *Nebbia*, the Court made clear that the same essential approach applied to federal regulations of economic affairs as well.[54]

The founders were a bit more committed to the protection of economic and property rights. They gave us a Constitution that was designed to ensure that those rights, among others, would be protected, primarily from abuses by the legislature, but more generally from abuses by any branch of government.

As James Madison stated in *The Federalist Papers* No. 10, protection of property rights "is the first object of government."[55] By property rights, Madison did not mean rights to tangible things only, but to "every thing to which a man may attach a value and have a right."[56] Within the sweep of this broad concept, Madison included an individual's rights to his "opinions and the free communication of them," "the safety and liberty of his person," and "the free use of his faculties and free choice of the objects on which to employ them."[57] That Madison included economic liberty within the rights of individuals is clear from his views on how governments often abuse rights:

> That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest . . . where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupa-

53 291 U.S. 502, 537 (1934).
54 United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).
55 The Federalist No. 10, *supra* note 2, at 78.
56 James Madison, Property, *supra* note 16, at 515.
57 *Id.*

> tions, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.[58]

For the framers, the branch of government most likely to abuse rights was the legislature. According to Madison, "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex" and it is therefore "against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."[59] To protect against the abuse of power, both legislative and otherwise, the framers established a constitutional system in which the powers of government were strictly limited and divided. As an additional protection, they added a Bill of Rights.[60]

Both James Madison and Alexander Hamilton, the primary authors of *The Federalist Papers*, envisioned a significant role for the courts in restraining government and protecting individual liberty.[61] Writing in *The Federalist Papers* No. 78, Hamilton described the courts as "bulwarks of a limited Constitution against legislative encroachments."[62] In Hamilton's view, "the courts were designed to be an intermediate body between the people and the legislature,"[63] both to enforce constitutional limits on the power of the legislature and to guard the rights of individuals.[64] As Hamilton put it, constitutional limitations on the legislative power:

> [C]an be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.[65]

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58 *Id.* at 516.

59 THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961). Thomas Jefferson concurred with Madison's view of the danger of legislatures, as did a number of delegates to the Constitutional Convention. *Id.* at 310–11 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA).

60 U.S. CONST. amends. I–X.

61 Madison expressed his view of the role of the courts in Federalist No. 44, where, in answering the claim that Congress might abuse its power under the Necessary and Proper Clause, Madison responded:

> I answer the same as if they should misconstrue or enlarge any other power vested in them . . . the same, in short, as if the State legislatures should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts . . . .

THE FEDERALIST NO. 44, at 285–86 (James Madison) (Clinton Rossiter ed., 1961).

62 THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

63 *Id.* at 467.

64 *Id.* at 467–69.

65 *Id.* at 466.

Accordingly, judicial power had to be coextensive with that of the legislature. Wherever legislatures can legislate, in other words, the courts can and should be there to restrain them and to protect the rights of the people.[66]

For much of the country's history, constitutional adjudication proceeded on the assumption that government powers were narrow and individual rights were broad, and that courts had a significant role in maintaining this basic framework. Courts first asked whether Congress was empowered to legislate in a particular area and second whether the means chosen were both necessary and proper—which is to say whether they were appropriately narrow and did not violate individual rights.[67] Adjudication of state laws proceeded in similar fashion, with courts determining whether a particular law was within the state's police power and whether it violated an individual's rights.[68] To be sure, this is a somewhat oversimplified version of an approach to constitutional adjudication that was not always consistently applied. At bottom, however, government powers were generally regarded during the late eighteenth and nineteenth centuries as limited in principle to those specifically enumerated on the federal level and those necessary and appropriate to bring order to society and protections to individuals from nuisance and harm at the state level.[69] Consis-

66 *Id.* at 467–68 (discussing the absurdity of the notion that the people's representatives could exercise power that the people did not delegate to them and contending that the judiciary's role is to ensure that this does not happen). Madison echoed this point in his speech to the Virginia ratifying convention. James Madison, Speech in the Virginia Ratifying Convention on the Judicial Power, *in* JAMES MADISON: WRITINGS 393, 394 (Jack N. Rakove ed., 1999) [hereinafter Madison, Speech in the Virginia Ratifying Convention] ("With respect to the laws of the union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to.").

67 Roger Pilon, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999, 1007 (1996). *See generally* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 765 (1997) [hereinafter Barnett, *Necessary*].

68 *See, e.g.*, Milhau v. Sharp, 27 N.Y. 611, 611 (1863) (holding that "[t]he corporate authorities of the city of New York have no power to confer upon individuals, by contract for an indefinite period, the franchise of constructing and operating a railroad in the public streets, for their private advantage"); Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19 (1856) (holding that the exclusive grant of authority to one company to lay gas pipes was monopolistic and rendering the grant non-exclusive). *See also* SIEGAN, ECONOMIC LIBERTIES, *supra* note 35, at 41–46, 55–58; JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 61–62 (2d ed. 1998); Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511, 511–12 (2000).

69 *See, e.g.*, Glenn v. Baltimore, 5 G. & J. 424 (Md. 1833) (upholding a ban on new distilleries and the rebuilding of old ones on the grounds that they constituted a nuisance, but suggesting that a ban on existing distilleries would be improper); Austin v. Murray, 33 Mass. (16 Pick.) 121 (1834); (striking down a law requiring the licensing law requiring the licensing of funeral directors and establishing mandatory burial grounds as an unreasonable business regulation); Wreford v. People, 14 Mich. 41 (1865) (striking down a law prohibiting the slaughter of animals in a particular part of town on the grounds that a town can only ban nuisances and cannot declare non-nuisances to be nuisances); Pierce v. State, 13 N.H. 536 (1843) (upholding the licensing of liquor sales on the ground that the law was a regulation as opposed to a prohibition); Wynehamer v. People, 13 N.Y. 378 (1856) (striking

tent with this approach, individual rights were construed broadly and received robust protection from the courts.

This framework was essentially reversed during the 1930s. With the advent of progressivism and the notion that government should become an active problem solver rather than a mere protector of rights, the Supreme Court in a handful of cases interpreted the powers of the federal government broadly and protections for individuals very narrowly.[70] State police power evolved from the power to protect rights to the power to provide positive "public goods" limited almost exclusively by majority or legislative will.[71] The judicial approach to laws that affect individual rights tracked these broad changes. The first question in cases challenging such laws today is not whether the government possesses the power to regulate in a certain area or manner—such power is generally presumed to exist—but whether and to what extent the exercise of that broad power infringes a particular right.[72] This change in emphasis from limited powers to limited rights alone significantly narrowed the protections for individual rights, but the Supreme Court went a step further and divided rights into two categories, "fundamental" and "non-fundamental."[73] Fundamental rights—such as rights to free speech, to privacy, and to vote—receive significant protection from the courts.[74] Non-fundamental rights—primarily economic and property rights—receive very little judicial protection at all.[75] This distinc-

down an alcohol prohibition law as destroying a property interest); Mayor of Hudson v. Thorne, 7 Paige Ch. 261 (N.Y. Ch. 1838) (striking down as unreasonable and discriminatory an ordinance prohibiting the building of wooden barns without a town resolution that the structure would not be a fire hazard on the ground that the common council could enjoin a nuisance but did not have power to make a blanket prohibition of building barns); Dunham & Daniels v. Rochester, 5 Cow. 462 (N.Y. Sup. Ct. 1826) (striking down an ordinance requiring the licensing of grocers as an unreasonable restraint on trade); People v. Berberrich, 20 Barb. 168 (N.Y. Gen. Term. 1855) (striking down an alcohol prohibition law as destroying a property interest); Trs. of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58 (1805) (striking down a North Carolina law that reversed a land grant to the University); Mayor of Memphis v. Winfield, 27 Tenn. (8 Hum.) 707 (1848) (voiding a curfew on blacks because it was oppressive and prevented them from earning a living). *See also* Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 236 (2003).

70 *See* ELY, *supra* note 68, at 101–134; Pilon, *supra* note 67.

71 *See* Reynolds & Kopel, *supra* note 68, at 511.

72 *See* Pilon, *supra* note 67. *See also* Wickard v. Filburn, 317 U.S. 111 (1942) (interpreting the Commerce Clause broadly to allow regulation of anything that affects interstate commerce); Helvering v. Davis, 301 U.S. 619, 640 (1937) (holding that courts should defer to Congress as to whether an expenditure under the General Welfare Clause was general or particular); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (interpreting the Commerce Clause as an affirmative grant of power to Congress to regulate commerce); United States v. Butler, 297 U.S. 1, 65–66 (1936) (interpreting the General Welfare Clause as granting Congress an independent power to spend for the general welfare).

73 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

74 *See supra* note 33. *See also* Montgomery v. Carr, 101 F.3d 1117, 1121–23 (6th Cir. 1996) (discussing the dichotomy between fundamental and non-fundamental rights and different tiers of scrutiny that apply to each).

75 *See Carr*, 101 F.3d at 1121–23. *See also* ELY, *supra* note 68, at 132–34.

tion between fundamental and non-fundamental rights prevails among state courts as well.[76]

Today, if one is unlucky enough to be subject to a law that affects one of these "non-fundamental" rights—which cover many of the most important activities in life, such as the right to earn a living, to use and dispose of property, and to contract—one's chances of having the courts take a serious look at the law are slim. The courts' approach to laws that infringe economic liberty gives legislatures and administrative agencies virtually complete discretion to regulate in this area. This approach is known as rational basis review. Under this standard, courts presume that a law is constitutional, and will overturn it only if the challenging party can refute "every conceivable basis which might support it."[77] Legislatures are under no obligation to "actually articulate at any time the purpose or rationale" for the law and those defending it have no obligation to produce evidence to support it.[78] "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[79] Legislative decisions may be "illogical" and "unscientific,"[80] and it makes no difference to the constitutionality of the law if the assumptions that underlie it are "probably not true" or even not true at all.[81] Nor is consistency required under the rational basis test. "Legislatures may implement their program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations"[82] or they may "select one phase of one field and apply a remedy there, neglecting the others."[83] The rational basis test is, to put it mildly, a very easy standard for legislatures to meet.[84]

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76 *See, e.g.*, Regency Servs. Corp. v. Bd. of County Comm'rs, 819 P.2d 1049, 1057 (Colo. 1991) (en banc) ("Although we have recognized that the right to work and receive the fruits of one's labor is an important right, we have never held that an individual has a fundamental constitutional right to pursue a specific occupation or business unfettered by governmental regulations that do not satisfy strict judicial scrutiny.") (citations omitted); People v. Cully, 675 N.E.2d 1017, 1022 (Ill. App. Ct. 1997) ("The right to pursue a profession is not a fundamental right for due process purposes."); Lens Express, Inc. v. Ewald, 907 S.W.2d 64, 69 (Tex. App. 1995) ("The right to sell contact lenses in Texas is not a fundamental right, and unlicensed optometrists are not a suspect class."). *See also* cases cited *infra* note 84.

77 Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)).

78 Heller v. Doe, 509 U.S. 312, 320 (1993) (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)).

79 FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

80 *Heller*, 509 U.S. at 321.

81 Gregory v. Ashcroft, 501 U.S. 452, 473 (1991).

82 City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

83 Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

84 Many, if not most, state courts apply rational basis scrutiny to economic laws. *See, e.g.*, 20th Century Ins. Co. v. Garamendi, 878 P.2d 566, 614 (Cal. 1994); Belk-James, Inc. v.

There are two generally accepted rationales for treating economic rights as constitutional second-class citizens. The first is that economic rights are not specifically enumerated in the Constitution and courts thus lack any textual basis for enforcing them.[85] This argument ignores the Ninth Amendment, however, which makes clear that the enumeration of rights in the Bill of Rights is not to be "construed to deny or disparage" other rights that are not enumerated.[86] Indeed, it was to prevent precisely this narrow interpretation of rights that the Ninth Amendment was included in the Bill of Rights in the first place.[87] The argument similarly ignores the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment, whose purpose was to protect a broad range of rights of national citizenship, including economic and property rights, that might be violated by the states.[88]

Moreover, courts have given less protection even to economic and property rights that are enumerated in the constitution. For instance, the Supreme Court has interpreted the "public use" limitation in the Takings Clause of the Fifth Amendment to mean, in essence, whatever a legislature says it means, which has allowed local and state governments to transfer property from one private owner to another.[89] The Contracts Clause of Article I, Section

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Nuzum, 358 So. 2d 174, 175 (Fla. 1978); Alamo Rent A Car, Inc. v. Ryan, 643 N.E.2d 1345, 1349 (Ill. App. Ct. 1994); Blue Hills Cemetery, Inc. v. Bd. of Registration, 398 N.E.2d 471, 475–76 (Mass. 1979); State Farm Mut. Auto. Ins. Co. v. State, 590 A.2d 191 (N.J. 1991); Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n, 520 N.E.2d 528, 530–31 (N.Y. 1988); Hayes v. Erie Ins. Exch., 425 A.2d 419, 421–22 (Pa. 1981); Mass. Indem. & Life Ins. Co. v. Tex. State Bd. of Ins., 685 S.W.2d 104, 114 (Tex. App. 1985). *See also* cases cited *supra* note 36.

85 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 39–40 (1990).

86 U.S. CONST. amend. IX.

87 Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 9–11 (1988) [hereinafter Barnett, *Reconceiving*].

88 *See* CLINT BOLICK, UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY 53, 57, 64 (1990); Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 25–27 (1998); BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 2–3, 36–37, 266 (2001) [hereinafter SIEGAN, PROPERTY RIGHTS]. The Fourteenth Amendment's drafters originally intended the Privileges or Immunities Clause to carry most of the substantive weight of the amendments' protections, but the Supreme Court virtually gutted the clause in the aptly-named *Slaughter-House Cases*. This left succeeding courts to utilize the Due Process and Equal Protection Clauses to do the work that the Privileges or Immunities Clause was intended to do.

89 *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240–42 (1984) (stating that courts will not substitute their judgment for the legislature's in determining what is a public use unless that determination is "palpably without reasonable foundation" and approving the transfer of land from owners to tenants for the purpose of eliminating "oligopoly" in land holdings); Berman v. Parker, 348 U.S. 26, 32–33 (1954) (stating that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive" and allowing property to be taken under the Fifth Amendment and transferred to a private developer for the purpose of redevelopment).

10,[90] which prohibits states from "impairing the Obligation of Contracts"[91] has been similarly diluted.[92] Finally, modern courts have vigorously protected rights, such as the rights to abortion and privacy, that are no more clearly set forth in the constitution than economic liberty. Clearly, something more than a failure to enumerate these rights has motivated courts to abandon them.

The key is to be found in the second rationale for treating economic liberties as inferior to other rights. Simply put, giving economic rights less protection than other so-called civil rights is more consistent with the societal values that gained ascendancy during and since the Progressive Era and the New Deal. This time period was characterized by faith in government's ability to solve problems and a willingness to grant it greater powers to do so. The progressives of the time were fairly open about their desire to remove constitutional impediments to their version of good government.[93] Courts, of course, were a bit more circumspect, but their assumptions were essentially the same. Limitations on government inhibit its ability to be creative and to solve problems.[94] Legislatures should be permitted wide latitude to deal with what they perceive to be societal evils with only certain narrow rights carved out that would not otherwise be protected through the democratic process.[95] Allowing courts to protect economic liberty and property rights would establish them as super legislatures, which would be anti-democratic.[96] "For protection against abuses by legislatures," the Supreme Court has often said, "the people must resort to the polls, not to the courts."[97] In other words, de-

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90 U.S. CONST. art. 1, § 10, cl. 1.

91 *Id.*

92 *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 401–06 (4th ed. 1991); Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 540–45 (1987).

93 *See* William J. Novak, *The Legal Origins of the Modern American State*, *in* LOOKING BACK AT LAW'S CENTURY 249, 269 (Austin Sarat et al. eds., 2002).

94 *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("Legislative bodies have broad scope to experiment with economic problems. . . ."); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) ("[T]he state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare . . . ."). *See also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.") (Brandeis, J., dissenting).

95 *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 390, 397–98 (1937) (reexamining previous case that invalidated minimum wage law because the state's police power must be judged in the light of supervening economic conditions and upholding similar law because legislatures must be permitted to adopt laws that reduce the "evils of the 'sweating system'").

96 *See* Williamson v. Lee Optical Co., 348 U.S. 483, 487–88 (1955); *See also Ferguson*, 372 U.S. at 732 ("[R]elief, if any be needed, lies not with us but with the body constituted to pass laws for the State . . . .").

97 *Williamson*, 348 U.S. at 488; *accord* Nebbia v. New York, 291 U.S. 502, 537 (1934).

mocracy, not judicial protections for individual rights, is the appropriate corrective measure for bad government.[98]

The problem with this view is that it is inconsistent with the constitutional plan. It is not true, as Robert Bork and other scholars have argued, that "in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities."[99] The founders were deeply suspicious of majority rule, and they gave us a constitution that restrained majorities in significant ways to ensure the protection of individual rights.[100] In short, the Supreme Court's dictum quoted above is only half right. For protections against abuses by legislatures, the people need not resort only to the polls, they may resort to the Constitution as well. The courts' duty is to ensure the individual's ability to do so.

Nevertheless, the view that majorities are entitled to rule without substantial restraint and that courts exceed their authority when they overrule legislatures endures. A large part of the reason for this seems to be the view that democracy is synonymous with good government. That assumption, in any event, lies at the root of the judiciary's refusal to engage in serious review of economic regulations. As argued in the next section, good government is far from what has been achieved.

IV. The Impact of Judicial Abdication

In the face of roughly seventy years of judicial antipathy toward economic rights, it might seem impossible that Nathaniel Craigmiles or Kim Powers could hope to prevail against the casket licensing laws that prevented them from conducting their busi-

98 *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.") (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949) ("The forum for the correction of ill-considered legislation is a responsive legislature.").

99 Bork, *supra* note 85, at 139.

100 Madison announced his concerns about democracy forcefully during the debates at the Constitutional Convention:

> In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. . . . We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man. What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the majority number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is that where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure.

James Madison, Speech in the Federal Convention on Factions, *in* James Madison, Writings 92, 92–93 (Jack N. Rakove ed., 1999) (hereinafter Madison, Speech in the Federal Convention).

nesses. However, the Supreme Court has not put the last nail, so to speak, in the coffin of economic liberty yet. Despite the sweeping statements of the rational basis test cited above, and the fact that courts almost always find economic regulations constitutional under the test, the Supreme Court itself has on occasion struck down laws under this standard.[101] As the Court has stated, "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."[102] Thus, the rational basis test arguably has some bite, even if the Supreme Court has not exactly squared its sweeping statements of the standard with the few instances in which it has decided the standard was exceeded.

Craigmiles and Powers hoped to capitalize on whatever bite the rational basis test might have, by demonstrating that the laws at issue in their cases had absolutely *no* footing in the realities of the subject of casket retailing. Both brought claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and argued that there was no conceivable rational basis for requiring them to obtain a funeral director's license in order to sell caskets. As discussed earlier, caskets have no health or safety function, Tennessee and Oklahoma do not regulate their use, and there is a great deal of merchandise related to funerals, such as graves, grave markers and stones, cards, flowers and the like, that consumers may purchase from unlicensed individuals.[103] Add to this the fact that the only interests these licensing laws would seem to serve are those of funeral directors, and Craigmiles and Powers had about as strong a case as one can make under the rational basis test.

Despite the strength of their cases, only *Craigmiles* was successful. The United States District Court for the Eastern District of Tennessee ruled that the licensing law violated his and his co-defendants' rights to due process and equal protection and struck it down as applied to casket retailers.[104] The Sixth Circuit affirmed.[105] Powers lost in the district court and her case is currently on appeal.[106] The judge in her case took what one might refer to as the standard approach to cases under the rational basis test. He cited the sweeping statements of the standard and concluded, in essence, that there is little for a court to do other than to imagine a rationale for the law and then to uphold it.[107] The

101 *See* Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

102 Heller v. Doe, 509 U.S. 312, 321 (1993).

103 *See supra* notes 50–51 and accompanying text.

104 Craigmiles v. Giles, 110 F. Supp. 2d 658, 667 (E.D. Tenn. 2000).

105 Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002).

106 Powers v. Harris, No. CIV-01-445-F, slip op. at 34 (W.D. Okla. Dec. 12, 2002).

107 *Id.* at 33.

rationale that the court came up with is that the law furthers consumer protection. It is part of a comprehensive regulatory scheme that "evince[s] an intent to forego laissez faire treatment" of the sale of funeral merchandise and services in the State of Oklahoma.[108] Licensing and the possibility of disciplinary action it entails might be said to deter inappropriate conduct.[109] Accordingly, Oklahoma's casket licensing law has a conceivably rational basis and is constitutional.[110]

By contrast, the district court and Sixth Circuit in *Craigmiles* emphasized that even economic legislation must have some basis in the realities of the subject at issue.[111] If this is true, there must be some limit to the burdens a state can impose on private economic activity, both in absolute terms and, more importantly, in terms of the relation of those burdens to some arguable state interest. To determine whether that limit has been exceeded courts must examine the facts and circumstances of both the law and the subject it deals with and make a practical determination as to whether one is related to the other—whether, in other words, the means chosen by the legislature actually further the ends the law is said to serve. That is precisely what the district court and the Sixth Circuit did in *Craigmiles* and precisely what the district court in *Powers* failed to do.

That is not to say that the *Powers* decision is not defensible. One does not have to read between the lines too carefully to conclude that the Supreme Court really does not want courts to overturn economic legislation, and virtually any decision that upholds such a law is going to be defensible. But that is precisely the problem. Many of the Supreme Court's statements of the rational basis test render it less a judicial standard than an excuse to avoid judgment altogether. As Professor Richard Epstein has described it, the rational basis test:

> [C]ompletely abandons the idea that serious intellectual discussion can yield right and wrong answers on matters of political organization and constitutional interpretation. Courts simply give up before they try, and embrace an appalling sort of ethical noncognitivism. Anything legislatures do is as good as anything else they might have done; we cannot decide what is right or wrong, so it is up to Congress and the states to determine the limitations of their own power—which, of course, totally sub-

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108 *Id.* at 24.

109 *Id.* at 24–25.

110 *Id.* at 33.

111 *See* Craigmiles v. Giles, 312 F.3d 220, 225–29 (6th Cir. 2002); Craigmiles v. Giles, 110 F. Supp. 2d 658, 664–65 (E.D. Tenn. 2000). These decisions are addressed in more detail below. *See infra* notes 184–90 and accompanying text.

> verts the original constitutional arrangement of limited government.[112]

The *Powers* decision provides a good example of this "ethical noncognitivism" at work. If one simply assumes, as the court did, that all licensing schemes protect consumers by providing the state with an enforcement mechanism, then the conclusion that a particular licensing scheme protects consumers follows as a matter of course. At a sufficient level of generality, any statutory scheme can be said to serve a state purpose. But reciting a tautology is not the same thing as examining whether a particular legislative choice is within the bounds of its constitutional authority. It is little more than a rationalization for government action dressed up as judicial review.

This approach to law has consequences. One is an inevitable loss of confidence in our judicial system. To quote Richard Epstein again, "[w]hen [courts] use transparent arguments to justify dubious legislation, they cannot raise the level of debate. When courts . . . hold that the state has the right to say X, when they know X is wrong, they fritter away their own political authority on an indefensible cause."[113] Of course, many scholars and commentators have argued that it is judicial activism that damages the credibility of the judiciary.[114] That argument is correct as far as it goes. Blatantly political decisions by the courts are indeed indefensible. But the opposite extreme is equally pernicious. When courts refuse to scrutinize laws at all, they end up attaching their reputations to whatever absurdity a legislature is willing to embrace. A rubber stamp is just as damaging to judicial credibility as a sledgehammer.

A more serious consequence of the rational basis test is its institutional effect. Extreme deference to legislatures prevents the courts from enforcing constitutional limitations and places legislatures in charge of determining the extent of their own power. This would be bad enough in any area of life, but it is particularly problematic in the realm of economic affairs given the obvious conflicts and temptations that legislatures are likely to face in this area. As James Madison observed:

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same

112 Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 39, 42–43 (James A. Dorn & Henry G. Manne eds., 1987).

113 *Id.* at 43.

114 *See* BORK, *supra* note 85, at 173, 353–54; EUGENE W. HICKOK & GARY L. MCDOWELL, JUSTICE VS. LAW 189–90 (1993).

> time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?[115]

One of the purposes of an independent judiciary was to ensure that judges would not be subject to the same public pressures and temptations as legislators. Echoing the danger of faction that Madison expressed in *The Federalist Papers* Nos. 10 and 51,[116] Hamilton stated in *The Federalist Papers* No. 78 that independent federal judges would be more likely to:

> [G]uard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.[117]

Countering the dangers of faction was thus an important virtue of judicial review for the authors of *The Federalist Papers*.[118] This virtue was not confined simply to striking down unconstitutional laws, but also included deterring their passage in the first place: "[I]t is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society."[119] Such "unjust and partial laws," as Hamilton pointed out, often only affect "the private rights of particular classes of citizens."[120] Equally important for Hamilton was the effect of judicial review on the legislative process itself:

> [T]he firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the

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115 THE FEDERALIST NO. 10, *supra* note 2, at 79.

116 *See* THE FEDERALIST NO. 51, *supra* note 19, at 323 ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.").

117 THE FEDERALIST NO. 78, *supra* note 62, at 469.

118 Noted nineteenth century jurist and scholar James Kent echoed this view:

> The Courts of Justice which are organized with peculiar advantages to exempt them from the baneful influence of Faction, and to secure at the same time, a steady, firm and impartial interpretation of the Law, are therefore the most proper power in the Government to keep the Legislature within the limits of its duty, and to maintain the Authority of the Constitution.

James Kent, *An Introductory Lecture to a Course of Law Lectures*, *in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, 936, 942 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

119 THE FEDERALIST NO. 78, *supra* note 62, at 470.

120 *Id.*

> legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.[121]

The framers, and particularly Madison and Hamilton, are often cited because they provide authoritative commentary on the meaning of, and the intent behind, the Constitution's provisions and overall design. But there is another good reason for doing so. The framers were accomplished statesmen and political philosophers. *The Federalist Papers* contain some of the most insightful and trenchant political philosophy in history. In short, the framers were not only authoritative, *they were right*. Human beings often seek to benefit themselves at the expense of others. They do not perform much better when they organize themselves into groups and call themselves "legislatures." Factions and interest groups can commit grave injustices and wreak havoc on individuals and on a nation. Limited, constitutional government is an effective solution to this problem. Yet if the constitutional balance is upset, if a whole branch of government effectively abdicates its assigned role, certain consequences are inevitable. Judging from the framers' views on the subject, those consequences would include infractions of the constitution and factional politics. Judging from contemporary experience, that is exactly what has happened. A few examples from cases the Institute for Justice has litigated demonstrate as much.[122]

A. Transportation Fiefdoms

In most heavily populated areas of this country, owning a car and being able to drive it would seem to guarantee an industrious person a ready source of income. This is a country constantly on the move, yet many people lack the transportation to get where

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121 *Id.*

122 The Institute for Justice has published studies of business barriers to entry in several large and mid-sized cities that show that this problem is widespread. *See* Dana Berliner, *How Detroit Drives Out Motor City Entrepreneurs*, *available at* http://www.ij.org/publications/city_study/citstud_detr_rep.html (last visited Feb. 25, 2003); Dana Berliner, *Running Boston's Bureaucratic Marathon*, *available at* http://www.ij.org/publications/city_study/citstud.gifs/citstud_bost_exsm.html (last visited Feb. 25, 2003); Clint Bolick, *Brightening the Beacon: Removing Barriers to Entrepreneurship in San Diego*, *available at* http://www.ij.org/publications/city_study/citstud_sandieg_rep.html (last visited Feb. 25, 2003); Clint Bolick, *Entrepreneurship in Charlotte: Strong Spirit, Serious Barriers*, *available at* http://www.ij.org/publications/city_study/citstud_charl_rep.html (last visited Feb. 25, 2003); Scott G. Bullock, *Baltimore: No Harbor for Entrepreneurs*, *available at* http://www.ij.org/publications/city_study/citstud_balt_rep.html (last visited Feb. 25, 2003); Donna G. Matias, *Entrepreneurship in San Antonio: Much to Celebrate, Much to Fight For*, *available at* http://www.ij.org/publications/city_study/citstud_SanAn_rep.html (last visited Feb. 25, 2003); William Mellor, *Is New York City Killing Entrepreneurship?*, *available at* http://www.ij.org/publications/city_study/CitStud_NY_rep.html (last visited Feb. 25, 2003).

they want to go. Private taxi, limousine, and van services are a testament to the fact that people are often willing to pay for a ride. Like the transportation industry in general, these businesses are among the most heavily regulated in the country, and thus the most difficult for independent businessmen to break into. Most cities have reasonable health and safety requirements that ensure such businesses possess adequate insurance, operate safe vehicles, and employ competent drivers. However, far too many have erected onerous licensing regimes that have nothing to do with protecting the public and everything to do with protecting entrenched interests.[123]

Denver is a typical example, as Leroy Jones discovered when he attempted to start a small taxicab company there in 1992. Jones drove a cab for two years for one of the three officially-approved cab companies in Denver, but decided to start his own business after becoming fed up with their treatment of drivers.[124] He banded together with a handful of other experienced cab drivers and started Quick Pick Cabs, but soon found that breaking into the business was next to impossible due to a web of restrictive regulations and a near insurmountable application process.[125] In Denver, as in many cities, new cab companies must obtain a certificate of public convenience and necessity in order to operate their business.[126] To obtain a certificate, new cab companies must meet a near impossible standard—they must demonstrate that existing companies are not meeting demand and could not do so if given the chance.[127] To make matters more difficult, existing companies may intervene in the application process and demand documents and information from the new company, which they can use to oppose the applications.[128] This increases both the time and the costs of the application process.

John West and Ed Wheeler faced a similar situation when they tried to start independent limousine businesses that challenged the status quo in Las Vegas. Like Leroy Jones, West and Wheeler faced the burdensome public convenience and necessity

123 *See generally* MARK W. FRANKENA & PAUL A. PAUTLER, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION, FEDERAL TRADE COMMISSION BUREAU OF ECONOMICS STAFF REPORT (1984). *See also* Sandra Rosenbloom, *The Taxi in the Urban Transport System*, *in* URBAN TRANSIT: THE PRIVATE CHALLENGE TO PUBLIC TRANSPORTATION 181, 181–84 (Charles A. Lave ed., 1985).

124 *See Challenging Denver's Taxicab Monopoly, Litigation Backgrounder: The Current Controversy*, Institute for Justice, *at* http://www.ij.org/cases/economic/denverbk.shtml (last visited Apr. 15, 2003).

125 Jones v. Temmer, 57 F.3d 921, 923 (10th Cir. 1995), *vacating as moot* 829 F. Supp. 1226 (D. Colo. 1993).

126 *See* COLO. REV. STAT. ANN. § 40-5-102 (West 1997). *See also Jones*, 829 F. Supp. at 1229.

127 *See, e.g.*, RAM Broad. of Colo., Inc. v. Pub. Util. Comm'n, 702 P.2d 746, 750 (Colo. 1985); Ephraim Freightways, Inc. v. Pub. Util. Comm'n, 380 P.2d 228, 229–30 (Colo. 1963).

128 *See* COLO. REV. STAT. ANN. §§ 40-5-103, 40-6-102 (West 1997).

standard as well as entrenched interests and a compliant regulatory board that were determined to prevent new entrants into the market. West and Wheeler also eventually decided to sue to vindicate their right to earn a living.

The onerous regulatory regimes that these men faced were outgrowths of a system that dates back to the beginnings of urban mass transit in the late nineteenth century.[129] When cable and trolley services emerged, most cities granted exclusive franchises to particular companies for all city services.[130] In exchange for what amounted to a monopoly in mass transit, the cities capped the rates these companies could charge their customers.[131] With inherent route limitations and rate caps, the companies were unable to respond to changes in demand and the need for more flexible and individualized services.[132] As cities grew, jitney van and taxi services arose to meet this demand.[133] In response, cable and trolley car companies lobbied for restrictions on this competition and found city governments, who were partial to the tax revenues that their franchisees generated and enjoyed the ease of regulating them, all too willing to help.[134] The result was restrictions on the rates that taxi, car, and van companies could charge, and, more importantly, the number of companies that could operate and the routes they could serve.[135] In some cases, companies were run out of business altogether.[136] Today, in many cities, these industries resemble the monopolized urban mass transit businesses with which they evolved to compete. Heavy restrictions and high costs of entry have resulted in only a few companies in many large metropolitan areas and little likelihood that competitors will emerge.

The problem, of course, for anyone like Leroy Jones, John West, and Ed Wheeler is that courts approach these laws in the same way that they approach all economic regulations. Courts defer almost completely to the government's decision to treat transportation industries as "regulated monopolies" and to bar new entrants who cannot demonstrate an additional "need" in the community for their services.[137] Indeed, under the deferential rational

129 George W. Hilton, *The Rise and Fall of Monopolized Transit*, *in* URBAN TRANSIT: THE PRIVATE CHALLENGE TO PUBLIC TRANSPORTATION 31, 34–37 (Charles A. Lave ed., 1985).

130 *Id.* at 34–35.

131 *Id.*

132 *Id.* at 35–36.

133 *Id.* at 36–37. *See also* Rosenbloom, *supra* note 123, at 183.

134 Hilton, *supra* note 129, at 37, 41.

135 *Id.* at 36.

136 *Id.* at 38.

137 *See, e.g.*, Jones v. Temmer, 829 F. Supp. 1226, 1234–35 (D. Colo. 1993), *vacated by* 57 F.3d 921 (10th Cir. 1995); Pub. Serv. Co. of Colo. v. Pub. Utilities Comm'n, 765 P.2d 1015, 1021–22 (Colo. 1988); Rocky Mtn. Airways, Inc. v. Pub. Util. Comm'n, 509 P.2d 804, 805, 807 (Colo. 1973).

basis test, demonstrating that a regulatory board's decision on these vague issues is irrational becomes impossible. The predictable result is that the regulatory agencies and existing companies treat these industries like little fiefdoms.

In Denver, for instance, three taxicab companies dominated the industry for over fifty years. During that time period, the city's population grew tremendously, yet the Public Utility Commission, which is the agency with authority over the industry, allowed no new companies to compete with the big three.[138] The industry finally opened up only after the legislature modified the standard for new entrants in the wake of Leroy Jones's lawsuit.[139] The lawsuit itself was not successful,[140] but it generated a lot of attention. The legislature relaxed the standards for new entrants while the case was on appeal.[141] Since then, two new companies have entered the cab business in Denver. The company Jones started employs nearly one hundred people under a new name: Freedom Cabs.

In Las Vegas, when John West and Ed Wheeler applied for permission to run their limousine services, the application process resembled a gauntlet in which existing companies attempted to increase a new applicant's costs and deplete its resources. In the initial process, applicants submit detailed personal and financial information to the Transportation Services Authority ("TSA"), which often requests additional information, conducts interviews, and inspects vehicles.[142] The real costs do not begin to mount until after the application is filed, however, when existing companies are permitted to intervene and demand detailed information from the new applicant, which they then use to oppose the application.[143] This information can include customer lists, tax returns, accounting records, and even where they buy gas and who repairs their cars. In many cases, new applicants must produce this information to several intervenors at a time.[144] Intervenors are also given the right to appear at hearings, introduce evidence, cross-examine witnesses, and make and argue motions.[145] Court reporting and transcribing fees associated with such hearings are borne by the applicant, who, of course, must also pay an attorney to appear on his behalf.[146] The entire process can take up to a year,

138 *Break the Stranglehold on Taxicab Entrepreneurs*, DENV. POST, Feb. 7, 1993, at 2D.

139 *See* Jones v. Temmer, 57 F.3d 921 (10th Cir. 1995).

140 *See Jones*, 829 F. Supp. at 1234–36 (dismissing plaintiffs' Due Process and Equal Protection Claims under the deferential rational basis standard).

141 COLO. REV. STAT. ANN. 40-10-105(2)(a) (West 1997).

142 NEV. ADMIN. CODE ch. 703, § 165 (1984 & Supp. 2002).

143 *Id.* § 580.

144 *Id.* § 600. *See also* John L. Smith, *Bell Owner Fights to Keep His Big Share of Limousine Market*, LAS VEGAS REV. J., July 19, 1996, at 1B.

145 NEV. ADMIN. CODE ch. 703, § 500 (1984 & Supp. 2002).

146 NEV. REV. STAT. ANN. 706.2873 (Michie 1998).

during which time the new applicant faces fines of $2,500 and possible impoundment of vehicles for operating his limousines without authorization.[147] One prospective applicant spent roughly $250,000 enduring this process, only to have its application rejected.[148] The impact of this process is predictable. When West and Wheeler filed their applications in 1998, Las Vegas had roughly 1.3 million residents and over 30 million visitors per year, but only six limousine companies.[149]

West and Wheeler achieved a measure of success in their legal challenges to this system, although at an incredibly high cost. Applying the rational basis test, the court rejected their claim that the public convenience and necessity standard violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[150] It did, however, conclude that their treatment at the hands of the TSA and existing companies violated their procedural due process rights.[151] Of the five plaintiffs in the lawsuit, only Wheeler had the financial wherewithal to endure the remainder of the application process. His application was ultimately approved and he currently operates a small limousine service in Las Vegas. Bill Clutter, another plaintiff in the suit, ultimately took a job driving for one of the existing limousine companies. West was forced to give up and is now a mechanic in New Mexico.

B. Eminent Domain for Hire

In a country whose founders fought a revolution in large part to prevent arbitrary seizures of property, it is no small irony that today state and local governments regularly take land from private owners and sell it to well-connected developers and private businesses on the grounds that their use of the property is deemed

147 *See* Bill Gang, *Limo Service Sues PSC Over Competitor*, LAS VEGAS SUN, Oct. 19, 1989, at 2B.

148 John L. Smith, *Bell Trans Always Gives Rough Rides to Limousine Applicants*, LAS VEGAS REV. J., July 17, 1996, at 1B. Another prospective service fought a multi-year court battle with existing companies and spent more than $200,000 before it received approval to operate. *See Public Service Commission Reviews "Limousine Wars,"* LAS VEGAS SUN, Oct. 20, 1985, at 6B; Julie Penn, *Las Vegas Limousine Rivalry in High Gear*, LAS VEGAS REV. J., Oct. 20, 1986, at 1C.

149 *See The Fight for a Free Market: Opening the Las Vegas Limousine Monopoly, Litigation Backgrounder: The Problem*, Institute for Justice, *at* http://www.ij.org/cases/economic/lv_limos/background.shtml (last visited Apr. 15, 2003). *See also Metropolitan Las Vegas Tourism Statistics*, The Center for Business and Economic Research, University of Nevada, Las Vegas, *available at* http://www.unlv.edu/Research_Centers/cber/tour.html; Las Vegas Chamber of Commerce, Demographics Statistics, *available at* http://www.lvchamber.com/ las_vegas/demographics.htm (last visited Apr. 19, 2003).

150 Clutter v. Transp. Servs. Auth. of Nev., No. A387827, slip op. at 3, 6 (D.C. Nev. May 16, 2001).

151 *Id.* at 11–12.

more beneficial to the "public."[152] In 1829, Supreme Court Justice Joseph Story decried the very idea of transferring private land from one owner to another:

> That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. . . . We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union.[153]

New York's highest court echoed this sentiment roughly fifty years later when it stated that private uses cannot become public merely by "legislative fiat."[154] Today, state and local governments regularly condemn private land on little more than legislative fiat and courts too often allow them to get away with it.[155]

Federal and state constitutions all provide that private property may be taken only for a "public use."[156] Unfortunately, courts have allowed this restriction to be diluted to near irrelevance. The process began in the early 1950s when the Supreme Court approached the public use limitation in much the same way that courts approach due process and equal protection limitations on government power found in the Fifth and Fourteenth Amendments—by deferring almost completely to legislatures. In *Berman v. Parker*, the District of Columbia condemned several parcels of land for the ostensive purpose of eradicating "blight."[157] The owners of one of these parcels opposed the condemnation on the ground that it violated the public use limitation in the Takings Clause because the land was to be transferred to a private developer.[158] The Supreme Court upheld the condemnations, however, ruling that whether the use of the land was "public" was entirely up to Congress.

> [W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining

152 *See* Dana Berliner, *Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain*, 1, 2–7 (Apr. 2003), *available at* http://www.castlecoalition.org/report/pdf/ED_report.pdf.

153 Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657–58 (1829).

154 *In re* Jacobs, 98 N.Y. 98, 111 (1885).

155 *See generally* Berliner, *supra* note 152 (documenting over 10,000 properties in forty-one states that were threatened with condemnation by state and local governments for the benefit of private parties from 1998 through 2002).

156 U.S. CONST. amend. V.

157 348 U.S. 26, 33 (1954).

158 *Id.* at 31.

> whether that power is being exercised for a public purpose is an extremely narrow one.[159]

Thirty years later, the Supreme Court made clear that there was little a legislature could not do with the power of eminent domain. In *Hawaii Housing Authority v. Midkiff*,[160] the Supreme Court upheld the transfer of thousands of acres of private land from owners to their tenants that the State claimed was necessary to eliminate what it characterized as a "land oligopoly."[161] When the plaintiffs pointed out that the State of Hawaii was simply transferring land from one private owner to another—exactly what Justice Story had condemned as unjust 150 years earlier—the Court responded that it was for the legislature to determine what constitutes a public use, not the courts.[162] In short, the Court "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[163] State courts have by and large followed this extremely deferential approach to the public use determination.

The results have been predictable. A power that was originally designed to be used only for necessary public or governmental purposes, has today become a license for local planning boards to realize their visions of the good society. Local governments have condemned land for shopping centers, industrial parks, factories, hotels, health clubs, marinas, office buildings, golf courses, and casinos, to name just a few examples.[164] Governments often justify these condemnations as public uses because they increase tax revenues.[165] Many courts have upheld takings on these grounds, meaning that virtually anything can be considered a public use.

Worse still, but equally predictable, governments often use the power of eminent domain to dole out special favors or to lure preferred businesses to their areas. In 1980, Detroit condemned thousands of homes so General Motors ("GM") could build a new factory when the company threatened to leave town.[166] Toledo, Ohio did the same for Chrysler a few years ago, as did Mississippi for Nissan.[167] In 2000, New London, Connecticut delegated its power of eminent domain to a private development corporation to

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159 *Id.* at 32 (citations omitted).

160 467 U.S. 229 (1984).

161 *Id.* at 241–42.

162 *Id.* at 244.

163 *Id.* at 241 (quoting United States v. Gettysburg Elec. R.R. Co., 160 U.S. 668, 680 (1896)).

164 *See* Berliner, *supra* note 152.

165 *Id.* at 5.

166 Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

167 *See* Dana Berliner, *Government Theft: The Top 10 Abuses of Eminent Domain*, 9–10 (Mar. 2002), *available at* http://www.castlecoalition.org/top_10_abuses/top_10_report.pdf.

condemn over a dozen homes on prime waterfront property so a private developer could put up a shopping center and hotel to complement a Pfizer office complex.[168] In West Orange, New Jersey, a private developer was having difficulty obtaining land for a road through a residential development he was building.[169] When negotiations broke down he turned to the city, which promptly condemned the land.[170] When Donald Trump needed to build a parking lot in 1996 near one of his Atlantic City casinos, the city condemned three nearby properties.[171]

In one of the worst examples of abuse in this area, a local agency literally hired out its power of eminent domain. The Southwestern Illinois Development Authority ("SWIDA") advertised that it would condemn land for "economic development," and even provided boxes on the appropriate application to be checked for "public use" or "private use" condemnations.[172] For "private use" condemnations, SWIDA charged a commission of about six percent of the value of the project.[173] When a local raceway owner failed to convince a nearby scrap yard to sell land it needed for a parking lot, the raceway paid SWIDA to condemn the land.[174] In the ensuing court battle, the raceway admitted that it could have built the parking lot on its own property, but that doing so would have been more expensive than paying SWIDA $50,000 to condemn its neighbor's land.[175] The Illinois Supreme Court initially upheld the condemnation as a proper public use, but reversed itself on rehearing and determined, in a five-to-two decision, that renting out the power of eminent domain was simply going too far.[176]

Most property owners are not as fortunate as the plaintiffs in the SWIDA case. The Michigan Supreme Court upheld Detroit's condemnation of homes for GM on the grounds that it was the legislature's prerogative to determine what constitutes a public use.[177] The New Jersey Supreme Court upheld West Orange's condemnation of land for a private road on the same grounds.[178] The property owners in New London won a partial victory in the trial

168 *Id.* at 2.

169 Township of W. Orange v. 769 Assoc., L.L.C., 800 A.2d 86, 89 (N.J. 2002).

170 *Id.*

171 Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 106–07 (N.J. Super. Ct. Law Div. 1998).

172 Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 710 N.E.2d 896, 898–99 (Ill. App. Ct. 1999).

173 Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 4 (Ill. 2002).

174 *Southwestern Ill. Dev. Auth.*, 710 N.E.2d at 902.

175 *Id.* at 903.

176 *Southwestern Ill. Dev. Auth.*, 768 N.E.2d at 3.

177 Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 458–59 (Mich. 1981).

178 Township of W. Orange v. 769 Assocs., LLC, 800 A.2d 86, 93 (N.J. 2002).

court on the narrow grounds that the city had not specified the uses to which some of the properties would be put.[179] The court declined to hold that the condemnations served only private rather than public uses.[180] The case is currently on appeal before the Connecticut Supreme Court. Similarly, Atlantic City's effort to hand property over to Donald Trump was struck down on the narrow ground that nothing ensured the land would be used for a public purpose.[181] The court declined to rule as a matter of law that condemning land for a casino parking lot was not a public use.[182]

The eminent domain and transportation cases discussed above are only a few examples of areas in which courts defer almost completely to legislative discretion, but they resoundingly demonstrate one thing: legislatures that are permitted to regulate without limits all too often exceed and abuse their powers.

V. THE SOLUTION TO JUDICIAL ABDICATION

If the extreme judicial deference epitomized by the rational basis test is the wrong approach to economic legislation, what is the right approach? One answer is that economic rights should not be treated any differently in principle than the so-called "fundamental" rights that courts do protect. Scholars such as Bernard Siegan, Randy Barnett, and Richard Epstein have covered that subject in detail and have offered comprehensive theories of judicial review that are properly grounded in the structure of the Constitution as well as the political and moral principles on which it is based.[183] Their approaches would require fundamental changes to government, which are certainly preferable, but not likely to occur anytime soon. In the meantime, courts can, and should, apply a standard of scrutiny that would remain within the existing framework of judicial review, but would rein in some of the worst abuses by the political branches of government.

The *Craigmiles* decision is a step in the right direction. As noted earlier, the district court in *Craigmiles* held that the law as applied to casket retailers violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[184] The Sixth Circuit affirmed, concluding that restricting sales of caskets to li-

179 Kelo v. City of New London, No. 557299, 2002 WL 500238, at *60 (Conn. Super. Ct. Mar. 13, 2002).

180 *Id.* at *112.

181 Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998).

182 *Id.*

183 *See generally* SIEGAN, ECONOMIC LIBERTIES, *supra* note 35, at 248–64, 318–31; Barnett, *Reconceiving*, *supra* note 87; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

184 110 F. Supp. 2d at 667.

censed funeral directors did not promote either public health or consumer protection.[185] While the Sixth Circuit recognized that the quality of a particular casket could conceivably protect health and safety, restricting casket sales to licensed funeral directors did not further that purpose because the State does not regulate the quality of caskets or require particular types of caskets to be used in any particular situation.[186] Consumers are free to purchase any casket they wish or to dispense with a casket altogether, and funeral directors are still free to advise consumers on what sort of casket they should purchase regardless of the source of the casket.[187] The court similarly concluded that the law does not promote consumer protection because the anti-fraud provisions of the funeral act are essentially the same as those available to consumers in general.[188] In other words, Tennessee law creates no incentive for licensed funeral directors to behave more honorably than other merchants. At bottom, the court recognized that the licensing law was well suited for only one conceivable purpose: "protecting the monopoly rents that funeral directors extract from consumers."[189] Merely "protecting a discrete interest group from economic competition," however, is not a legitimate state purpose.[190] Accordingly, the law could not withstand scrutiny even under the rational basis test.

One might take issue with the Sixth Circuit's claim that economic protectionism is not a legitimate state interest under existing Supreme Court precedent—indeed, the court in *Powers*, which was decided after the *Craigmiles* appeal, did exactly that.[191] If courts are going to accept economic protectionism as a legitimate state interest, however, we ought to recognize that our approach to government has truly come full circle and ended up precisely where the framers began. What is "economic protectionism" after all but the basest example of factional politics? Economic protectionism by the states is precisely what motivated the framers to convene a constitutional convention and draft a new constitution.[192] If courts embrace economic protectionism as a le-

185 Craigmiles v. Giles, 312 F.3d 220, 225–26 (6th Cir. 2002).

186 *Id.* at 225.

187 *Id.* at 225–26.

188 *Id.* at 226–27.

189 *Id.* at 229.

190 *Id.* at 224. The court cited *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949), and *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983), for this proposition, but it is also supported by *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 882–83 (1985), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984).

191 *See* Powers v. Harris, No. CIV-01-445-F, slip op. at 26–27 (W.D. Okla. Dec. 12, 2002).

192 *See, e.g.*, Madison, Speech in the Federal Convention, *supra* note 100, at 92; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 231 (1824) ("If there was any one object riding over

gitimate state purpose, they will end up achieving precisely what the framers sought to avoid.

Yet courts can rein in legislative abuses only if they engage in a more searching analysis than the extremely deferential review epitomized by the court in *Powers* and most rational basis cases. Courts must look behind the stated rationales for a law, and use common sense to determine what in fact the legislature was attempting to accomplish. As the Supreme Court stated over a century ago:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.[193]

The Supreme Court has applied the rational basis test in precisely this manner. In *Romer v. Evans*, for instance, the Court cited a number of cases that upheld laws under the rational basis test and stated:

> The laws challenged in the cases just cited were narrow enough in scope and *grounded in a sufficient factual context* for us to ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.[194]

In *City of Cleburne v. Cleburne Living Center*, the Court struck down a zoning ordinance that required a home for the mentally retarded to obtain a special use permit to operate in a specific location.[195] Finding that "the *record does not reveal any rational basis* for believing that the . . . home would pose any special threat to the city's legitimate interests," the Court concluded that the law violated the Equal Protection Clause because it treated the home differently than it treated similar buildings, such as apartments and hospitals.[196] In both of these cases, the Supreme Court gave substance to the rational basis test by requiring some connection based in actual facts between the stated purposes of a law and the

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every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints.").

193 Mugler v. Kansas, 123 U.S. 623, 661 (1887).

194 517 U.S. 620, 632–33 (1996) (emphasis added).

195 473 U.S. 432, 450 (1985).

196 *Id.* at 448 (emphasis added).

means chosen to achieve it.[197] Other lower courts besides the Sixth Circuit have applied the rational basis test in a similar manner.[198]

If courts are to perform their proper function of enforcing constitutional limitations on government and protecting individual rights, this more searching form of review must become the rule, rather than the exception. First, courts must be prepared to declare some ends, such as economic protectionism, illegitimate. Second, in order to separate legitimate from illegitimate ends, and to ensure that legislatures do not regulate too broadly or legislate for the benefit of private parties, courts must require some fit between means and ends that is based in fact, rather than fancy. Certainly courts should not assume a roving commission to second-guess a legislature's motives, but neither should they ignore the obvious. It does not take a terribly penetrating analysis to see the real reason behind laws that require a license to sell caskets, or permission from existing limousine or taxi companies in order to compete with them, or that hand private land to Donald Trump so he can build a casino parking lot.[199] Courts make such common sense judgments in other constitutional contexts—for instance when they review laws under the First Amendment and the Dor-

197 State courts during the nineteenth century often scrutinized economic laws in similar fashion. *See, e.g.*, Chaddock v. Day, 42 N.W. 977, 978 (Mich. 1889); *In re* Jacobs, 98 N.Y. 98, 110–11 (1885), and cases cited *supra* notes 68–69. Anything approaching substantive scrutiny of economic laws is often derided as "Lochnerism," but the Supreme Court scrutinized economic laws in this manner well before the so-called *Lochner* era. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 365–66 (1886) (striking down a local ordinance that prohibited the operation of laundry businesses in wooden buildings without permission from the city because the law was being enforced only against Chinese immigrants in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323–24, 327–28 (1866) (striking down state law requiring an oath of loyalty to the United States as a condition of employment as unconstitutional bills of attainder and *ex post facto* laws because the requirements were punishments for acts taken when they were legal (i.e., supporting secession) rather than appropriate professional standards); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 355–58 (1866) (upholding the same principles as *Cummings* with respect to federal law).

198 *See, e.g.*, Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434, 440–41 (S.D. Miss. 2000) (striking down retail casket licensing law under Due Process and Equal Protection Clauses of Fourteenth Amendment); Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999) (stating that "[t]here are limits to what the State may require before its dictates are deemed arbitrary and irrational" and striking down law requiring African hair braiders to become licensed cosmetologists); Santos v. City of Houston, 852 F. Supp. 601, 608–09 (S.D. Tex. 1994) (striking down an anti-jitney law); Brown v. Barry, 710 F. Supp. 352, 355–56 (D.D.C. 1989) (holding a ban on street corner shoeshine stands unconstitutional).

199 Indeed, as David Bernstein has demonstrated, the effect, if not the purpose, of many occupational licensing and other economic laws during the late nineteenth and early twentieth centuries was to exclude disfavored groups such as African Americans and other minorities. Courts' recognition of this fact and their greater scrutiny of these laws during the *Lochner* era thus benefited minorities by opening many fields from which they would otherwise have been precluded. *See* BERNSTEIN, *supra* note 43, at 28–45.

mant Commerce Clause.[200] There is no reason to avoid doing so in the economic context as well.

VI. CONCLUSION

That the problem of faction still exists today, despite the framers' efforts to avoid it, should serve as a warning sign. Something has gone wrong in our constitutional system. Courts bear a large part of the responsibility. They have allowed government to grow far beyond its intended size and scope. With government doing as much as it does today, the opportunities for abuse are many. If courts are not going to limit the size of government, they must be prepared at the very least to limit its abuses. Yet they cannot discharge this vital responsibility if they refuse to judge. It is no small irony that in a time allegedly characterized by judicial realism, the one thing that courts consistently refuse to be realistic about is governments' tendency to abuse power when wealth and property are at stake.

In short, to play their proper constitutional role, courts must become a little more realistic in their assessment of the political branches of government and a little less skeptical of their own abilities to counter abuses. In 1889, the Supreme Court of Michigan noted:

> It is quite common in these later days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts.[201]

This is sage advice. If courts are to play their proper role of enforcing constitutional limitations, they ought to heed it.

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200 *See, e.g.*, Thompson v. W. States Med. Ctr., 122 S. Ct. 1497, 1507 (2002) (holding that FDA advertising ban for compounded drugs violated First Amendment's protections for commercial speech, stating that "regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try"); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (finding that town ordinance requiring all recycling to be performed at a local transfer station hoarded a resource for the benefit of local businesses, and violated the Dormant Commerce Clause).

201 Chaddock v. Day, 42 N.W. 977, 978 (Mich. 1889).

The Right to Earn a Living

*Timothy Sandefur**

"The monopolizer engrosseth to himself what should be free for all men."

-Edward Coke[1]

I. INTRODUCTION

"At common law," wrote William Blackstone, "every man might use what trade he pleased."[2] This seemingly innocuous phrase, dropped offhandedly into a chapter on the obligations of master and servant, hints at a rich common law tradition which has largely been ignored—or even denied outright—by more modern scholarship.

One representative sample of the modern view of economic liberty is the following:

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* College of Public Interest Law Fellow, Pacific Legal Foundation. J.D., Chapman University School of Law, 2002; B.A., Hillsdale College, 1998. A much-abridged version of this article appeared in 7 INDEPENDENT REV. 69 (2002). In the following paper, many quotations from antique sources reproduce obsolete or incorrect spellings which appear in the original. Using "sic" after all of these unique spellings would quickly become tedious. Thus, these quotations are reproduced without the customary "sic" designation, except for a few instances where the editors felt its inclusion was necessary to avoid the appearance of typographical error. In addition, many of the cases discussed in this paper were written in Law French, an odd mixture of Latin, Norman French, and English, which constituted a unique legal language until the seventeenth century. These have been translated and summarized. I wish to thank Harvard law student Alexander Volokh and Chapman University School of Law Professor John C. Eastman for their help.

I wish to dedicate this article to my father, Mark M. Sandefur, who, like his father before him (a World War II veteran), has secured the blessings of liberty to himself and to me, first by helping to win the Cold War, and now by working to win the war in which we are engaged today.

> Your fathers . . . were peace men; but they preferred revolution to peaceful submission to bondage. They were quiet men; but they did not shrink from agitating against oppression. They showed forbearance; but that they knew its limits. They believed in order; but not in the order of tyranny. With them, nothing was "settled" that was not right. With them, justice, liberty and humanity were "final;" not slavery and oppression. You may well cherish the memory of such men. . . . They seized upon eternal principles, and set a glorious example in their defense. Mark them!

Frederick Douglass, *What to the Slave is the Fourth of July?, reprinted in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 192 (P. Foner & Y. Taylor eds., 1999).

1 *Quoted in* CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 420 (1957).

2 1 WILLIAM BLACKSTONE, COMMENTARIES *427.

> I do not count the Supreme Court decisions defending contract or property rights from state regulation as Bill of Rights decisions. None of these cases represents a defense of civil liberties. The Court merely used libertarian philosophy to protect the wealthy from progressive legislation. The Court eventually rejected these economic liberty decisions because they were not connected to the text of the Constitution or any philosophy with roots in the history and traditions of our nation and its democratic process.[3]

In Part I of this paper I will examine the history of the common law right to pursue a lawful occupation, to demonstrate just how thoroughly wrong this view is. Part II will address the history of this right from the Magna Carta to the era of Sir Edward Coke, who might rightly be regarded as the founding father of what is now called "economic substantive due process."[4] Part III discusses the effect of Coke's works on the American Revolution, and Part IV discusses his influence on the early period of American Constitutional history. Part V discusses the *Slaughter-House Cases*,[5] and the treatment of the right to earn a living between those cases and the New Deal era. Part VI discusses academic criticism of these cases, and the triumph of legal positivism in 1937. Part VII will review the treatment of this right from 1937 to the present day. It is my desire that this paper will at least illustrate that the economic substantive due process cases did not announce principles unknown to legal history—were not legal interlopers gone beyond reasonable readings of precedent—and that it was instead the 1937 repudiation of protections for economic liberties that was the new, ahistorical reading of the law,[6] and one which has proven itself to be fallacious and dangerous.

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3 John E. Nowak, *The 'Sixty Something' Anniversary of the Bill of Rights*, 1992 U. ILL. L. REV. 445, 452 (1992).

4 This term is generally used to refer to the theory, much reviled in the legal academy, that the Due Process Clauses of the Fifth and Fourteenth Amendments prevent government from infringing on certain rights which are generally associated with "economic" behaviors—*e.g.*, property rights, or the right to earn a living. Today, the Due Process Clauses are seen as protecting rights such as the right to privacy, but not economic freedoms. That the term "economic substantive due process" dissolves on closer inspection, particularly because there is no principled distinction between "economic" and "personal" rights, is one of the major themes of this article. Another theme, that the Due Process Clause was interpreted as including a substantive component long before the nineteenth century, has been thoroughly explored by Bernard Siegan, particularly in his recent book. *See* BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM THE MAGNA CARTA TO THE FOURTEENTH AMENDMENT (2001).

5 83 U.S. (16 Wall.) 36 (1873).

6 *See infra* note 230.

II. Before the American Revolution

A. Magna Carta to Lord Coke

By Magna Carta, "[a]ll merchants are to be safe and secure in leaving and entering England, and in staying and traveling [sic] in England . . . to buy and sell free from all maletotes by the ancient and rightful customs . . . ."[7] Although Magna Carta's importance has been greatly exaggerated, the "myth of Magna Carta" was built by men who were simultaneously building the background tradition of English and American liberty.[8] Before (and after) Magna Carta, the king exercised a vaguely defined sweep of power called the "prerogative,"[9] by which he could grant certain exclusive rights, or "franchises" to his subjects. But from early on, the English suspicion of the prerogative power manifested itself in resistance to these royal grants of exclusive rights to trade.

Thus Fortescue, whose *De Laudibus Legum Anglie*[10] was written in 1471, wrote that:

> In the realm of England, no one . . . [is] hindered from providing himself with salt or any goods whatever, at his own pleasure and of any vendor. . . . Nor can the king there, by himself or by his ministers, impose tallages, subsidies, or any other burdens whatever on his subjects, nor change their laws, nor make new ones, without the concession or assent of his whole realm . . . in . . . parliament.[11]

Fortescue believed that this relative economic freedom was responsible for England's prosperity and he was largely right.[12] Of course, the monarchy was hardly a free-market institution, but as far back as the reign of Edward III, common law courts had been concerned with protecting the subject's right to economic freedom. In 1377, the court struck down a royal monopoly which had been granted to a man named John Peachie, on the sale of wine in London.[13] The court held this to be a violation of the right of free

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7 J.C. Holt, Magna Carta 461–63 (2d ed. 1992). By the Confirmatio Cartarum, King Edward I acknowledged that the Magna Carta had become common law. Confirmatio Cartarum (Nov. 5, 1297), *available at* http://www.constitution.org/eng/confir_cartarum.htm.

8 *See* Winston S. Churchill, The Birth of Britain 254–57 (Barnes & Noble Books 1993) (1956); Holt, *supra* note 7, at 2–22, 378–405 (describing the rise of the "myth of Magna Carta").

9 *See generally* 1 Blackstone, *supra* note 2, at *271–73. Blackstone also discusses the effects of prerogative in corporate law. 1 *id.* at *467–85.

10 "In Praise of the Laws of England" (per author's own translation).

11 Sir John Fortescue, De Laudibus Legum Anglie 87 (S.B. Chrimes ed. and trans., Wm. W. Gaunt & Sons, Inc. 1986) (1545).

12 *Id.* at 87–89.

13 Edward Coke, The Third Part of the Institutes of the Laws of England *181 (William S. Hein Co. 1986) (1797) [hereinafter Coke, The Third Part of the Institutes]; 4 Sir William Holdsworth, A History of English Law 344 (3d ed. 1945).

trade.[14] Similarly, in *John Dier's Case*,[15] Chief Justice Holt ruled against a monopoly charter, holding that he would have imprisoned anyone who had claimed such a monopoly on his own authority.[16]

Thus, the right of the king to control the economy *was* limited at common law, by a right, the importance of which must have been very obvious in an era where starvation and pestilence were daily experiences. The right to support oneself by a lawful calling[17] was not only central to the health of the state, but to the lives of citizens. Such economic liberties were protected in, for example, *Prior of Christchurch Canterbury v. Bendysshe*, in which the court held that merely selling products adjacent to an existing seller does not constitute a cause of action, even though it might injure an existing seller.[18] As Holdsworth said, "the mediæval [sic] judges favoured the principle [of free trade], just as they favoured the principle of freedom of alienation, because they were hostile to all arbitrary restrictions on personal liberty, or rights of property, for which no legal justification could be shown."[19]

B. Lord Coke

By far the most outspoken defender of the right to earn a living was Sir Edward Coke.[20] speaker of the House of Commons, then attorney general for Queen Elizabeth, Coke was appointed Chief Justice of King's Bench by King James I.[21] Coke is best remembered today for his decision in *Dr. Bonham's Case*,[22] in which he asserted the supremacy of the law over the king.[23] But Coke was also the leading opponent of royal monopolies.[24] This is rather ironic, since, as Elizabeth's Attorney General, Coke was re-

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14 4 HOLDSWORTH, *supra* note 13, at 344 n.6.

15 2 Y.B. Henry V *26 (per author's own translation).

16 *See also* The Case of the Tailors, 77 Eng. Rep. 1218, 1219 (K.B. 1615) (citing *Dier's Case*, and noting that "there Hull held, that the bond was against the common law, and by G—d if the plaintiff was here, he should go to prison till he paid a fine to the King").

17 Throughout this paper, I will use interchangeably such terms as "the right to a lawful calling," "the right to pursue a lawful occupation," "the right to earn an honest living," and so forth. I find the term "right of livelihood" to have been tainted by frequent misuse. *See infra* text accompanying note 274.

18 93 SELDEN SOCIETY 8, 9 (1503).

> [D]amage alone is not a cause of action. Thus, [where] an innkeeper or other victualler comes and dwells next to another [innkeeper] and thereby more of the customers resort to him than to the other, it is a damage to the other but no wrong, for he cannot compel men to buy victuals from him rather than from the other.

93 *id.* (second and third alteration in original). *See also* Keeble v. Hickeringill, 103 Eng. Rep. 1127, 1128 (K.B. 1707).

19 11 HOLDSWORTH, *supra* note 13, at 477–78 (footnotes omitted).

20 *See* BOWEN, *supra* note 1.

21 *Id.* at 340–41.

22 77 Eng. Rep. 646 (K.B. 1610).

23 *See* BOWEN, *supra* note 1, at 314–17.

24 *Id.* at 420.

quired to argue on behalf of the plaintiff in the famous *Case of Monopolies*, or *Darcy v. Allen*, in 1602.[25] Edward Darcy had received a monopoly to sell playing cards from the monarchy. Allen then made and sold playing cards, and Darcy sued.[26] Chief Justice Popham ruled for the defendant. As Coke wrote:

> All . . . trades, as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liberty of the subject . . . .[27]

Today, those who criticize the concept of "economic due process" essentially argue that protection of freedom of contract is merely a guise for the wealthy to oppress the poor or to prevent regulations which aim to protect the safety and health of the people.[28] Some critics have even contended that economic due process is an attempt to "enact Mr. Herbert Spencer's Social Statics,"[29]

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25 77 Eng. Rep. 1260 (K.B. 1602).

26 For an enlightening history of this case, see Jacob I. Corré, *The Argument, Decision, and Reports of* Darcy v. Allen, 45 EMORY L.J. 1261 (1996).

27 77 Eng. Rep. at 1262–63. Note that this was the argument of one of the attorneys in the case, not an opinion by Popham. *Id.* at 1262. Popham and the court did not explain their decision in print. Corré, *supra* note 26, at 1269–70.

28 Although I quote many such critics throughout this article, this view is so prevalent that it would be impossible to cite all but a fraction of them here. *See, e.g.*, Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 431–32 (1999) (arguing that *Lochner* was an example of "misuse of the Fourteenth Amendment to invalidate humane state legislation"); Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 51 (2002) ("The U.S. Supreme Court's use of rights doctrines to invalidate progressive legislation during the *Lochner* era attests to the fact that the protection of rights can advance causes on the political right as well as that of the left."). *See also* Jane Rutherford, *The Myth of Due Process*, 72 B.U.L. REV. 1, 12 (1992) (arguing that "[t]he *Lochner* era decisions . . . protected private enterprise from the incursions of an impoverished majority, echo[ing] the original Framers' fear of the poor masses"). Rutherford recognizes that the Founders probably would have "approved of a baker's 'right' to work sixteen hours per day. Born without property, a person could only hope to acquire such property by dint of extraordinary effort. Indeed, limiting the baker's 'right' to work sixteen hours a day may have relegated him to a life of poverty." *Id.* Yet she proceeds to argue that "[t]he anti-regulatory decisions err (are substantively arbitrary) because they fail to balance power in favor of the oppressed," which of course begs the question. *Id.* Mr. Lochner, after all, *won* his case.

29 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Holmes' remark, and his further explanation that a constitution is "made for people of fundamentally differing views" and is "not intended to embody a particular economic theory" can be questioned. *Id.* at 75–76. A constitution is exactly where a particular political and economic theory is embodied. The United States Constitution explicitly protects private property, contracts, and even a gold standard. *See* U.S. CONST. amend. V. *Id.* art I, § 10, cl. 1. Indeed, what *is* a constitution, if it is not an enactment of a particular economic and political system? Classical philosophers such as Aristotle and Augustine theorized that political society is (in Augustine's words) "an assemblage associated by a common acknowledgement of right, and by a community of interests." *See* AUGUSTINE, THE CITY OF GOD 19:23–24,

and consequently a threat of rampant *laissez-faire*, leaving the consumer no protection against faulty or dangerous products. Yet the common law courts, which had always defended freedom of contract, had also always upheld the right of the government to regulate or license dangerous occupations to protect the consumer.

Indeed, evidence of judicial consumer protection dates back to the twelfth century.[30] Glanville wrote that "if the seller has sold the thing to the buyer as sound and without fault and the buyer can afterwards satisfactorily prove that at the time of the contract the thing was not sound and had a fault, then the seller will be bound to take back his thing."[31] Ancient court reports are also full of cases which protect the consumer from fraud or from shoddy merchandise. For instance, in the Leet Rolls of Edward I, "Robert Suffield [was found liable] for making fraud etc., by selling oil of one kind for oil of another kind," and was fined four shillings.[32] In another case, "all those Sprowston men . . . knowingly buy measly pigs, and they sell the said sausages and puddings, unfit for human bodies, in Norwich market."[33] The Fair Court of St. Ives routinely dealt with similar cases in which, for instance, a loaf of

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reprinted in THE ESSENTIAL AUGUSTINE 211 (Vernon J. Bourke ed., 2d ed. 1974). *See also* ARISTOTLE, POLITICS 1:2, *reprinted in* INTRODUCTION TO ARISTOTLE 555 (Richard McKeon ed., 1947) ("[T]he state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life."). Thus, classical political theory lends support to the idea that at least one of the purposes of a constitution is to delineate common societal interests in order to affect the public's common political and economic goals. While such modernists as Holmes may have rejected this view, even their view, that society is only a means of organizing and bargaining for political power, would beg the question: On what premises does a society create the rules for that bargaining? Further, even if the Constitution is only a procedural document, the decisions that lead to those procedural arrangements are certainly based on at least an implicit judgment of good and bad. It is harder for the Congress, for example, to overrule the President's veto than for the Congress to pass a law with the President's consent. Ostensibly, this is because a law which the President does not approve is more likely to be a "bad" law than a law which both the President and the Congress agree upon. To have made the procedure (i.e., the power-sharing) more difficult in one case than in the other embodies a judgment of good and bad which can only be called a "particular political theory." Likewise, the Constitution prohibits any state from "mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts." U.S. CONST. art I, § 10, cl. 1. This rule can *only* be explained by reference to "a particular economic theory." *See also* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 324 (1946) ("The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.").

30 *See* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1157–59 (1931).

31 RANULF DE GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 129 (G.D.G. Hall trans. & ed., Thomas Nelson & Sons 1965) (1189).

32 Leet Roll of 24 Edward I. 129 5/6, *in* 5 THE PUBLICATIONS OF THE SELDEN SOCIETY 47 (1891).

33 Leet Roll of 24 Edward I. 128 7/8, *in* 5 THE PUBLICATIONS OF THE SELDEN SOCIETY 8 (1891).

bread was found "deficient in weight," and the seller fined,[34] or where "Adam Cabel sells whelks with good and bad mixed together."[35]

The courts have acknowledged the legitimacy of government regulations to protect consumers, though they have not held that the right to pursue a given occupation necessarily meant being free from basic safety and other similar regulations. For example, the courts never held that the state could not prohibit the exercise of a lawful trade on Sabbath days.[36] Rather, the common law held that such regulations were invalid when used for the purpose of keeping an honest person out of the market.[37] In the *Case of the City of London*,[38] the court ruled that "the King may erect *guildam mercatoriam*, *i.e.*, a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, and not for the hindrance or diminution of it."[39] In other words, government could regulate trade impartially, but not in order to prevent the free exercise of a lawful calling. The cases agreed with the principle explained by Friedrich Hayek: "[A] free system does not exclude on principle all those general regulations of economic activity which can be laid down in the form of general rules specifying conditions which everybody who engages in a certain activity must satisfy"—for example, a ban on the production and sale of phosphorus matches for reasons of health.[40] Truly benign regulations of trade may result in greater economic efficiency by reducing production costs.[41] Thus, while Hayek acknowledged that such regulations might sometimes be worthwhile,[42] he warned that "[t]he economist will remain suspicious and hold that there is a strong presumption against such measures because their over-all cost is almost always underestimated and because one disadvantage in particular—namely, the prevention of new

34 Pleas of the Fair on Wednesday Before the Feast of St. Dunstan the Bishop in the Aforesaid Year (A.D. 1302), *in* 23 THE PUBLICATIONS OF THE SELDEN SOCIETY 83 (1908).

35 Leet Roll of 24 Edward I. 128 7/8, *supra* note 33, at 10.

36 *See* Crepps v. Durden, 98 Eng. Rep. 1283, 1284 (K.B. 1777).

37 This point was put succinctly in an 1833 New York case, where the court said that "a by-law that no meat should be sold in the village would be bad, being a general restraint; but that meat shall not be sold except in a particular place is good, not being a restraint of the *right to sell* meat, but a *regulation* of that right." Village of Buffalo v. Webster, 10 Wend. 99, 101 (N.Y. Sup. Ct. 1833) (emphasis added).

38 77 Eng. Rep. 658 (K.B. 1610).

39 *Id.* at 663. *Accord* Walter v. Hanger, 72 Eng. Rep. 935 (K.B. 1602) (per author's own translation).

40 FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 224–25 (1960).

41 *Id.* Note here the similarity to what Richard Epstein has called "Implicit In-Kind Compensation." RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195 (1985).

42 HAYEK, *supra* note 40, at 224–25.

developments—can never be fully taken into account."[43] As a 1727 case indicated, a restraint on trade is acceptable so long as the party exercises the trade somewhere, but is undesirable if it tends to prevent the exercise of the trade anywhere.[44] A South Carolina court put it more simply. A city may regulate a trade, "[b]ut the suppression of a trade is not a regulation. To be regulated, the trade must subsist."[45]

In *Davenant v. Hurdis*,[46] Coke argued the same point—that although a "by-law" which regulated the practice of a trade was legitimate, a law which restrained trade was unjust. He reasserted this stance some twenty-eight years later in *Monopolies*: "[O]rdinances for the better rule and government of the company . . . are consonant to law and reason," but an ordinance which required a person to have clothing only made by a particular guild of tailors "was against the common law, because it was against the liberty of the subject . . . ."[47]

Another example is *Allen v. Tooley*,[48] in which an upholsterer was sued for failure to serve an apprenticeship before taking up his trade. Coke, who by this time had become Chief Justice of King's Bench, ruled that "no skill there is in this, for he may well learn this in seven hours."[49] As unskilled labor, it was not subject to the sort of licensing restrictions appropriate to more technical trades. The court in *Tooley* lucidly explained the common law's view of regulations for the protection of consumers:

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43 *Id.*

44 Chesman ex Ux' v. Nainby, 93 Eng. Rep. 819, 821 (K.B. 1727).

> The reason why particular restraints [on trade] are allowed is, because the publick is not concerned, so long as the party exercises the trade somewhere. But if it tends to prevent the exercise of [the trade] any where, it is not to be endured; because the publick loses the benefit of the party's labour, and the party himself is rendered an [sic] useless member the community.

Id. Or to put it in the words of a 1787 text on English legal history:

> Many other statutes were made [in the reign of Henry VIII] for the conducting of different manufactures, of which, as well as of the other acts of this and the following reigns, it may be observed in general, that they had a tendency to give preferences to corporations and fraternities, and to encourage a spirit of monopoly.

4 JOHN REEVES, HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS TO THE END OF THE REIGN OF PHILIP AND MARY 230 (2d ed. 1787). *See also* Wannel v. Camerar' Civit' London, 93 Eng. Rep. 775, 775–76 (K.B. 1726).

> We are all of opinion, that this is a good by-law, being made in regulation of trade, and to prevent fraud and unskilfulness [sic], of which none but a company that exercise the same trade can be judges. This does not take away his right to his freedom, but only his election of what company he shall be free . . . .

Id. Accord Player v. Vere, 83 Eng. Rep. 149 (K.B. 1691), *also reported at* 83 Eng. Rep. 168.

45 State v. Town Council of Columbia, 40 S.C.L. (6 Rich.) 404, 415 (1853). *Accord* Sweet v. City of Wabash, 41 Ind. 7 (1872); Town of Cantril v. Sainer, 12 N.W. 753, 753–54 (Iowa 1882); City of Emporia v. Volmer, 12 Kan. 622, 626 (1874).

46 72 Eng. Rep. 769 (K.B. 1574) (per author's own translation).

47 Darcy v. Allen, 77 Eng. Rep. 1260, 1263 (K.B. 1602).

48 80 Eng. Rep. 1055 (K.B. 1614).

49 *Id.* at 1057.

> [B]y the very common law, it was lawful for any man to use any trade thereby to maintain himself and his family; this was both lawful, and also very commendable, but yet by the common law, if a man will take upon him to use any trade, in the which he hath no skill; the law provides a punishment for such offenders, and such persons were to be punished in the court leet, and by actions brought, as by the cases before . . . .[50]

The court cited the example of a blacksmith who injured a horse because he was not skilled in his trade—proper legal redress, the court explained, was already available in the form of a suit for damages. "Unskilfulness [sic] is a sufficient punishment for him," Chief Justice Coke said,[51] but the case settled out of court before a final decision.[52] In short, the common law view was that skilled trades were subject to regulation only in order to increase or advance trade, but not to hinder it.[53] In the *Case of the Tailors* (1615), Coke again wrote that "at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness,"[54] and thus "the common law abhors all monopolies, which prohibit any from working in any lawful trade . . . ."[55]

Coke's defense of the free market in these cases was not intended to protect the rich, but exactly the opposite: to defend the poor from legal restrictions on the freedom which gave them a chance to work their way out of poverty. It was the wealthy who *benefited* from monopoly practices. When, furious over *Dr. Bonham's Case*, James finally fired him, Coke entered the House of Commons and continued his attack on the monopolies: "The monopolizer engrosseth to himself what should be free for all men," he said.[56] Finally, he managed to get an act passed, the Statute of Monopolies, which declared that all monopolies—save temporary patents, used to encourage innovation—"are altogether contrary to the laws of the realm, and so are and shall be utterly void and of none effect and in no wise to be put in use or execution."[57] In his *Commentaries on American Law*, Chancellor Kent referred to the Statute of Monopolies as "magna charta for British industry," and quoted the view that it "contained a noble principle, and secured to every subject unlimited freedom of action, provided he did no injury to others, nor violated statute law."[58]

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50 *Id.* at 1055.

51 *Id.* at 1059.

52 *Id.*

53 *See also* Chamberlain of London's Case, 77 Eng. Rep. 150, 151 (K.B. 1592) (upholding regulation of trade where it is "made . . . to prevent all frauds and falsities").

54 77 Eng. Rep. 1218, 1219 (K.B. 1615).

55 *Id.*

56 BOWEN, *supra* note 1, at 420.

57 21 Jac. 1 c. 3.

58 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *272 n.(c) (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 12th ed. 1999) (1873).

Coke was not the only judge who argued that monopolies violated the common law.[59] In *Colgate v. Bacheler*,[60] the court held that:

> [T]his condition is against law, to prohibit or restrain any to use a lawful trade at any time . . . for as well as he may restrain him for one time . . . he may restrain him for longer times . . . being freemen, it is free for them to exercise their trade in any place. . . . [A party] ought not to be abridged of his trade and living.[61]

In the 1632 case of *Mounson v. Lyster*, the court struck down a monopoly under the Statute of Monopolies.[62] Only a few years earlier, the court struck down an ordinance of the Company of Bricklayers which prohibited the plastering of chimney bricks with lime, and permitting only the Company of Plasterers to do the job.[63]

But it was Coke who fought monopolies so intensely that his name became permanently associated with freedom of trade. After he retired from Parliament, he wrote a series of books, the *Institutes of the Common Law of England*, which were to be the training books for generations of lawyers, including Thomas Jefferson, John Adams, and John Marshall.[64] In a chapter on monopolies, Coke wrote that "all grants of monopolies are against the ancient and fundamentall [sic] laws of this kingdome," because "a mans trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a mans trade, taketh away his life . . . ."[65] In short, "[n]o man ought to be put from his livelihood without answer."[66]

> So likewise, and for the same reason, if a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that graunt is against the liberty and freedome of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter.
>
> Generally all monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against the law of the land.[67]

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59 *See also* Weaver of Newbery's Case, 72 Eng. Rep. 962, 962 (K.B. 1616) (per author's own translation).

60 78 Eng. Rep. 1097 (K.B. 1602).

61 *Id.* at 1097.

62 82 Eng. Rep. 122, 122 (K.B. 1632) (per author's own translation).

63 Les Brick-Layers & Tilers v. Les Plaisterers, 81 Eng. Rep. 871, 872 (1624) (per author's own translation).

64 BOWEN, *supra* note 1, at 513–14.

65 COKE, THE THIRD PART OF THE INSTITUTES, *supra* note 13, at *181.

66 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *47 (William S. Hein Co. 1986) (1797) [hereinafter COKE, THE SECOND PART OF THE INSTITUTES].

67 *Id.*

The "Myth of Magna Carta," largely Coke's invention, had come down to earth. Monopolies were anathema to the generation that grew up reading the *Institutes*. In 1678, the Court of King's Bench found a Mr. Ripton not guilty of "exercising the trade of a grocer, not having served an apprentiship," because "any man at common-law might use what trade he pleaseth."[68] In 1685, in *Thomas v. Sorrel*,[69] the Court of Exchequer Chamber noted that "any free-man of London . . . may trade in any part of England."[70] In 1687, King's Bench struck down a monopoly which had been granted for "the sole printing of *blank writs, bonds,* and *indentures*."[71] In 1695, the court struck down an ordinance requiring that "every person using the occupation of music and dancing" in London should be a member of the Company of Musicians, calling the law monopolistic.[72]

In the 1718 case of *Parry v. Berry*,[73] the court held that "without a custom such a bye-law, to restrain persons not being free of the borough from exercising a trade, cannot be maintained . . . ."[74] Probably the most famous of these cases is *Keeble v. Hickeringill*,[75] in which the plaintiff complained that the defendant was firing off a gun to frighten ducks away from his duck-pond, "intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl . . . and deprive him of his profit . . . ."[76] Chief Justice Holt wrote that "when a man useth his art or his skill to take [ducks], to sell and dispose of for his profit; this is his trade; and he that hinder another in his trade or livelihood is liable to an action for so hindering him."[77] *Hickeringill*'s protection of the right to earn a living continues through the English cases of the eighteenth century, providing the necessary legal protection for the beginning of the Industrial Revolution.[78]

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68 Wade v. Ripton, 84 Eng. Rep. 79, 79 (K.B. 1678).

69 84 Eng. Rep. 689 (K.B. 1685).

70 *Id.* at 689.

71 Earl of Yarmouth v. Darrel, 87 Eng. Rep. 48, 48 (K.B. 1687).

72 Robinson v. Groscourt, 87 Eng. Rep. 547, 547 (K.B. 1695).

73 92 Eng. Rep. 1066 (K.B. 1718).

74 *Id.* at 1066. *See also* The King v. Co. of Fishermen of Faversham, 101 Eng. Rep. 1429, 1430 (K.B. 1799) (a private agreement not to compete is legal, but a law in restraint of trade is harmful); Mitchell v. Reynold, 92 Eng. Rep. 859, 859 (K.B. 1714) (Private contracts in restraint of trade, "where no particular consideration is to balance the restraint of trade . . . are void, in what form soever the contract appears."); Broad v. Jollyfe, 79 Eng. Rep. 509, 509 (K.B. 1616).

75 103 Eng. Rep. 1127 (K.B. 1707). *See also* A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 45–75 (1996).

76 *Keeble*, 103 Eng. Rep. at 1128.

77 *Id.*

78 Law reports from this era and earlier frequently record only the attorney's arguments, or only the judge's words, and do not record other material. In *Robinson v. Watkins*, 90 Eng. Rep. 165 (K.B. 1702), the reporter has carefully preserved the long and eloquent argument of the defendant's counsel, and then reports of the outcome only that the matter "was settled in Parliament," without saying what the settlement was. *Id.* at 171. The re-

III. COKE'S LEGACY IN AMERICA

The result of all this, in no small part, would be the American Revolution. After the repeal of the Townshend Duties in 1773, Jefferson wrote that "[n]othing of particular excitement occurring for a considerable time our countrymen seemed to fall into a state of insensibility to our situation."[79] The immediate crisis of the Townshend Acts being over, the tradesmen who made up Boston's Sons of Liberty had returned home, and the American Revolution teetered on the brink. It was *monopoly* that pushed it over.[80] When George III granted the East India Company the right not only to *ship* tea, but to *sell* it in America, workers who were now legally closed out of a livelihood reacted with the famous Boston Tea Party.[81]

The founding generation probably understood monopoly in a way we do not. To them, the term monopoly meant a company

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port, however, is strong evidence that by 1702, the English courts regarded it as a settled matter that "the common law . . . leaves it lawful for any man to exercise a lawful imployment [sic] . . . ." *Id.* at 169. *See also* Harrison v. Godman, 97 Eng. Rep. 161, 163–65 (K.B. 1756) (striking down licensing requirement for butchers); Rex v. Combs, 90 Eng. Rep. 454, 454 (K.B. 1702) ("[A]n indictment, which sets forth that there is an antient [sic] custom in Winchester, that no person should exercise any trade till free of the Guild of Merchants there . . . was quashed without difficulty."). Yet still the courts upheld regulations which were necessary to continue the trade or protect quality. *See, e.g.*, Clark v. Le Cren, 109 Eng. Rep. 20, 22 (K.B. 1829) ("By common law, any person may carry on any trade in any place, unless there be a custom to the contrary . . . but if there be no such custom, a by-law in restraint of trade will be bad."); Bricheno v. Thorp, 37 Eng. Rep. 864, 865 (K.B. 1821) ("A gentleman going into business for himself must not carry into it the secrets of his master; but, on the other hand, I think it my duty to take care that he may not be prevented from engaging in any business that he may fairly and honourably take."); King *ex rel.* Coates v. Coopers Co. of Newcastle-upon-Tyne, 101 Eng. Rep. 1123, 1123 (K.B. 1798) (by-law oppressing trade is void); Kirk v. Nowill, 99 Eng. Rep. 1006, 1006 (K.B. 1786) (striking down regulation of manufacture of cutlery where penalty was forfeiture); Hesketh v. Braddock, 97 Eng. Rep. 1130 (K.B. 1766).

> In the regulation of their own members, [guilds] may indeed make bye-laws . . . . But if corporations were to try their own suits against strangers upon a bye-law "for excluding all traders but themselves," there would be an end of the distinction which has long been established, "that a bye-law which lays this restraint upon trade is void, unless there be a custom to support it."

Id. at 1136; Rex v. Harrison, 97 Eng. Rep. 854, 857 (K.B. 1762) (upholding licensing requirement for butchers because it "is only regulating the trade to what is most right and reasonable."); Rex v. Master of Co. of Surgeons, 97 Eng. Rep. 621, 621 (K.B. 1759) (upholding requirement that surgeon's apprentice must understand Latin); Bosworth v. Hearne, 93 Eng. Rep. 1047, 1047–48 (K.B. 1738) (by-law permissible if reasonable and not in restraint of trade).

79 Autobiography of Thomas Jefferson, *in* THOMAS JEFFERSON: WRITINGS 6 (Merrill D. Peterson ed., 1984).

80 *See, e.g.*, THOMAS FLEMING, LIBERTY!: THE AMERICAN REVOLUTION 75, 77 (1997) (British trade restrictions "virtually made the government the East India Company's permanent partner."); JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 341 (1943) ("The menace of monopoly united virtually all businessmen—whether smugglers or honest traders—in opposition to the East India Company."); SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 203 (1965) (noting colonial reaction to tea monopoly).

81 MORISON, *supra* note 80, at 203–04. *See also* A.J. LANGGUTH, PATRIOTS: THE MEN WHO STARTED THE AMERICAN REVOLUTION 179–84 (1988).

insulated from competition by a special legal privilege which barred others from competing, and thereby earning a living. It was not what we mean by the term today—simply a large and successful company, often one which has succeeded in *spite* of the law. Microsoft, for instance, was not what Thomas Jefferson or Adam Smith meant when they denounced "monopoly." The Post Office is.[82] It was precisely the fact that the government made illegal harmless competition—indeed, helpful competition—that upset the founding generation.[83] In their famous "Cato's Letters," published in 1721, John Trenchard and Thomas Gordon wrote that while free trade "will turn Deserts into fruitful Fields, Villages into great Cities, Cottages into Palaces," the state's exercise of arbitrary power would pervert trade into a weapon or a catastrophe.[84] Trenchard and Gordon believed that those who used "Bribes or Favour," to establish "exclusive Companies" prospered only at the expense of honest merchants who simply lacked political connections.[85]

Some may remark that Thomas Jefferson's ringing phraseology in the Declaration of Independence was meant to depart from John Locke's earlier defense of the rights of "life, liberty, and estate," or "life, liberty and property." In light of Jefferson's other

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82 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *159 (defining monopoly as "a license or privilege allowed by the king for the sole buying and selling, making, working, or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before."). Adam Smith wrote:

> The price of monopoly is upon every occasion the highest which can be got. The natural price, or the price of free competition, on the contrary, is the lowest which can be taken, not upon every occasion indeed, but for any considerable time together. The one is upon every occasion the highest which can be squeezed out of the buyers, or which, it is supposed, they will consent to give: The other is the lowest which the sellers can commonly afford to take, and at the same time continue their business.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 65 (Edwin Cannan ed., 1937) (1776). Note that software prices have consistently fallen while postage stamps have consistently risen. *See also* Budd v. New York, 143 U.S. 517, 550–51 (1892).

> There are two kinds of monopoly; one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law, justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference. It exists where anyone by his money and labor furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He has therefore a monopoly of that business; but it is a monopoly of fact, which anyone can break who, with like business courage puts his means into a similar building.

Id. (Brewer, J., dissenting); *see also* GEORGE REISMAN, CAPITALISM: A TREATISE ON ECONOMICS 375–440 (1996) (detailing two different meanings of the term "monopoly").

83 *See generally* THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 37–70 (1997).

84 John Trenchard, *Trade and Naval Power the Offspring of Civil Liberty Only, and Cannot Subsist Without It* (Feb. 3, 1721), *in* THE ENGLISH LIBERTARIAN HERITAGE 146 (David L. Jacobson ed., 1965).

85 *Id.* at 147.

influences, it is evident that Jefferson's use of the phrase, "life, liberty, and the pursuit of happiness," was meant to assert this right of livelihood. Earlier in 1776, George Mason had begun the Virginia Declaration of Rights with the phrase, "That all men are by nature equally free and independent, and have certain inherent rights . . . namely, the enjoyment of life and liberty, with *the means of acquiring* and possessing property, and *pursuing and obtaining* happiness and safety."[86] Jefferson, who read Mason's declaration with interest while he labored away in Philadelphia, was very concerned with social mobility; he resented what he would later call the "artificial aristocracy," and wanted instead to foster the "natural aristocracy" of "virtue and talents."[87] That government was best which most efficiently enabled the natural aristocracy to rise, he said, and America presented a unique opportunity to create such a government. "Here every one may have land to labor for himself if he chuses; or, preferring the exercise of any other industry, may exact for it such compensation as not only to afford a comfortable subsistence, but wherewith to provide for a cessation from labor in old age."[88] In his first inaugural address, Jefferson defined "the sum of good government" as one which "shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned."[89] "[E]very one has a natural right to choose for his pursuit such one of them as he thinks most likely to furnish him subsistence," he wrote.[90] Surely this is "the pursuit of happiness." James Madison summed up these ideas keenly in his essay "Property"—

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his

86 ROBERT ALLEN RUTLAND, GEORGE MASON: RELUCTANT STATESMAN 111 (1961) (emphasis added).

87 Letter of Thomas Jefferson to John Adams (Oct. 28, 1813), *in* THE ADAMS-JEFFERSON LETTERS 387, 388 (Lester J. Cappon ed., 1959).

88 *Id.* at 391.

89 First Inaugural Address of Thomas Jefferson (Mar. 4, 1801), *in* THOMAS JEFFERSON: WRITINGS 492, 494 (Merrill D. Peterson ed., 1984).

90 Thomas Jefferson, Thoughts on Lotteries (Feb. 1826), *in* 17 THE WRITINGS OF THOMAS JEFFERSON 448, 449 (A. Bergh ed., 1905). Jefferson drafted this memo while he was asking the Virginia legislature for permission to hold a lottery to raffle off Monticello and thereby pay off his crushing debts. Although he received permission, the lottery was a failure. *See* DUMAS MALONE, THE SAGE OF MONTICELLO 473–82, 495–96 (1981).

> neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the œconomical [sic] use of buttons of that material, in favor of the manufacturer of buttons of other materials![91]

Bernard Siegan has said that "[t]he Framers might well be described as commercial republicans."[92] The specter of legally forbidding an honest person from making an honest living haunted the founding generation so much that four states, when ratifying the Constitution, included a ban on monopolies among their proposed bills of rights.[93] To the Framers of the Constitution, the question of monopoly was not merely a matter of economic efficiency. Rather, it was primarily a matter of *natural right*: the right to engage in the very labor which Locke said was the foundation of property rights to begin with: "[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."[94] It was a matter of the free exercise of one's faculties, a right granted by nature, and protected by the common law. This is why Chancellor Kent referred to the Statute of Monopolies as protecting "freedom of *action*."

We can see this concern expressed also in the founders' attitude toward patents and copyrights. In *The Federalist Papers*, James Madison expressed his belief that "[t]he utility of the power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law."[95] But in truth, Madison and Jefferson were quite suspicious of the idea. Jefferson wrote to him that he wished the new Constitution would prohibit monopolies. "With regard to Monopolies they are justly classed among the greatest nusances [sic] in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?"[96] Jefferson agreed that the temporary monopolies called patents and copyrights were *useful*, even while he disagreed that they were *legitimate* from a natural rights point of view.[97] In

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91 James Madison, Property, *reprinted in* JAMES MADISON: WRITINGS 515, 516 (Jack N. Rakove ed., 1999).

92 BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 104 (1980) [hereinafter SIEGAN, ECONOMIC LIBERTIES].

93 *See* THE DEBATE ON THE CONSTITUTION (Bernard Bailyn ed., 1993). The states were Massachusetts, *id.* at 1:944, North Carolina, *id.* at 2:571, New Hampshire, *id.* at 2:551, and New York, *id.* at 2:542.

94 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 328–29 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

95 THE FEDERALIST No. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).

96 Letter from James Madison to Thomas Jefferson, (Oct. 17, 1788), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 562, 566 (James Morton Smith ed., 1995).

97 *See also* William Grampp, *A Reexamination of Jeffersonian Economics*, *in* 1 THE RANDOM HOUSE READERS IN AMERICAN HISTORY 393–404 (Joseph Ernst et al., eds., 1970).

a letter written in 1813, he expressed his deep concerns about the monopolistic power inherent in patents. "Every man should be protected in his lawful acts," he wrote. "But he is endamaged, if forbidden to use a machine lawfully erected, at considerable expense, unless he will pay a new and unexpected price for it. . . . Laws, moreover, abridging the natural right of the citizen, should be restrained by rigorous constructions within their narrowest limits."[98] Jefferson and his contemporaries therefore presumed strongly against laws which granted exclusive business privileges. As the Chief Justice Marshall wrote in *Charles River Bridge v. Warren Bridge*, "'[t]he exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.'"[99]

At the Constitutional Convention, the Framers debated a motion to establish "a [Congressional] power 'to grant charters of incorporation . . . .'"[100] Some delegates objected because they believed such a power might permit Congress to create monopolies. George Mason, responding to these fears, stated that "[h]e was afraid of monopolies of every sort, which he did not think were by any means already implied" by the commerce clause.[101]

Historian Gordon S. Wood described the hostility with which the founding generation greeted the notion of monopolies.

> [B]ecause of a republican aversion to chartered monopolies, the creation of corporations [in early America] did not take place without strenuous opposition and heated debate. As a consequence, these corporations were radically transformed. Within a few years most of them became very different from their monarchical predecessors: they were no longer exclusive monopolies and they were no longer public. They became private property and what Samuel Blodget in 1806 called "rivals for the common weal." And they were created in astonishing numbers unduplicated anywhere else in the world.[102]

"What [Jefferson] wanted essentially was the increased incentive resulting from monopoly grants without the ill effects of monopoly." *Id.* at 401.

98 Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* THOMAS JEFFERSON: WRITINGS 1286, 1287 (Merrill D. Peterson ed., 1984).

99 36 U.S. (11 Pet.) 420, 546 (1837) (quoting Beatty v. Lessee of Knowler, 29 U.S. (4 Pet.) 152, 168 (1830)).

100 JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION 638 (Adrienne Koch ed., 1966).

101 *Id.*

102 GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 318 (1992). At the California Constitutional Convention of 1849, the subject of corporations was debated at length in an exchange that reveals the way in which, as Paul Kens has put it, the nineteenth century saw "people with the same Jacksonian and free-labor roots split over the meaning of liberty and the proper scope of government power." PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 8 (1997). Delegate Charles Botts warned the Convention that:

> Corporations as they were originally known to the Roman law, had several beneficial properties. . . . The institution as it was known when adopted by the common

The revolution had been fought to prevent the arbitrary sway over economic liberty which the throne exercised through (*inter alia*) the monopoly power. Chancellor Kent explained: "[A]lthough corporations were found to be very beneficial in the earlier periods of modern European history . . . their exclusive privileges have too frequently served as monopolies, checking the free circulation of labor, and enhancing the price of the fruits of industry."[103] These monopolies, writes Wood, "even when their public purpose seemed obvious . . . were repugnant to the spirit of American republicanism, 'which does not admit of granting peculiar privileges to any body of men.'"[104] As Wood explained, this principle did not lead early American legislatures or courts to abolish the power to grant corporate charters, but led instead to the *widening of access to those charters*: "[T]he legislatures opened up the legal privileges to all who desired them."[105] This meant that "the traditional exclusivity of corporate charters [was] destroyed."[106]

Economic liberty was specifically protected in various parts of the Constitution. The contracts clause, for instance, prohibited any state from passing any law "impairing the Obligation of Contracts."[107] The farmers who had made Shays' Rebellion (which had served as a spur for holding a Constitutional Convention) had sought, among other things, to have their debts annulled.[108] But

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law, had engrafted upon it this doctrine: that to establish a corporation was the great prerogative of the crown; and it followed soon with the numerous other prerogatives of the crown . . . and certain great privileges and immunities were given to these corporations. . . . The Legislature should not be permitted to grant exclusive privileges to these corporations; they are then not only harmless, but they are useful.

J. ROSS BROWNE, REPORT OF THE DEBATES OF THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 124–25 (1850).

103 2 KENT, *supra* note 58, at *271.

104 Wood, *supra* note 102, at 319.

105 *Id.* at 321.

106 *Id.*

107 U.S. CONST. art. I, § 10, cl. 1.

108 *See generally* DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980); Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, And The Forgotten Role of The Domestic Violence Clause,* 66 GEO. WASH. L. REV. 1, 19–21 (1997); 1 MORISON, *supra* note 80, at 390–94. One particularly revealing comment on Shays' Rebellion is to be found in Arthur Miller's *Pretense And Our Two Constitutions*: "Shays' Rebellion in Massachusetts in 1786 . . . terrified the propertied elite (and . . . [was] quickly smashed by use of violence)." Arthur S. Miller, *Pretense and Our Two Constitutions,* 54 GEO. WASH. L. REV. 375, 384 (1986) [hereinafter Miller, *Pretense*]. Such a comment totally overlooks the real consequences of the principles advocated by the Shaysites: the drying up of credit that would have resulted from the abolition of debts, or the higher prices caused by inflationary paper currency—all of which harm the poor most of all. Here is how one contemporaneous observer of Shays' Rebellion described it:

There was a black cloud that rose in the east last winter, and spread over the west. . . and burst upon us, and produced a dreadful effect. It brought on a state of anarchy, and that led to tyranny. . . . People that used to live peaceably, and were before good neighbors, got distracted, and took up arms against government. . . and then, if you went to speak to them, you had the musket of death presented to

protecting the right to make contracts was just as important for the poor farmer as for the landlord. As Madison wrote in *The Federalist Papers* No. 44: "[L]aws impairing the obligation of contracts . . . are contrary to the first principles of the social compact and to every principle of sound legislation," and the prohibition of such laws was a "bulwark in favor of personal security and private rights."[109] The founders understood that it is the poor who have the most to gain from economic freedom, and that laws restricting the freedom of contract are restrictions on the right to pursue happiness—the very purpose of freedom itself. Although the right to pursue a lawful occupation has been repeatedly cited in American case law, it has been mentioned more often in the breach than in the observance.

IV. After 1787

A. Essential Rights

In the 1798 case of *Calder v. Bull*, Justice Chase described a class of laws which "cannot be considered a rightful exercise of legislative authority":

> your breast. They would rob you of your property; threaten to burn your houses; oblige you to be on your guard night and day; alarms spread from town to town; families were broken up; the tender mother would cry, "O, my son is among them! What shall I do for my child!" Some were taken captive, children taken out of their schools, and carried away. Then we should hear of an action, and the poor prisoners were set in the front, to be killed by their own friends. How dreadful, how distressing was this! Our distress was so great that we should have been glad to snatch at any thing that looked like a government. Had any person, that was able to protect us, come and set up his standard, we should all have flocked to it, even if it had been . . . a tyrant . . . . [W]hen I saw this Constitution, I found that it was a cure for these disorders. . . . I got a copy of it, and read it over and over. . . . I did not go to any lawyer, to ask his opinion; we have no lawyer in our town, and we do well enough without. I formed my own opinion, and was pleased with this Constitution.

Comments of Mr. Smith, 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 102–03 (J. Elliott ed., 1836). Farmer Smith was hardly a member of the "propertied elite." Smith described himself as "a plain man, and get my living by the plough." *Id.* at 102. Unlike Miller, Smith and those he called "my brother ploughjoggers" did not have the luxury of ignoring the consequences of economic liberty—or the lack of it.

109 The Federalist No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961). Note also that the Constitution specifically preserved "[a]ll debts contracted and engagements entered into, before the adoption of this Constitution." U.S. Const. art. VI, §1. The Founding generation's belief in the sanctity of debt and contract is reflected in *Ware v. Hylton*, in which the Court held that the state of Virginia had no right to cancel debts owed to British creditors before the Revolution. Justice Chase held that "the immutable principles of justice; the public faith of the states . . . the rights of the debtors . . . all combine to prove, that ample compensation ought to be made to all the debtors." 3 U.S. (3 Dall.) 199, 245 (1796). Justice Paterson wrote "[c]onfiscation of debts is considered a disreputable thing among civilized nations of the present day . . . ." *Id.* at 255. Also, Justice Wilson held that "[b]y every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable . . . ." *Id.* at 281. *But see* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 416 (1934) (upholding the constitutionality of a Minnesota act which extended the due dates on property rental and mortgage payments).

> A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.[110]

The state and federal courts were in wide agreement on this point. In another famous case, *Corfield v. Coryell*,[111] Justice Bushrod Washington wrote that there are certain "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments . . . ."[112] These "fundamental principles" were viewed as protections of certain basic rights, such as the right of "enjoyment of life and liberty . . . the right to acquire and possess property . . . and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole," and the right "to pass through, or to reside in any other state, for purposes of trade, agriculture, [or] professional pursuits."[113]

Between *Corfield* and the 1873 *Slaughter-House Cases*, there are about sixty reported cases at both state and federal levels which discussed this common law right.[114] *Sewall v. Jones*[115] for instance, held that "[s]tatutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be construed strictly."[116] The 1829 case of *Beall v. Beck* addressed whether a landlord or innkeeper had the right to take possession of property, which in this case involved a slave left behind by a boarder who had not paid his rent.[117] The court said that although the landlord had a privilege to retain a non-paying guest's property, "[w]herever the privilege of the landlord would destroy a lawful trade or occupation which is useful to the public, it is restrained by law."[118]

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110 3 U.S. (3 Dall.) 386, 388 (1798).

111 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

112 *Id.* at 551.

113 *Id.* at 551–52.

114 See *infra* Appendix A for those cases not addressed in the text.

115 Sewall v. Jones, 26 Mass. (9 Pick.) 412 (Mass. 1830).

116 *Id.* at 414.

117 2 F. Cas. 1111, 1111 (C.C.D.C. 1829) (No. 1,161).

118 *Id.* at 1114. This legal preoccupation with protecting the individual's ability to earn a living is also revealed by the decisions concerning public access to fishing or hunting areas. In *Peck v. Lockwood*, the Connecticut Supreme Court held that at common law anyone might take oysters from a stream, even if another person owned the soil surrounding the stream; the landowner must show some right to exclusive fishing. 5 Day 22 (Conn. 1811). "[T]he right of fishing in such place where there is a flux and reflux of the sea, is a right common to every citizen, although the soil be the estate of a particular person." *Id.* at

Some of the cases are historically intriguing. In *City of Memphis v. Winfield*,[119] Justice Turley of the Tennessee Supreme Court struck down an ordinance which required the city watchmen to arrest, fine, or punish "all free negroes who might be found out after ten o'clock."[120] Given that this case arose in a southern court in the 1840s, it is remarkable enough that the court struck down the statute. The angry language which the court used to denounce it is even more surprising: "This new curfew law . . . is high handed and oppressive, and . . . an attempt to impair the liberty of a free person unnecessarily, to restrain him from the exercise of his lawful pursuits, and to make an innocent act a crime . . . without trial before any tribunal."[121] The court based its reasoning on the fact that "very often, the most profitable employment is to be found in the night," and therefore restraining free blacks from engaging in meaningful employment was "both cruel and useless."[122] Earning a living ought not to be punished as if it were a "crime against society" the court noted, since free people have a right to earn a living as they can.[123]

B. The Moral Dimension

We therefore discover a moral dimension to the common law right to earn a living. A number of nineteenth century cases which discussed this right would trace it to the Bible, where, in Genesis, God tells Adam, "In the sweat of thy face shalt thou eat bread, till thou return unto the ground."[124] The Alabama Supreme Court held in 1838 "that a citizen has the right to aspire to office, or to pursue any lawful avocation," and no citizen should be "legally deprived of this right, as a punishment for an offence com-

27. This reflects the general presumption against exclusivity in the pursuit of a lawful occupation. "[A] man may have an exclusive privilege of fishing in an arm of the sea; but such right is not to be presumed; it must be proved . . . ." *Id. See also* Warren v. Matthews, 91 Eng. Rep. 312, 312 (K.B. 1704); Carter v. Murcot, 98 Eng. Rep. 127, 127, 129 (K.B. 1768).

119 27 Tenn. (8 Hum.) 707 (Tenn. 1848).

120 *Id.* at 707.

121 *Id.* at 709.

122 *Id.*

123 *Id.* at 710.

124 *Genesis* 3:19 (King James). In *Democracy in America*, Alexis de Tocqueville noted that "[e]very honest profession is honorable."

> Among democratic peoples where there is no hereditary wealth, every man works for his living, or has worked, or comes from parents who have worked. Everything therefore prompts the assumption that to work is the necessary, natural, and honest condition of all men. . . . As the desire for prosperity is universal, fortunes are middling and ephemeral, and everyone needs to increase his resources or create fresh ones for his children, all see quite clearly that it is profit which, if not wholly then at least partially, prompts them to work. . . . In the United States professions are more or less unpleasant, more or less lucrative, but they are never high or low.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 550–51 (J.P. Mayer ed. & G. Lawrence trans., Anchor Books 1969) (1850).

mitted, without a trial by jury."[125] In 1850, the Georgia Supreme Court held, in *Mayor of Savannah v. Hartridge*,[126] that "Statutes which impose restrictions upon trade or common occupations, and which levy an excise or tax upon them, must be construed strictly."[127] And the Supreme Court of Illinois held, in the 1855 case of *Wade v. Halligan*,[128] that "[t]here are lawful trades, which are, nevertheless, treated as nuisances in particular places and localities."[129] The law should resist such restraints of trade, explained the court: judges should act with "an anxious view to protect all parties in their just rights, and the profitable . . . pursuit of their interests."[130] Similarly, in *Wynehamer v. People*, the New York Court of Appeals struck down an 1856 temperance law, noting that although liquor might have pernicious effects, it was still property, and selling it was therefore a legitimate occupation protected under the Constitution.[131] In short, as one author has noted, "long before the adoption of the Fourteenth Amendment, British and American courts protected many facets of the individual's right to pursue a gainful occupation against encroachment by the government."[132]

C. The Fourteenth Amendment

After the Civil War, in response to the Black Codes and Jim Crow laws, the Federal Government sought new ways to protect the former slaves from oppression by their own states. The ingenuity with which the Southern legislatures devised ways of "keeping the black man in his social and legal place" is occasionally

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125 *In re* Dorsey, 7 Port. 293, 368 (Ala. 1838).

126 8 Ga. 23 (Ga. 1850).

127 *Id.* at 30. *See also* Hall v. Ohio, 20 Ohio 8, 13 (1851) ("[S]tatutes which impose restrictions on trade or common occupations must be construed strictly.") (quoting Sewall v. Jones, 26 Mass. (9 Pick.) 412 (1830)).

128 16 Ill. 507 (Ill. 1855).

129 *Id.* at 512.

130 *Id.*

131 13 N.Y. 378, 385–86 (N.Y. 1856). A large number of the cases involving interference with the right of livelihood concern temperance or prohibition laws. As one court put it, however, such regulations are legitimate not *in spite of* the right of a liquor purveyor to make his living in this fashion, but because "'[t]o sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling.'" Sherlock v. Stuart, 55 N.W. 845, 846 (Mich. 1893) (quoting BLACK, INTOX. LIQ. §§ 46, 48). *But see* Baker v. Beckwith, 29 Ohio St. 314, 319 (Ohio 1876) ("At common law, it was lawful to sell or give away intoxicating liquors, and still continues so, except to the extent that the sale, or giving away, has been prohibited by the statute."). In *Mugler v. Kansas*, 123 U.S. 623 (1887), the Supreme Court upheld restrictions on the sale of liquor against the challenge that it violated this common law right, noting that because liquor caused a variety of moral and physical ills, it was properly the subject of especially stringent controls. *Id.* at 660–63.

132 Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 399–400 (1993-94) [hereinafter McCormack, *Economic*].

astonishing.[133] Among the laws which Congress passed to redress these problems was the Civil Rights Act of 1866[134] and the Fourteenth Amendment, the first section of which held in part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[135]

There is a good deal of dispute in the scholarly literature over the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, but as Bernard Siegan wrote, "commentators generally agree that [the Amendment] was intended to guarantee and constitutionalize the Civil Rights Act of 1866."[136] That Act's primary concern was the protection of economic rights for new black citizens. It mentioned *none* of what courts later would call "fundamental rights" (speech, travel, procreation, *etc.*), though it did state that all "citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[137] It is noteworthy that the Congressional Framers of the Fourteenth Amendment, Senators Howard and Trumbull for instance, referred to Justice Bushrod Washington's explanation of "privileges or immunities" in *Corfield v. Coryell* when explaining this clause.[138] Representative John Bingham,

133 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 308 (1973). *See also* Poindexter v. La. Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967) (detailing the history of Louisiana's mechanisms for segregating public schools).

134 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1994)).

135 U.S. CONST. amend. XIV, §1.

136 SIEGAN, ECONOMIC LIBERTIES, *supra* note 92, at 50. *See also* Buchanan v. Warley, 245 U.S. 60, 78–79 (1917); Virginia v. Rives, 100 U.S. 313, 317–18 (1879) (explaining the Fourteenth Amendment was designed to constitutionalize the Civil Rights Act of 1866); Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause*, 10 SETON HALL CONST. L.J. 321, 332 (2000) ("Most students of the Privileges or Immunities Clause . . . agree on one point: the Privileges or Immunities Clause was meant to protect, in some fashion, the freedoms enumerated in the Civil Rights Act of 1866. Property and contract rights, access to the courts and personal security were the principal concerns of the Act."); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389–90 (1992) ("Virtually everyone agrees that Section 1 of the Fourteenth Amendment was intended at least to empower Congress to pass the Civil Rights Act of 1866. Most students of history would go a bit further and say that the Amendment actually writes the substance of the 1866 Act into the Constitution.").

137 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1994)).

138 *See* CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). *See also* CONG. GLOBE, 42d Cong., 1st Sess. App. 69 (1871) (statement of Sen. Shellabarger); SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD AS A LEGISLATOR, STATE JUDGE, AND JUDGE OF THE SUPREME COURT OF THE UNITED STATES 124 (1881) ("[The Fourteenth Amendment] was intended to make every one within the jurisdiction of the United States a free man, and as such to

one of the authors of the Privileges or Immunities Clause, said that the clause included "the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."[139]

Senator John Sherman explained that courts interpreting the Fourteenth Amendment's Privileges or Immunities Clause will "look first at the Constitution of the United States as the primary fountain of authority,"[140] but also to the Declaration of Independence, American and English history, and English common law, where "they will find the fountain and reservoir of the rights of American as well as English citizens."[141] Representative Hamilton asked:

> [H]as not every person a right, to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself, as long as it is a legitimate exercise of this right and not vicious in itself, or against public policy, or morally wrong, or against the natural rights of others?[142]

These statements are at least plausible support for the conclusion of one federal court, that "it seems quite impossible that any definition of these terms [privileges and immunities] could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence."[143]

The Fourteenth Amendment's protection of the right to earn a living was part of the sublimated conflict that made up the Reconstruction era. That conflict consisted largely of vengeful, pent-up frustration, cultural chauvinism, and attempts by Southerners to maintain to the last a firm hold on a social order which was "gone with the wind." A good example is the case of *Cummings v. Missouri*, which involved Missouri's constitutional requirement that citizens take an oath of loyalty to the United States before engaging in a profession.[144] Citizens were required to swear that they had never "been in armed hostility to the United States, or to the lawful authorities thereof," or had participated in the secessionist cause in any way.[145] A person who refused to take this oath was forbidden not just from holding "any office of honor, trust, or

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allow him to pursue his happiness by the ordinary avocations of life upon the same terms and conditions as others.").

139 CONG. GLOBE, 42d Cong., 1st Sess. App. 86 (1871).

140 CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872).

141 *Id.*

142 1 CONG. REC. 363 (1874).

143 *In re* Parrott, 1 F. 481, 506 (C.C.D. Cal. 1880). *See generally* Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995).

144 71 U.S. (4 Wall.) 277, 316–17 (1866).

145 *Id.* (quoting MO. CONST.).

profit" under state authority, but even from holding any position in *any* corporation, teaching in private schools, or "holding any real estate or other property in trust for the use of any church."[146]

In an opinion by Justice Field, the Supreme Court struck down the state constitutional requirement, holding that "[t]he oath could not . . . have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged."[147] The state had argued that the requirement did not deprive citizens of "life, liberty, or property," but merely restrained them from working. Field rejected this contention. "The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law," he wrote. "He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. . . . Disqualification from the pursuits of a lawful avocation . . . may also, and often has been, imposed as punishment."[148]

> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.[149]

In an era in which such severe racial conflicts were leading to statutory schemes for keeping individuals from pursuing happiness, the importance of protecting the right to earn an honest living could hardly be overestimated. In *Ex parte Garland*, which like *Cummings* involved an oath that a person was required to take before engaging in a lawful occupation, attorney Reverdy Johnson put the point starkly:

> [T]he legislature undertakes to say to [the defendant], "You shall no longer enjoy that right, unless you will swear that you have not done the things stated in the oath which we require you to take;" . . . . Certainly, he is not obliged to take it. No man

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146 *Id.* at 317 (quoting MO. CONST.).

147 *Id.* at 320.

148 *Id.*

149 *Id.* at 321–22. Likewise, in *Munn v. Illinois*, Justice Field wrote:

> By the term "liberty," as used in the [Fourteenth Amendment], something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.

94 U.S. 113, 142 (1876) (Field, J., dissenting).

> is obliged to follow his occupation; but unless he takes it he must starve, except he have other means of living."[150]

Thus by 1870, when the cases which eventually became the *Slaughter-House Cases* were being heard in lower federal courts, Circuit Justice Bradley could write:

> [I]t is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit—not injurious to the community—as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments . . . . These privileges cannot be invaded without sapping the very foundations of republican government. . . . [A]ny government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions, or at least subject only to such restrictions as are reasonably within the power of government to impose,—is tyrannical and unrepublican. And if to enforce arbitrary restrictions made for the benefit of a favored few, it takes away and destroys the citizen's property without trial or condemnation, it is guilty of violating all the fundamental privileges to which I have referred, and one of the fundamental principles of free government.[151]

V. THE *Slaughter-House Cases*

A. The Louisiana Monopoly

Federal determination to protect the right to earn a living was soon crippled, however, with the *Slaughter-House Cases*, which questioned the constitutionality of a Louisiana law granting a twenty-five year monopoly to a state butchery company.[152] Any cattle brought to New Orleans and several surrounding counties could only be slaughtered in the facilities run by this company—effectively outlawing private slaughterhouses.[153]

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150 *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 370 (1866).

151 Live-stock Dealers' & Butchers' Ass'n v. Crescent City Live-stock Landing & Slaughter-House Co., 15 F. Cas. 649, 652 (D. La. 1870) (No. 8,408). Likewise, in *State ex rel. Belden v. Fagan*, another case arising out of the Louisiana butchery regulations, the Supreme Court of Louisiana held:

> [W]hile for sanitary reasons, [the state legislature] had the right to compel the butchers to abandon the locality where their slaughterhouses are situated . . . imposing this limitation upon their natural rights for the public good, justifiable only by the necessity, it had not the right to create this monopoly in favor of the Slaughterhouse Company . . . . It had no right to place unnecessary restrictions upon labor, to compel the numerous persons pursuing the occupation of butchers to repair to the premises of the Slaughterhouse Company and there pay tribute to it for the privilege of pursuing their usual occupation or earning their living.

22 La. Ann. 545, 559 (La. 1870).

152 83 U.S. (16 Wall.) 36, 66 (1873).

153 *Id.* at 59–60. The *Slaughter-House Cases* contrast sharply with an English case, *Pierce v. Bartrum*, which upheld a regulation prohibiting any slaughtering within the walls

The proponents of the law claimed it was enacted to protect public health and safety, just as the proponents of the regulation of upholsterers in *Allen v. Tooley*, or of tailors in *Davenant v. Hurdis*. The private butchers sued, on the grounds that the law violated their right to pursue a lawful occupation, a right protected by the privileges and immunities clause of the Fourteenth Amendment; however, in a five to four decision, the Supreme Court upheld the constitutionality of the Louisiana law.[154] Justice Miller, writing for the majority, declared that it was "difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation," because the law did not forbid butchers from slaughtering cattle *themselves* in the state corporation's slaughterhouses; a private butcher was free "to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place."[155] Miller thus considered the Louisiana statute as nothing more than a legitimate health regulation. Peter Irons wrote, however, that "[a]s they had in 1810, when they ignored evidence of corruption in the Yazoo land grants, the justices shut their noses to the stench of bribery in the *Slaughterhouse Cases*."[156]

Miller held that Coke's *Case of Monopolies* was inapposite. Monopolies in England, he held, had been outlawed because they were conveyed by the king, against the will of the people.[157] A legislature, however, represented the will of the people. "It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the Constitution of that state or in the amendments to the Constitution of the United States . . . ."[158] In other words, whatever the legislature passed was legitimate, unless the legislature was specifically prohibited from acting in that regard. Even if such a

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of the city of Exeter. *Pierce*, 98 Eng. Rep. 1080 (K.B. 1775). The regulation was challenged as being in restraint of trade, but the court, while scrutinizing the regulation to protect the right to earn a living, upheld it as a reasonable health and safety regulation. Unlike the law in the *Slaughter-House Cases*, *Pierce* did not establish a monopoly by requiring all butchers to do their work at a particular butcher-shop.

154 *Slaughter-House Cases*, 83 U.S. at 66, 83.

155 *Id.* at 61. In *Noe v. Morristown*, the Tennessee Supreme Court emphasized this fact:

> We are referred to the *Slaughterhouse Case* as an authority in support of such a monopoly. That case does hold that it was within the power of the Legislature of the state of Louisiana to establish such a monopoly as to the place where the slaughter was to be done, but distinctly pointed out that at that place everybody was permitted to do their own slaughtering, and the company in charge of the place was bound under heavy penalties to permit them.

161 S.W. 485, 486 (Tenn. 1913) (internal citations omitted).

156 PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 199 (1999).

157 *Slaughter-House Cases*, 83 U.S. at 66, 66.

158 *Id.*

"blank-check view" of state power was appropriate at the state level, the question was equally whether the federal Constitution prohibited the state from establishing such a monopoly. Miller rejected the claim that the privileges or immunities clause was intended to protect citizens against the legislatures of their own states: The clause "speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states . . . . [T]he latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment."[159]

Justice Stephen Field, in a famous dissent, reviewed the history of monopoly practices. At the time of the Revolution, Field wrote that the right of "every free subject . . . to pursue his happiness by following any of the known established trades" was among the most cherished principles in English law.[160]

> This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a Republic only in name.[161]

It is neither necessary nor possible to fully discuss the aspects of the *Slaughter-House Cases* here; other commentators have written very extensively about the subject,[162] and as Justice Thomas recently said, they have agreed on little except that the *Slaughter-House Cases'* interpretation of the Privileges and Immunities Clause was wrong.[163] But it is pertinent to note a few things about the case. First, the holding, which Robert Bork has praised as "a narrow victory for judicial moderation" because it allowed the cor-

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159 *Id.* at 74.

160 *Id.* at 105.

161 *Id.* at 109–10.

162 *See, e.g.*, JOHN E. SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 325–26 (1998); BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION 68–71 (1987); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 79 (1993); Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges Or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 27–48 (1998).

163 *See* Saenz v. Roe, 526 U.S. 489, 522 n.1 (Thomas, J., dissenting).

ruption of the Louisiana legislature to proceed unchecked by judicial interference—did not escape controversy in its own time.[164] More importantly, the majority in the *Slaughter-House Cases* did not deny that the right to earn an honest living was, indeed, a common law right; rather, the majority implicitly agreed that it was, and merely held that the Privileges or Immunities Clause was not meant to protect that right, at a federal level, against state encroachments.[165] Third, the majority held that the Louisiana statute had not actually violated that right.[166]

Thus, the *Slaughter-House Cases* did not actually hold that state monopolies could never violate such a right, or that such a right did not exist. In fact, the Court increasingly began to observe the validity and importance of that right. The subsequent era of "economic substantive due process" has been charted well enough by Bernard Siegan,[167] but it is important to note that by 1888, the Court's majority in *Powell v. Pennsylvania* would conclude as correct that one's "enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property as guarantied by the fourteenth amendment. . . ."[168] The *Slaughter-House Cases* were truly an example of the age-old tension between legitimate business regulation and the wrongful restraint of liberty. As economic regulation became more prevalent from the turn of the century to the present, the courts were increasingly called upon to resolve this tension.

B. The Impact of the *Slaughter-House Cases*

Lawrence Friedman described the emergence of protectionist economic measures disguised as health and safety regulations during the post-Civil War era: "[O]ccupational licensing . . . absolutely burgeoned in this period," and while some of these regulations were "solely designed to produce revenue," others were

164 ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 39 (1990). The *Slaughter-House Cases* was one of what became a string of cases undermining the Civil War Amendments in the post-Civil War decades. In *United States v. Cruikshank*, the Court, relying on the *Slaughter-House Cases*, held that the Fourteenth Amendment gave Congress no power to stop southern states from tacitly aiding in the mass murder of former slaves, because the right to life is a right incident to state, and not federal, citizenship. 92 U.S. 542, 549 (1875). *See also* Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2151–60 (1993). Such scandalously bad law prevailed, however, culminating in the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which the Court, by applying "judicial restraint," refused to block southern majorities from obliterating the Reconstruction commitment to civil rights.

165 83 U.S. (16 Wall.) 36, 78–80 (1873).

166 *Id.* at 78, 83.

167 *See generally* SIEGAN, ECONOMIC LIBERTIES, *supra* note 92.

168 Powell v. Pennsylvania, 127 U.S. 678, 684 (1888).

discriminatory defensive measures meant to exclude outside merchants from the local market.[169] Licensing was first required for the "learned" professions, especially those concerned with health issues, like dentistry or pharmacy, because it was easier to make the argument that these practices should be regulated for public safety purposes.[170] Licensing requirements were subsequently broadened to include architecture, midwifery, mining, and blacksmithing.[171] While the state justified such licensing laws as safeguards for the public's health and safety, the true motivation was often to stifle competition within a given trade or occupation.[172] As Friedman believed, "[t]he [licensing] argument was quite obvious in the case of doctors . . . . For barbers, the argument was a trifle strained; and for horseshoers, fairly desperate."[173]

In 1889 the Michigan Supreme Court summarized the negative effects of this phenomenon:

> It is quite common in these later days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts . . . .[174]

In a well-known case, *Butchers' Union Co. v. Crescent City Co.*, Justice Field wrote that monopolies violated the common law because:

> [T]hey destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a lawful trade or employment.[175]

The court shunned the granting of monopoly power to a corporation or specific class of business, notwithstanding the state's rec-

169 FRIEDMAN, *supra* note 133, at 397 (emphasis deleted). *See also* Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 CAL. L. REV. 487 (1965).

170 *Id.* at 397–99.

171 *Id.*

172 *Id.* at 399.

173 *Id.* at 399–400.

174 Chaddock v. Day, 42 N.W. 977, 978 (Mich. 1889).

175 111 U.S. 746, 756 (1884) (Field, J., concurring).

ognized right to limit or prevent undesirable nuisances resulting from the operation of certain types of businesses.[176] In *Dent v. West Virginia*, the Supreme Court definitively described the "right of every citizen of the United States to follow any lawful calling, business, or profession he may choose," for the right to earn a living, said the Court, was a property right, one which is "often of great value to the possessors, and cannot be arbitrarily taken from them."[177]

State cases also enunciated this principle, holding that "[s]tatutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be strictly construed."[178] In these cases, the question before the court was as follows: "Is the act in question an arbitrary interference with the right of contract, and is there no reasonable ground upon which the legislature, acting within its conceded powers, could pass such a law?"[179] In other words, is the challenged regulation of business a legitimate exercise of the state's power to prevent public nuisances—or was that merely a guise for monopolistic practices, limiting the right of the individual to pursue a lawful calling? That analysis often required the Court to look beyond the facial explanation of the law. These cases, which today are referred to as the "economic substantive due process" cases, were substantive due process cases in the sense that they examined the substance of legislation to determine if the legislature, "under the pretext of executing its powers, [had] pass[ed] laws for the accomplishment of objects not entrusted to the government," when it would then "become the painful duty of this tribunal . . . to say that such an act was not the law of the land."[180] To discover such a pretext requires the court to examine the *substance* of legislation, and not merely the procedures by which it was promulgated.[181] One of the

176 *Id.* at 749–53.

177 129 U.S. 114, 121–22 (1889). Note that the Court here, at the height of the *laissez-faire* era, which allegedly proscribed legislative attempts to protect consumers and society, nevertheless concluded "[b]ut there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society." *Id.* at 122.

178 Memphis v. Bing, 30 S.W. 745, 746 (Tenn. 1895). *See also* Merced County v. Helm & Nolan, 36 P. 399, 400 (Cal. 1894) (holding that business license taxes must be strictly construed); Washington Electric Vehicle Transp. Co. v. District of Columbia, 19 App. D.C. 462, 470 (D.C. 1902); Mace v. Buchanan, 52 S.W. 505, 507 (Tenn. 1899); Combined Saw and Planer Co. v. Flournoy, 14 S.E. 976, 977 (Va. 1892); State v. Pullman Palace Car Co., 23 N.W. 871, 875 (Wis. 1885). *See also infra* Appendix B.

179 McLean v. Arkansas, 211 U.S. 539, 548 (1909).

180 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

181 In Cummings v. Missouri, Justice Field penned perhaps the most succinct defense of substantive due process ever. 71 U.S. 277, 325 (1866). He wrote:

> The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form,

most famous of these "economic substantive due process" cases—which is not often referred to as such—is *Yick Wo v. Hopkins*.[182]

Hopkins involved a statute which regulated Chinese laundries in San Francisco. Laundries were not permitted to be housed in wooden structures, and they were required to be licensed by a board of supervisors.[183] Although the legislature justified the statute as necessary to protect public health and safety, the Supreme Court found that the regulation was actually part of a statutory scheme of discrimination against Chinese immigrants, whose laundry cleaning businesses were generally made of wood. In fact, nearly all of the laundries in the city were made of wood, as were most residences.[184] Why then, did the regulation affect only laundries? And were wooden laundry facilities really more dangerous than those made of stone? "We are . . . constrained, at the outset," the Supreme Court said, "to differ from the Supreme Court of California upon the real meaning of the ordinances in question."[185] The statute was not a means of protecting society; instead it vested the board of supervisors with "a naked and arbitrary power to give or withhold" a business license.[186] The statute was a sort of "Jim Crow law," a disguised attempt to infringe on the rights of Chinese immigrants to freely earn a living.

> [T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[187]

Just as literacy tests for voting had been used in the South under the pretext of ensuring an educated electorate—though actually used to keep former slaves from voting—so this law, supposedly regulating businesses for safety's sake, was in fact a pretextual attempt to exclude Chinese workers from the marketplace.

> however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

Id. *See also* Davidson v. New Orleans, 96 U.S. 97, 102 (1877) ("[C]an a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail . . . ."); John C. Eastman & Timothy Sandefur, *Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier?*, 6 NEXUS 121 (2001) (reviewing Field's views on the right to earn a living).

182 118 U.S. 356 (1886). *See also In re* Parrott, 1 F. 481, 520 (D. Cal. 1880) (striking down law prohibiting the hiring of Chinese); Lin Sing v. Washburn, 20 Cal. 534, 535, 580 (Cal. 1862) (striking down tax on Chinese laborers as unconstitutional).

183 *Yick Wo*, 118 U.S. at 366.

184 *Id.* at 368.

185 *Id.* at 366.

186 *Id.*

187 *Id.* at 370.

Yick Wo was one of a number of economic liberty cases which protected the right to earn a living on equal protection grounds. In an 1875 case, the Illinois Supreme Court stated that:

> If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and, for that reason, void, but its direct tendency would be to create a monopoly, which the law will not tolerate.[188]

After quoting Justice Field's opinion in *Butcher's Union*, an 1891 Colorado appellate court similarly explained that any law which allows one individual to pursue a vocation while excluding another from the same business effectively nullifies the fundamental right of United States citizens to pursue any lawful calling.[189]

In *Allgeyer v. Louisiana*, the Court reiterated that the "'the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States,'"[190] and that this right was one of the "rights which are covered by the word 'liberty' as contained in the 14th Amendment."[191] Yet again the Court repeated that the pursuit of a lawful occupation could be subjected to legitimate licensing restrictions for the protection of the public—but such regulations should not be disguised restrictions on individual freedom. With this standard in mind, the Court left open the question of professional licensing, explaining it should be determined on a fact-specific basis.[192]

Given this background, the "notorious" case of *Lochner v. New York*[193] seems much less arbitrary and scandalous than it is usually described in the scholarly literature. *Lochner* involved a statute which regulated the number of hours that bakers could work.[194] This law was a protectionist measure, pushed through the legislature by larger bakery companies which primarily relied upon machinery.[195] The statute thus limited the smaller bakeries' ability to effectively compete, as they were more reliant on human labor.[196] As one author explained, "[w]ere such a result achieved by private contract, it would violate the antitrust laws."[197] It is ironic that such laws are often described as beneficial to the less

188 Tugman v. Chicago, 78 Ill. 405, 409 (Ill. 1875).

189 May v. People, 27 P. 1010, 1012 (Colo. Ct. App. 1891).

190 165 U.S. 578, 590 (1897) (quoting Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 764 (1884)).

191 *Id.*

192 *Id.*

193 Lochner v. New York, 198 U.S. 45 (1905).

194 *Id.* at 64.

195 Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 42–43 (1999).

196 *See* Meese, *supra* note 195, at 42–43.

197 *Id.*

powerful. To put the point simply, you cannot make people richer by making their jobs illegal.[198]

Although the legislature claimed that the statute was a health and safety regulation, the Court did not blithely accept this purported explanation. Rather, it looked into the real substance of the law and concluded that the statute unconstitutionally interfered with the freedom of contract between employer and employee, while bearing little relationship to employee health and safety.[199]

Lochner is generally cited as the ultimate point of hubris in the career of a Court run wild on newfangled *laissez-faire* economic theory. In reality, it was the continuation of a legal theory whose roots went back for centuries.[200] It was followed by a number of high profile cases striking down economic regulations. In *Adair v. United States*, the Supreme Court struck down a law which made it illegal to discriminate against employees who were not members of a labor union.[201] The liberty clause of the Fourteenth Amendment "embrace[s] the right to make contracts for the purchase of the labor of others . . . ."[202] In *Truax v. Raich*, the Court struck down an Arizona statute which prohibited companies from employing more than twenty percent non-citizens.[203] In this rerun of *Yick Wo*, the Court said that "[t]he right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law."[204] Just as the statutes in *Yick Wo* and *Lochner* were defended as health-and-safety mea-

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198 *Id.*

199 Lochner v. New York, 198 U.S. 45, 64 (1905).

200 *See, e.g.*, *In re* Jacobs, 98 N.Y. 98, 115 (N.Y. 1885).

> When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void.

Id. The myth that *Lochner* announced a "new" and "unprecedented" rule has long deserved debunking. The reader will find a list of cases predating *Lochner*, with holdings identical to those the Court reached—that the Court must look behind the scenes of a police power regulation which infringes on economic rights. *See infra* Appendix B.

201 208 U.S. 161, 180 (1908).

202 *Id.* at 172.

203 239 U.S. 33, 38 (1915). *See also* Truax v. Corrigan, 257 U.S. 312, 334–35 (1921).

> The Fourteenth Amendment . . . intended . . . that all persons should be equally entitled to pursue their happiness and acquire and enjoy property . . . that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid on others in the same calling and condition . . . .

Id. at 334–35 (quoting Barbier v. Connolly, 113 U.S. 27, 31 (1885)).

204 239 U.S. at 38.

sures, so too was the law in *Truax*.[205] Nevertheless, while the legislature may act to protect health and safety, the Court held such measures unconstitutional when they go beyond that point and deny people the "ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."[206]

The rule that impositions on the common law right of livelihood should be strictly construed was also maintained at the state level during this period.[207] Economic substantive due process was a means by which the real effect of a regulation of private contracts could be analyzed to see whether it was *really* a legitimate exercise of police power, or a protectionistic or monopolistic scheme. As the Court explained in *Adams v. Tanner*,[208] the mere potential for abuse within a given profession does not justify complete removal of one's right to pursue that profession.[209] "Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."[210]

This was the backdrop for the famous pre-New Deal cases. In *United States v. Butler*, the Supreme Court struck down a New Deal statute called the Agriculture Adjustment Act, which required "processors" of crops—mill owners, for instance—to pay a tax, thus generating revenue to be turned over to farmers.[211] The plaintiffs sued, and the government responded that this was only a tax system, and therefore Constitutional under the provision for "lay[ing] and collect[ing] taxes" as well as protecting the "general

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205 *Id.* at 41. This, of course, began the notorious era of economic substantive due process and "rampant *laissez-faire*," and the cases are more prevalent during this period. *See infra* Appendix C.

206 *Id.*

207 *See infra* Appendix D.

208 244 U.S. 590 (1917).

209 *Id.* at 594–95. *See also* Commonwealth v. Fowler, 28 S.W. 786, 787 (Ky. 1894).

> Every one has the right to follow an innocent calling without permission from the government. He may do with his own whatsoever he pleases, so that he injure no one else. We agree with learned counsel that "the doctrine of legislative permission, as a condition precedent to the conduct of any useful or harmless business, is grossly repugnant to those obvious principles of human right which lie at the foundation of just government among men." So, then, without governmental interference or consent, the farmer may till his soil, the merchant may buy and sell, the lawyer and the doctor practice their professions, and the druggist and pharmacist compound their medicines. And if, by reason of shysters and quacks, an injured people demand protection, or if, because ill-behaved druggists or pretended pharmacists debauch the public morals by dealing out intoxicating liquors and nostrums as beverages, yet the pursuit of these callings cannot be prohibited.

Id.

210 *Adams*, 244 U.S. at 594–95.

211 297 U.S. 1, 54–56, 78 (1936).

welfare."[212] The Supreme Court found the statute unconstitutional, determining that the government's justification of the statute as a tax measure was merely a disguise: "The tax can only be sustained by ignoring the avowed purpose and operation of the act."[213] Just as in *Yick Wo* and *Truax*, the Court refused to blindly accept the government's justification of the law. "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."[214]

VI. Economic Substantive Due Process and Its Enemies

I have quoted these cases at such length because they demonstrate the fragility of the prevailing interpretation of the pre-New Deal courts. Under the prevailing interpretation, the court struck down government intervention in the economy because such laws ran contrary to the Supreme Court Justices' personal economic views, which they then wrongfully enforced from the bench. These "economic substantive due process" cases were thus a concoction of the bourgeoisie in its effort to suppress and exploit the proletariat. According to Arthur S. Miller, "a complaisant Supreme Court that was a de facto arm of the capital-owning class. . . . invented, through a flash of revelation known only to them, the notion that due process of law had a substantive dimension, and thereby protected corporations against social legislation."[215]

Upon closer inspection, however, it seems odd to call any of these decisions "*economic* substantive due process," since the Court did not address economic concerns or apply any law-and-economics methodology. Similarly, the Court did not rely on economics when striking down the New Deal statutes. For instance, in *Adkins v. Children's Hospital*, a minimum wage law that only applied to females had the potential to cause the replacement of female workers by males, since males were not covered by the

212 *Id.* at 64. Until the New Deal, there was broad consensus among American jurists that, as Justice Chase put it in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798) ("[A] law that takes property from A. and gives it to B. . . . is against all reason and justice."). *See also* Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657–58 (1829) ("We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union."); Goshen v. Stonington, 4 Conn. 209, 221 (Conn. 1822) ("If, for example, the legislature should enact a law, without any assignable reason, taking from *A.* his estate, and giving it to *B.*, the injustice would be flagrant, and the act would produce a sensation of universal insecurity."); Taylor v. Porter & Ford, 4 Hill 140, 143 (N.Y. 1843) ("The property of A. is taken, without his permission, and transferred to B. Can such a thing be rightfully done? Has the legislature any power to say it may be done?").

213 *Butler*, 297 U.S. at 58.

214 *Id.* at 68.

215 Miller, *Pretense*, *supra* note 108, at 390.

statute and were therefore cheaper to employ.[216] Congress justified the law as an attempt to protect women's "health and morals."[217] In an opinion by Justice Sutherland, the Court struck down the law, not only for its unequal treatment, but also for its infringement on the right of a woman to be employed as she sees fit: "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court and is no longer open to question."[218]

Indeed, the law in *Adkins* fits precisely the description of sexist paternalism provided by none other than Justice Ruth Bader Ginsburg. Such laws were "apparently designed to benefit or protect women [but] could often, perversely, have the opposite effect."[219] Such legislation was "ostensibly to shield or favor the sex regarded as fairer but weaker, and dependent-prone," but was in fact "premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them."[220] Some defenders of the legislation in *Adkins* explicitly embraced such paternalism. Roscoe Pound, for instance, explained that the individual should have no right "by contract [to] impose[ ] substantial restraints upon his liberty," because "[f]reedom to impose restraints, in the hands of the weak and necessitous, defeats the very end of liberty."[221] In other words, the poor could not be trusted with the right to decide for themselves the number of hours, or for how much pay, they wished to work.

In any case, just like the statute in *Lochner*, the minimum wage law in *Adkins* had nothing to do with health and safety; rather, both statutes were protectionist economic measures meant to benefit politically-favored classes by restricting the freedom of others to compete.

> It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the

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216 261 U.S. 525, 554–60 (1923).

217 *Id.* at 555.

218 *Id.* at 545.

219 Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 269 (1997).

220 *Id.* at 269–70.

221 Roscoe Pound, *Liberty of Contract,* 18 YALE L.J. 454, 484 (1909).

> provisions relating to minors), who are legally as capable of contracting for themselves as men.[222]

As Hadley Arkes points out, Sutherland nowhere used any economic arguments in the opinion. "There were no ventures into the theories of monetarism or fiscal policy with the manipulation of aggregate demand and 'multipliers.' There was not even a feint toward theories of price and the supply of labor."[223] Instead, Sutherland was "offering nothing less than a moral instruction . . . [and] was settling the case in terms that were as purely *jural* as an opinion could be. . . . Sutherland and his colleagues would find, in the contrivances of the New Deal, arrangements that offended, deeply, the principles of lawfulness."[224] They offended the right of the individual to use her land, her property, or her talents as she saw fit.

Cases like *Adkins*, *Yick Wo*, and *Lochner* may have been "substantive due process" cases, but were not examples of "judicial activism." They were examples of the court restraining *legislative activism* which abridged the right to earn a living; a right with at least seven hundred years of traditional protection behind it. We may measure the political origins of the modern hostility toward these decisions by one bitter comment made in an attack on *Adkins* published shortly after it came down. "From somewhere or other Mr. Justice Sutherland derives the constitutional doctrine [that] . . . 'freedom of contract is, nevertheless, the general rule and restraint the exception,'" wrote the commentator.[225] But "[n]o such doctrine is stated in the Constitution. . . . [R]egulation has long since become the rule, and freedom the exception. Whence, then, comes the rule that Mr. Justice Sutherland reveals? Needless to say, it comes from Mr. Justice Sutherland."[226]

This is a backwards interpretation of the Constitution. In wording similar to the Fifth Amendment, the Fourteenth Amend-

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222 Adkins v. Children's Hosp., 261 U.S. 525, 554 (1923). Yet again, the straw man accusation—that the *Adkins* Court was defending "unlimited freedom of contract"—is belied by Sutherland's own words: "There is, of course, no such thing as absolute freedom of contract." *Id.* at 546.

> The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good . . . . But, nevertheless, there are limits to the power, and, when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

Id. at 561.

223 HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND 78 (1994).

224 *Id.* at 79, 82.

225 Thomas Reed Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545, 555 (1924) (quoting Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923)).

226 *Id.*

ment reads, "nor shall any State deprive any person of life, liberty, or property, without due process of law."[227] In logical sequence, this means that the individual possesses life, liberty, and property to begin with, and that he may be *deprived* of it subsequently, only when due process standards are met. In other words, freedom is the rule, and government action is the exception.[228] But reversing this order—and then denouncing the original order as the concoction of a capitalist cabal on the federal bench—was imperative to establishing the regulatory welfare state.

To ratify the extreme sorts of regulation which made up the New Deal, it was necessary to overcome the presumption of liberty, or to deny its existence. When the Court finally gave in to New Deal pressures in the famous "Switch in Time That Saved Nine," and held that courts should defer almost entirely to legislative economic regulations, it was in fact reversing the old rule that the common law "is always jealous of its own importance; and requires every statute which invades its authority to be carefully watched and strictly construed."[229] In *United States v. Carolene Products Co.,* most famous for its fourth footnote, the Court reversed this completely, holding:

> Even in the absence of [evidentiary] aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[230]

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227 U.S. CONST. amend. XIV, § 1.

228 *See also* Randy E. Barnett, *Necessary and Proper*, *in* THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM 157, 186–94 (Bradford P. Wilson & Ken Masugi eds., 1998) (explaining the "presumption of liberty"); James Madison, Charters, *reprinted in* JAMES MADISON: WRITINGS 502, 502 (Jack N. Rakove ed., 1999) ("In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty.").

229 Lessee of Brewer v. Blougher, 39 U.S. (14 Pet.) 178, 185 (1840) (Argument of Mr. Pigman, for Plaintiff).

230 304 U.S. 144, 152 (1938). Although throughout this paper I refer to *Carolene Products* in particular, I do so only as shorthand, because the case was only one of a trio of cases which announced the new epoch in Constitutional law brought on by the New Deal. The other two were *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937), which expanded Congress' Commerce Clause power, and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which upheld minimum wage legislation. Thus, I refer to this shift as occurring in 1937 even though *Carolene Products* was announced on April 25, 1938. Moreover, I do so while acknowledging that the expansion of economic regulation did not begin suddenly in 1937, but gradually over the course of the preceding half-century, with its Populist and Progressive movements. Nevertheless, as Samuel R. Olken puts it, while the "Switch In Time That Saved Nine" model of legal history is "overly simplistic," it remains true that "a fairly complete transformation in constitutional thought occurred" in the 1920s and 30s, during which "an emerging majority of Supreme Court Justices adapted constitutional provisions to changing economic and social conditions." Samuel R. Olken, *Historical Revisionism and Constitutional Change: Understanding the New Deal Court*, 88 VA. L. REV. 265, 278 (2002)

Saying that economic regulations would bear such a strong presumption of constitutionality, the Court split individual rights into "fundamental" rights and "economic" rights. Yet, as generations before had understood, the two cannot be separated. The "economic right" to run a business had never been based only on economic justifications; it was the right of a person to act and provide for himself or his family. The spurious nature of *Carolene Products'* dichotomy has been sufficiently demonstrated elsewhere,[231] but it is remarkable how, after 1937, the Courts' treatment of the right to earn an honest living has been confused.

Among the reasons for this confusion is the frequently articulated premise with which we began this article: that the economic liberty cases lacked historical foundation, and that there was no such thing as the right to earn a living. The rise of Progressivism,[232] and in particular, of legal positivism, led by Oliver Wendell Holmes, Louis Brandeis, and others, was the first time that the very *existence* of such a right was to be directly challenged. In *McAuliffe v. New Bedford*,[233] Holmes wrote, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[234] This is strictly correct, since the common law guarantees only the right to *work*, not the right to *be hired*, but Holmes's dictum, as Justice William Douglas would later write, "ha[d] pernicious implications,"[235] and was generally taken to be a denigration of the common law right to *seek* employment. Holmes denied that the right to earn a living was protected by the Constitution ostensibly because he denied that the Constitution was based on an economic theory. But one contemporary admirer of Holmes got closer to the truth—that Holmes was rewriting the Constitution:

> Justice Holmes came to the bench in 1882, when the transition from individualism to collectivism in England was in progress. . . . [He] was too learned in the history of the law to be

(reviewing G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000)). *See also* Barry Cushman, *Lost Fidelities*, 41 WM. AND MARY L. REV. 95 (1999) (providing a much more balanced assessment of the history of the "Switch In Time That Saved Nine"). Still, compared to the period from 1215 to 1937, the decades of the 1920s and 1930s still appear as a flash in legal history. What was new in 1937 was the ascendancy of rational basis scrutiny.

231 *See, e.g.*, ROGER PILON, THE PURPOSE AND LIMITS OF GOVERNMENT 31–33 (Cato's Letters No. 13, Cato Institute, 1999); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 34–45; Bernard H. Siegan, *Separation of Powers and Economic Liberties*, 70 NOTRE DAME L. REV. 415, 469–82 (1995) [hereinafter Siegan, *Separation of Powers*].

232 For more on Progressivism, see generally Thomas G. West, *The Constitutionalism of The Founders Versus Modern Liberalism*, 6 NEXUS 75 (2001); ERIC FONER, THE STORY OF AMERICAN FREEDOM 163–93 (1998).

233 29 N.E. 517 (1892).

234 *Id.* at 518.

235 Barsky v. Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

> blind to the fact that the socialistic trend in American political thought would finally demand extensive paternal legislation in no uncertain terms; and that when this demand became strong enough serious consequences might follow the failure of the courts to acquiesce . . . .
> . . . [T]he necessity for the establishment of a benevolent attitude towards social reform was apparent . . . [yet] the Constitution was regarded as almost immutable. . . . [N]o further [Amendment] might be looked for short of a popular upheaval. Next to amendment of the Constitution, the most feasible means of giving validity to new principles was to change the interpretation of the provisions under which the inevitable social legislation would be held invalid. "Liberty of contract" and the broad powers of review assumed by the courts under the 5th and 14th Amendments were the elements which barred the way to reform,—and it is against these interpretations that Justice Holmes' most significant attacks have been directed.[236]

As an element of this process of Constitutional pseudo-amendment, it was necessary to ignore a few messy details, such as centuries of precedent supporting the right to earn a living, and to instead portray the economic liberty cases as the interlopers. This effort was fruitful. In 1936, an admirer of Justice Brandeis argued that the nineteenth century Court had adopted "[n]ew definitions of 'liberty' and 'property,'" including the right to earn a living, as a "means . . . of the Judiciary's becoming substantially 'a perpetual censor upon all legislation of the states.'"[237] Today's critics continue to deny the existence of this right. Peter Irons de-

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236 DORSEY RICHARDSON, CONSTITUTIONAL DOCTRINES OF JUSTICE OLIVER WENDELL HOLMES 41 (1924) (footnote omitted). Perhaps I should add that Richardson approved of this view. *Id.* at 43. ("[I]t is the duty of the courts to note the change in the very nature of society, and to do away with the theories of the past that are erroneously being applied to the present.").

237 ALPHEUS THOMAS MASON, BRANDEIS AND THE MODERN STATE 128–29 (1936) (quoting Allgeyer v. Louisiana, 165 U.S. 578, 589–91 (1897)). Mason's hagiographic book is a remarkable window into the shift in legal philosophy that went on in 1936–1937, and the contradictory "pragmatism" that was written into Constitutional law in that era. In almost gushing terms, Mason described Brandeis as "an avowed partisan of the common man; his special concern is for those economically and financially dependent; he prefers human welfare to property rights." *Id.* at 226. Mason's book blows apart the prevailing notion that the New Deal Court did nothing more than awaken from the *Lochner* era legislating from the bench, and return to the dispassionate weighing of the objective constitutionality of laws. Brandeis "is at heart a crusader," convinced that "eighteenth century individualistic philosophy of rights and property is no longer a creed adequate for modern life . . . ." *Id.* at 229, 232–33. Yet, while Mason confesses—indeed, applauds—that Brandeis "sustains social legislation . . . because he believes it desirable and expedient as well as constitutional . . . ." *Id.* at 224. Nevertheless, he excoriates the *Lochner* Court for being "possessed by preconceived theory," and basing its opinions not "upon any statable rule, but rather upon what social-political philosophy is held by a majority of the justices." *Id.* at 146, 149–50. The solution to this contradiction, according to Mason, was for the Court to allow legislatures "to experiment in things social and economic . . . only when such enactments conform with certain standards of social justice." *Id.* at 223. But, of course, those standards depend on nothing more objective than a particular Justice's sensitivity "to present-day economic and social ills . . . ." *Id.* at 227.

rides the *Lochner* Court for "[h]aving *inserted* 'liberty of contract' into the Constitution."[238] Robert Bork denounces *Lochner* and similar cases stating, "[t]his was lawlessness. The Court made up an entire new set of freedoms . . . ."[239] John Semonche wrote that in his *Lochner* dissent, "Holmes was arguing against the use of the Fourteenth Amendment to protect *newly discovered* individual rights from control by state legislatures,"[240] and refers to the "*new* liberty of contract."[241] Paul Kens claims that the right to pursue a lawful calling was solely the brainchild of Stephen Field's dissent in the *Slaughter-House Cases*. He argues "[Field] invented a new right. Nowhere does the Constitution expressly guarantee a right to engage in a trade or profession."[242] Erwin Chemerinsky writes that during "[t]he fifty years prior to 1937 . . . . The Supreme Court . . . struck down progressive legislation enacted by state and federal legislatures to protect workers and consumers. These decisions reflected the Justices imposing their political and economic philosophies."[243] Such statements simply ignore the multiple protections for property and economic liberties in the Constitution—backed as they were by over a century and a half of common law protections for economic liberties.

Common criticisms during the Progressive Era that the economic liberty cases promoted unlimited or extreme freedom of contract, concepts supposedly central to *Lochner*, were merely straw men. The common law had always protected consumers, had always struck down contracts if contrary to public policy—contracts restraining trade, for instance—and had always permitted regulations for the protection of the public.[244] But neither the minority in the *Slaughter-House Cases* nor the majority in *Lochner*—nor,

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238 IRONS, *supra* note 156, at 249 (emphasis added).

239 BORK, *supra* note 164, at 44. Bork's hostility to judicial review is particularly extreme.

240 SEMONCHE, *supra* note 162, at 151 (emphasis added).

241 *Id.* at 150 (emphasis added).

242 KENS, *supra* note 102, at 117. Nowhere in his book does Kens mention Edward Coke, which is ironic, since elsewhere he notes that the Court's holding in *Munn* that the state could regulate businesses which are "affected with a public interest"—was based on the "age-old legal authority" of Lord Hale, another seventeenth century English Chief Justice. *Id.* at 161. *See also* Eastman & Sandefur, *supra* note 181, at 126.

243 Erwin Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review*, 66 B.U. L. REV. 47, 61–62 (1986) (footnote omitted). *But see* Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 97 (1989) ("Without judicial enforcement, the Constitution is little more than the parchment that sits under glass in the National Archives.").

244 *See, e.g.*, Chi. v. Rumpff, 45 Ill. 90, 99 (Ill. 1867).

> [Cities], no doubt, have the power to designate the particular quarter of the city within which the business may be conducted, and prohibit it in others, and regulate and restrain them so as to prevent their becoming offensive or injurious, but in doing so all persons should be free to engage in the business within those localities by conforming to the municipal regulations.

Id. See also Chi. Packing & Provision Co. v. Chicago, 88 Ill. 221 (Ill. 1878) (explaining police power right to control businesses).

for that matter, any decision in any case, state or federal—had ever held otherwise. What *Lochner* had said was that it was the duty of the Court to look behind the facial justification of the law at its substantive effect. Just as the *Yick Wo* Court had looked behind the alleged health and safety justification for the law and seen the anti-Chinese intent, so the *Lochner* Court found that the regulation had no relation to "the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor . . . ."[245] The *Lochner* Court explicitly recognized the right of the state to pass legitimate health and safety regulations, which were equally binding upon all those involved in that trade.

However, this did not satisfy the Progressives, because at the heart of Progressivism was an abandonment of the age-old distinction between public and private activity. The common law had always permitted government to regulate activities that had public effects—that is, nuisances, or other such effects upon third persons who were protected because they had not chosen to take on such burdens. Private activities, by contrast, could not be regulated because society was not concerned in them. Over the course of the Progressive Era, however, the concept of "public effects" was broadened more and more in order to accommodate increasing regulation of eventually almost every private activity.[246] For example, John Dewey, probably the most important Progressivist intellectual, explicitly denounced "the notion that there are two different 'spheres' of action and of rightful claims; that of political society and that of the individual, and that in the interest of the latter the former must be as contracted as possible."[247] Of course, since all actions have *some* attenuated public effects, Progressivism found an opportunity to abandon nearly all restraints on governmental power, and to replace limited government with, in Dewey's words, "that form of social organization, extending to *all the areas and ways of living*, in which the powers of individuals

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245 Lochner v. New York, 198 U.S. 45, 64 (1905).

246 *See* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 41–42 (Yale Univ. Press, 1976) (1922) ("[With the coming of Progressivism,] [f]reedom of engaging in lawful callings came to be restricted, and an elaborate process of education and examination to be imposed upon those who would engage in them, lest there be injury to the public health, safety, or morals."). *Cf.* John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 HASTINGS CONST. L.Q. 115, 171–72 (2002).

> [O]ne of the most striking developments in the trajectory of liberal thought from its classical to its contemporary variants is the movement, from moralistic to paternalistic modes of justification, with respect to the increasing number of laws that limit private and consensual activity. . . . [T]he dark side of modern progressivism has been its willingness to limit individual liberty in the name of individual security or well-being.

Id.

247 JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 5 (Capricorn Books 1963) (1935).

shall not be merely released from mechanical external constraint but shall be fed, sustained and *directed*."[248] The abandonment of the distinction between public and private, and the resulting abandonment of limitations on government power, are typified in *Carolene Products* and its sister cases.[249]

Lochner had stood merely for the proposition that state action which imposed a burden on the individual's right to make contracts must be justified by evidence that the statute was a legitimate attempt to protect the health and safety of citizens. *Carolene Products* announced that such evidence would simply be presumed to exist—a presumption so strong that, to overcome it, a challenger must demonstrate the utter irrationality of the challenged regulation.[250] This sort of reasoning arguably reached its height when the Court found, in *Wickard v. Filburn*, that Congress' power to "regulat[e] . . . commerce . . . among the states" meant it could regulate the private gardens of individuals who grew wheat only for their own private consumption.[251] Contrast this with the *Case of the City of London*, where the Court refused to find Jacob Wagoner liable for breaking the regulation of candlemakers, because the evidence "doth not shew that he sold any candles, &c. [sic] for if he made them for his own use, without selling any for lucre or gain, he might well do it, as every one may bake or brew, &c. [sic] for his own use, without selling bread or beer . . . ."[252]

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248 *Id.* at 31 (emphasis added). Roscoe Pound was similarly candid: "The political and juristic preaching of today leads logically to absolutism." ROSCOE POUND, CONTEMPORARY JURISTIC THEORY 9 (1940).

249 As Roger Pilon writes,

> The value-laden distinction between two kinds of rights ["fundamental" rights versus "economic" rights, from *Carolene Products*] is nowhere to be found in the Constitution, of course. It was written from whole cloth to pave the way for the redistributive and regulatory programs of the New Deal. Indeed, Rexford Tugwell, one of the principal architects of the New Deal, said as much some 30 years after *Carolene Products* was decided: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [*i.e.*, the Constitution] intended to prevent them."

Pilon, *supra* note 231, at 31 (footnote omitted).

250 It is ironic that Justice Brandeis of all people endorsed this position. Brandeis is associated with the so-called "Brandeis Brief," a mechanism by which a mound of sociological and statistical data would be submitted to a court to illustrate the validity of a proposed scheme. But once on the Court, Brandeis held that no such evidence was even *necessary*. I am indebted to Professor Randy E. Barnett for this observation.

251 317 U.S. 111, 124 (1942).

252 77 Eng. Rep. 658, 669 (K.B. 1610) (footnotes omitted). Another ironic note is to be found in *Bush v. Seabury*, 8 Johns. 418 (N.Y. Sup. Ct. 1811). There a statute permitted city officials to regulate public markets, with the single exception that they could not regulate the price of bread offered for sale. The court rejected the plaintiff's arguments against the statute as *reductio ad absurdam*: "Extravagant cases may be stated of the abuse of the power," the court said, "as by an ordinance to regulate the sale of wheat, &c. but this is not a logical way to test the existence of the power." *Id.* at 420–21. By the time of *Wickard*, what the New York court had thought too absurd for discussion had become national economic policy and constitutional law.

Another criticism of the economic liberty cases is the argument that they embodied "conservative" values, and tended to perpetuate class distinctions. Justice Souter, for instance, has said that *Lochner* and its progeny perpetuated the "ordering of economic and social relationships."[253] In fact, precisely the opposite is true. The free market is a great disrupter of social stratification. Only in government-controlled economies can a stable class structure safely take root; while in a free market, each individual may pursue his own dreams and make his own place in the world—or, more to the point, *her* own place. Consider for example one case which arose nearly a century ago, when for the first time ever, women were trying to become lawyers. In *Bradwell v. Illinois*, Myra Bradwell attempted to practice the profession of law, but an existing occupational regulation prevented her from doing so.[254] When she sued, the Court upheld the regulation on the same grounds that such regulations are justified today: that she did not know what was best for her, but her state did.[255] *Bradwell*, which might be called "the *Slaughter-House* For Her," is a great illustration of how nothing ossifies the stable, class-structured society, where everybody "knows his or her place," more efficiently than the bureaucratic state. The great strides which have been made by women in the legal profession since the outdated era of *Bradwell* evidence the point. Those who believe a woman's place is in the home have much to gain by making it harder for her to get a business license, harder to get a job, harder for her to pursue her dreams. Alternatively, those who believe that a grown woman has the right to make her own contracts, and does not need an older, wiser government to save her from herself, should embrace the free market. It is unfortunate for the latter group that today, the overwhelming majority of legal academics agree with Souter's paternalistic, and yes, *conservative* view.[256]

VII. The Right to Earn a Living in Today's World

Prior to the advent of rational basis review, the Court had defended the idea of the right to pursue a lawful occupation. In *Meyer v. Nebraska*, the Court listed this right among others which were protected by the word "liberty" in the Fourteenth Amendment:

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253 Seminole Tribe v. Florida, 517 U.S. 44, 166 (1996) (Souter, J., dissenting).

254 83 U.S. (16 Wall.) 130, 131–32 (1872).

255 *Id.* at 142.

256 I am hardly the first to point out this convergence of left and right in opposition to the free market. There are some better analyses of this phenomenon. *See generally* Dinesh D'Souza, The Virtue of Prosperity: Finding Values in an Age of Techno-Affluence (2000); Virginia Postrel, The Future And Its Enemies: The Growing Conflict over Creativity, Enterprise, and Progress (1998).

> [I]t denotes not merely freedom from bodily restraint but also *the right of the individual to contract, to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and *generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.* The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.[257]

Even after *Carolene Products*, and even while the Court upheld legislation that infringed on free economic action, it did not entirely abandon the idea of the right to pursue a lawful calling. In *Takahashi v. Fish & Game Commission*, the Court reviewed a California law which repealed the state's prior practice of granting fishing licenses to residents regardless of citizenship.[258] In 1943, the state began issuing these licenses only to citizens, which meant that Japanese immigrants like Mr. Takahashi, who by federal law could not acquire U.S. citizenship, were no longer permitted to work as fishermen.[259] The state asserted that its "proprietary interest in fish in the ocean waters within 3 miles of the shore . . . justified the State in barring all aliens in general and aliens ineligible to citizenship in particular from catching fish."[260] As in *Lochner,* the Court did not stop at this asserted interest, however, and, as in *Yick Wo* and *Truax*, it found that the law was actually an attempt to discriminate against Japanese immigrants, stating:

> To all intents and purposes and in effect the provision in the 1943 and 1945 amendments are the same, the thin veil used to conceal a purpose being too transparent. Under each and both, alien Japanese are denied a right to a license to catch fish on the high seas for profit . . . this discrimination constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground of classification and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.[261]

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257 262 U.S. 390, 399–400 (1923) (citations omitted) (emphasis added).
258 334 U.S. 410, 413–14 (1948).
259 *Id.*
260 *Id.* at 414.
261 *Id.* at 426–27 (quoting trial court).

Still, *Carolene Products* had announced the regime under which America still lives—that economic regulations would be subjected only to "rational basis review." The right of the individual to earn an honest living has suffered greatly at the hands of rational basis review,[262] and an example of the hostility with which the "economic substantive due process" cases are held can be seen in Justice David Souter's concurring opinion in *Washington v. Glucksberg*.[263] Souter likened the economic due process cases to the infamous *Dred Scott* case, in which the Supreme Court had upheld a constitutionality of slavery.[264] The *Lochner* Court had "harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused."[265] The irony of likening the economic liberty cases to *Dred Scott* eluded Justice Souter, as it would not have eluded, say, Frederick Douglass, who captured the importance of the freedom of contract in his memoirs, when he recalled his feelings on receiving his first wages as a free man:

> [T]he dear lady put into my hand *two silver half-dollars*. To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—*that it was mine—that my hands were my own,* and could earn more of the precious coin—one must have been in some sense himself a slave.[266]

Nevertheless, Souter wrote almost as powerfully in his dissent in *Seminole Tribe v. Florida*:

> It was the defining characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic

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262 *See, e.g.*, Nat'l League of Cities v. Usery, 426 U.S. 833 (1976). In this case, the Supreme Court struck down a federal minimum wage law which set wage standards for employees of State governments. *Id.* at 856. Nowhere in the opinion did the Court consider the rights of those employees who would inevitably lose their jobs as a result of the forced increase in costs of employment. The Court instead held that the law would "significantly alter or displace the States' abilities to structure employer-employee relationships." *Id.* at 851. Yet the minimum wage statute in *Adkins* significantly altered the employee's and the employer's ability to structure *their own* relationships. One would think that such private actors should have even more freedom of contract than a State government, since the latter is a state actor. But *Usery* was based purely on protecting the efficient working of governments, and was not truly concerned with the rights of employees to seek employment on their own terms.

263 521 U.S. 702, 752–89 (1997) (Souter, J., concurring).

264 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

265 521 U.S. at 761. *Cf.* State v. Goodwill, 10 S.E. 285, 287 (W. Va. 1889) ("The enjoyment or deprivation of these rights and privileges, [*i.e.*, the right to pursue a lawful occupation] constitutes the essential distinction between freedom and slavery; between liberty and oppression.").

266 Frederick Douglass, *The Life and Times of Frederick Douglass*, *reprinted in* DOUGLASS: AUTOBIOGRAPHIES 453, 654 (Henry Louis Gates, Jr. ed., 1994).

> matters as constitutionally suspect. And yet the superseding lesson . . . that action within the legislative power is not subject to greater scrutiny merely because it trenches upon the case law's ordering of economic and social relationships, seems to have been lost on the Court.[267]

Yet the economic substantive due process cases were not at all what Souter claimed. Neither *Lochner* nor *Adkins* held that the common law could not be reached by the legislature, or that it trumped the Constitution. They simply said that laws which infringed on common law rights—which rights had been incorporated by the Constitution's text and by the Fourteenth Amendment—must in fact have the health and safety effect which the legislature claimed, and not be mere pretexts for seizing economic power for economic or political pressure groups.[268] Souter's characterization of *Adkins* as holding that it "treated the common-law as paramount," is belied by *Adkins'* own text: "There is, of course, no such thing as absolute freedom of contract" and "[i]t must frequently yield to the common good."[269]

Still, in deriding the right to earn an honest living, Souter is in the company of most legal scholars. In modern academia, the common law right to earn an honest living has received only minimal notice. In two masterful 1994 articles, Professor Wayne McCormack referred to it as "the right of livelihood,"[270] arguing that "the range from economic to personal liberty choices is a spectrum, not a dichotomy."[271] Just because a person chooses to act in such a way that brings him profit, McCormack argued, does not mean that the act should lose its protection as the act of a person entitled to freedom: "Property and liberty may be two words that express the opposite ends of a spectrum of human conduct from the most autonomous (liberty) to the most interconnected (prop-

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267 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (citations omitted). Justice Souter is generally considered the most liberal member of today's Court, but he is joined in this interpretation by the arch-conservative Robert Bork. *See* BORK, *supra* note 164, at 47 ("Perhaps there ought to have been a constitutional provision invalidating those [economic regulations]. But there was not, and the Court had no business striking them down.").

268 *See In re* Jacobs, 98 N.Y. 98, 110 (N.Y. 1885).

269 Adkins v. Children's Hosp., 261 U.S. 525, 546, 561 (1923).

270 McCormack, *Economic*, *supra* note 132. *See also* Peter Huang, *Preventing Post-*PepsiCo *Disaster: A Proposal for Refining the Inevitable Disclosure Doctrine*, 15 SANTA CLARA COMPUTER & HIGH TECH. L.J. 379, 405 ("The government should not be able to take away the right to control one's livelihood without adequate safeguards."); Wayne McCormack, *Property and Liberty – Institutional Competence and the Functions of Rights*, 51 WASH. & LEE L. REV. 1 (1994) [hereinafter McCormack, *Property*]; Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 21 (1999) ("[A]ny abridgment of the right to pursue a calling or to make a contract that does not fall within the police power so defined is arbitrary and inconsistent with the meaning attributed to the Due Process Clause by those authorities on which Justice Souter relied.").

271 *See* McCormack, *Property*, *supra* note 270, at 59.

erty)."[272] This is simply a restatement of Madison's belief that just government does not "deny to part of its citizens that free use of their faculties, and free choice of their occupations, which . . . are the means of acquiring property strictly so called."[273]

Perversely, the term "right to livelihood" has more frequently become attached to an argument in favor of a Constitutional right to *welfare payments*—that is, a right to be maintained above a specified poverty level, at the expense of others who work.[274] This is most certainly not what Coke and subsequent common law courts had in mind. Rather, they sought specifically to enforce an individual's "negative right" to be free from interference while going about the business of earning an honest living, under the most minimal restrictions necessary and proper for protecting consumers or preventing public dangers and nuisances.[275] This is, as Chancellor Kent said, a guaranty of freedom of action—in short, it is the freedom of contract. It is what Locke called "a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own."[276] While all along the common law had stipulated that government may impose regulations on the practice of that right—as Locke says, "[man has] an Understanding to direct his Actions . . . and liberty of Acting . . . within the bounds of that Law he is under"[277]—those regulations could be unreasonable infringements on freedom when they deprived a person of his freedom to pursue a lawful occupation. This requires some exercise of judgment with regard to the reasonableness of those restrictions. This substantive due process protection is in the tradition of what is now nearly eight hundred years of common law, and in the defense of a right which was certainly "deeply rooted in this Nation's history and tradition."[278]

The emptiness of the prevailing view of economic liberties is nowhere more clearly revealed, than by the fact that the right to earn a living has proven too important for the Court or the academy to ignore completely. One rarely finds a detractor of *Lochner* who is consistent enough to call for the reversal of *Yick Wo* or the

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272 *Id.*

273 *See* Madison, *supra* note 91, at 516.

274 *See, e.g.*, Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1133 n.9 (1999) (including a long list of articles in which "[s]cholars have put forward a range of normative arguments in favor of welfare rights").

275 The bold assertion that there is no distinction between positive rights and negative rights is nothing new. *See* Tom G. Palmer, Book Review, 19 CATO J. 331 (1999).

276 LOCKE, *supra* note 94, at 324.

277 *Id.*

278 Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

revival of *Bradwell*.[279] In a variety of cases, the Supreme Court and state courts have invoked this right, and even struck down licensing schemes which infringe upon it. One of the legal areas in which this issue has arisen was in the anti-communist hysteria of the first half of the twentieth century. *Barsky v. Bd. of Regents of the State of New York*,[280] involved a doctor whose license was revoked when he refused to submit to an investigation into his alleged communist sympathies. The Court upheld this action, but the arch-liberal Justice William Douglas dissented, writing that:

> The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. . . . It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. . . .
> . . . [So] the question here is not what government must give, but rather what it may not take away.[281]

This is *exactly* the holding of *Lochner, Adkins*, and other now reviled cases: laws which infringe on a person's right to pursue a lawful calling should be subjected to substantive judicial scrutiny. Douglas' view was echoed decades later in *Board of Regents v. Roth*.[282] There, the Court reviewed the complaint of a professor from a state college who was fired for criticizing the administration of the school. The Court held that the professor did have the right "to engage in any of the common occupations of life," and that "[t]here might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated."[283]

Today, licensing statutes are all too frequently used as a method of monopolizing trade for a few privileged individuals or corporations.[284] The regulation of taxicabs is an example common in American states. In Colorado, a man named Leroy Jones, who made a living by selling hotdogs at Denver's Mile-High Stadium,

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279 One who was so consistent was Justice Hugo Black, who dissented in Griswold v. Connecticut, on the grounds that the case, like the pre-New Deal cases, embodied what he called the "shocking doctrine" that some activities were beyond the reach of government. 381 U.S. 479, 519 (1965). "I had thought," Black said, "that we had laid that formula, as a means for striking down state legislation, to rest once and for all." *Id.* at 522.

280 347 U.S. 442, 445 (1954).

281 *Id.* at 472–73.

282 408 U.S. 564 (1972).

283 *Id.* at 572–73.

284 David Bernstein has done much outstanding work demonstrating that the primary victims of occupational licensing are poor minorities. *See generally* David E. Bernstein, Lochner, *Parity, And The Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999); David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89 (1994); David E. Bernstein, *Roots of The "Underclass": The Decline of Laissez-Faire Jurisprudence And The Rise of Racist Labor Legislation*, 43 AM. U.L. REV. 85 (1993).

decided to start his own taxi company.[285] But in order to operate a taxicab in Colorado, one must be granted a certificate of public convenience and necessity—that is, approval by a state board that a new taxi company is needed in the city.[286] Of course the board is run by a handful of taxi operators with no interest in increasing their competition. But even if it were to operate under the purest of motivations, how does one go about proving that a city needs a new business, of whatever sort?[287] Nobody could have known, in the 1960s, that Americans *needed* electronic mail, cellular telephones, or compact disc players, and these things would never have come about, had their introduction into commerce been predicated on approval by a state board made up of the manufacturers of stationery, rotary dial phones, or record players. Jones sued, basing his claim on, *inter alia*, his right to pursue a lawful occupation, as protected by the Fourteenth Amendment.[288] Of course, he lost. The court held that "'the argument that the clause creates a substantive right to pursue one's lawful occupation or profession free from state limitations was laid to rest long ago by the United States Supreme Court.'"[289] Fortunately, the state legislature changed the law, to allow more competition.[290]

One recent case illustrates even more clearly the problem of licensing statutes. In *Craigmiles v. Giles*, a Tennessee law, which made it illegal for a person to sell a coffin without being a licensed funeral director, was at issue.[291] This license required a person to pay a large fee and attend classes in subjects like embalming—subjects of little importance to a person who merely wanted to sell a box.[292] A number of casket retailers sued, arguing that this scheme violated their right to earn a living, for the aggrandizement of those who already possessed funeral director licenses.[293] The state defended the regulation as a necessary public health and safety measure, but the district court rejected this argument, calling it "somewhat of a joke," and found in favor of the casket sellers: "The requirement certainly has nothing to do with public

285 *See* CLINT BOLICK, TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT 76–80 (1998).

286 Jones v. Temmer, 829 F. Supp. 1226, 1229 (D. Colo. 1993), *vacated by* 57 F.3d 921 (10th Cir. 1995). Note the similarity to the regulatory scheme at issue in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

287 This point is more thoroughly developed in ARKES, *supra* note 223, at 51–61.

288 829 F. Supp. at 1233. *Cf.* Checker Cab Co. v. Johnson City, 216 S.W.2d 335, 337 (1948) (striking down taxi licensing scheme because "'the power in a municipal corporation to license or regulate a useful trade does not carry the implied authority to . . . create a monopoly therein'") (quoting 36 AM. J. JURIS. 524).

289 *Jones*, 829 F. Supp. at 1233–34 (quoting Galahad v. Weinshienk, 555 F. Supp. 1201, 1207 (D. Colo. 1983)).

290 *See* Jones v. Temmer, 57 F.3d 921, 922 (10th Cir. 1995).

291 110 F. Supp. 2d 658, 659 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002).

292 *Id.* at 660.

293 *Id.* at 659, 661.

health and safety. A casket is nothing more than a container for human remains."[294] The court even explained that while "[i]t is not for this trial court to breathe new life into the Privileges and Immunities Clause 127 years after its demise. . . . the argument of the *Slaughter-House* dissenters may reflect historical truth[, and] it may be time, as Justice Thomas suggests . . . to take another look at the Privileges and Immunities Clause and its place within the Fourteenth Amendment."[295] In December, the Sixth Circuit Court of Appeals affirmed.[296] "[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose," the court noted.[297] Although the court declined to address the *Slaughter-House Cases,* it noted that the licensing scheme was "nothing more than an attempt to prevent economic competition."[298]

The danger of licensing schemes becoming a method for monopolizing trade was also touched on in a series of recent anti-trust cases.[299] In 1963, an American Medical Association committee, which was formed to investigate the claims of chiropractic medicine, determined their claims were scientifically unsound, and that under medical ethics principles, no doctor could be permitted to refer patients to chiropractors, or even to associate with chiropractors.[300] While they may have had sound scientific reasons for reaching this conclusion, this clearly interfered with not only the rights of chiropractors to pursue their businesses, but with the right of doctors to refer their patients to specialists if, in their medical judgment, such a referral was proper. But more importantly, the AMA's special position—essentially in control of the career of every doctor in the country—led it to become a monopoly. Wrote one Circuit Court,

> Getting needed information to the market is a fine goal, but the district court found that the AMA was not motivated solely by

294 *Craigmiles*, 110 F. Supp. 2d at 662, 664 n.3. *Cf.* Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002) ("Tennessee's justifications for the 1972 amendment come close to striking us with 'the force of a five-week-old, unrefrigerated dead fish. . . .'") (quoting United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001)).

295 *Id.* at 665–67.

296 *Craigmiles*, 312 F.3d 220 (2002).

297 *Id.* at 224.

298 *Id.* at 225. *But see* Powers v. Harris, No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002) (mem.) (upholding identical statute in Oklahoma).

299 Wilk v. AMA, 895 F.2d 352 (7th Cir. 1990); Chiropractic Coop. Ass'n of Michigan v. AMA, 867 F.2d 270 (6th Cir. 1989); Myers v. ADA, 695 F.2d 716 (3d Cir. 1982). Due to "rational relationship scrutiny," recent cases addressing the right to earn a living have in general been *antitrust* cases as opposed to cases against wrongful *government action. See, e.g.*, Twine v. Liberty Nat'l Life Ins. Co., 311 So. 2d 299 (Ala. 1975). Private contracts in restraint of professions have been disfavored by the common law for centuries, just as state action, which does the same thing. *Cf.* Tomlinson v. Humana, Inc., 495 So. 2d 630 (Ala. 1986). While the AMA cases did not involve issues of state action, the unique position of the AMA in licensing doctors should raise such questions.

300 *Wilk*, 895 F.2d at 356.

> such altruistic concerns. Indeed, the court found that the AMA intended to "destroy a competitor," namely, chiropractors. It is not enough to carry the day to argue that competition should be eliminated in the name of public safety.[301]

Today, the Supreme Court and other courts continue to refer, in dicta, to the individual's right to pursue a lawful occupation.[302] In some dicta, it has even been referred to as a "fundamental" right.[303] In different contexts it has abided by the rule that statutes in derogation of common law rights should be strictly construed,[304] and it has noted that "[l]iberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[305] In *Toomer v. Witsell*,[306] the Court held "that commercial shrimping in the marginal sea, *like other common callings*, is within the purview of the privileges and immunities clause."[307] As recently as 1999 the Supreme Court held that the Fourteenth Amendment protects the right to "choose one's field of private employment . . . subject to reasonable government regulation."[308] But the Court upheld the regulation in that case. Likewise, in *United Building & Construction Trades Council v. Mayor of Camden*,[309] the Court wrote that "the pursuit of a common calling" is "[c]ertainly" one of the "most fundamental of those privileges protected" by the Privileges and Immunities Clause of Article Four. But the Court upheld the regulation there as well.[310]

In *Lowe v. SEC*,[311] the Court struck down an injunction which had been secured by the Securities and Exchange Commission against a group of former investment advisors. These advisors had lost their SEC licenses, and thus could no longer offer professional investment advice. Instead they began to publish a newsletter expressing their opinions on stock market investments. The

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301 *Id.* at 361 (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978)).

302 *See, e.g.*, Lebbos v. Judges of Superior Court, 883 F.2d 810, 818 (9th Cir. 1989); Benigni v. City of Hemet, 868 F.2d 307, 312 (9th Cir. 1988) (explaining that substantive due process "protects a liberty or property interest in pursuing the 'common occupations or possessions of life.'") (quoting Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 238–39 (1957)). *See also* Chalmers v. City of Los Angeles, 762 F.2d 753, 757 (9th Cir. 1985).

303 *See, e.g.*, New Hampshire v. Piper, 470 U.S. 274, 281 n.10 (1985).

304 *See, e.g.*, Norfolk Redev. & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Virginia, 464 U.S. 30, 35 (1983).

305 Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

306 334 U.S. 385 (1948).

307 *Id.* at 403 (emphasis added). The Court is referring to the Article Four Privileges and Immunities Clause, not to the Fourteenth Amendment. *Id. See also* Hicklin v. Orbeck, 437 U.S. 518, 524 (1978) (privileges and immunities clause of Article Four prohibits "state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State").

308 Connecticut v. Gabbert, 526 U.S. 286, 292 (1999).

309 465 U.S. 208 (1984).

310 *Id.* at 219, 221.

311 472 U.S. 181 (1985).

SEC enjoined them on the grounds that the loss of their licenses prohibited them from offering the public investment advice.[312] The investors responded that their right to publish was protected by the First Amendment, and the Court agreed.

> This issue involves a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment. The Court determined long ago that although "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, . . . there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed . . . for the protection of society." Regulations on entry into a profession, as a general matter, are constitutional if they "have a rational connection with the applicant's fitness or capacity to practice" the profession.[313]

State courts have also protected this right. Texas courts have held that citizens "hav[e] a vested property right in making a living."[314] In 1938, a New York court held that a statute requiring podiatrists to obtain licenses could not be applied to shoe salesmen.[315] This rule was followed in a Connecticut case, *Connecticut Chiropody Society, Inc. v. Murray*, in which the court held that "[a] statute which restricts the conduct of an occupation which was lawful at common law should be construed with reasonable strictness."[316] Wyoming has also held that "[s]tatutes which impose restrictions on trade or common occupations, or which levy an excise tax upon them, are generally construed strictly."[317]

In *Estes v. Gadsden*, the Alabama Supreme Court upheld the constitutionality of a broad licensing tax "for the privilege of engaging in or following any trade, occupation or profession within the corporate limits of the city and covers all salaried or wage-earning employees."[318] At the same time, though, the court noted that "[t]he right to earn a livelihood is an inalienable right guaranteed by the Bill of Rights."[319] Likewise, the California Supreme Court has declared the right to earn a living a "fundamental"

312 *Id.* at 184–85.

313 *Id.* at 228 (citations omitted). *See also* Commodity Trend Serv., Inc. v. CFTC, 1999 U.S. Dist. LEXIS 15877 (E.D. Ill. 1999).

314 Smith v. Decker, 213 S.W.2d 632, 634 (Tex. 1958).

315 People v. Dr. Scholl's Foot Comfort Shops, Inc., 13 N.E.2d 750 (N.Y. 1938).

316 153 A.2d 412, 414 (Conn. 1959). *See also* Hart v. Bd. of Exam'rs of Embalmers, 26 A.2d 780, 782 (Conn. 1942) (embalmer's licensing scheme "restricts a common right and thus derogates from the common law and should be strictly construed in favor of the right") (internal citation omitted).

317 State v. Capital Coal Co., 88 P.2d 481, 483 (Wyo. 1939). *See also* County of Natrona v. Casper Air Serv., 536 P.2d 142 (Wyo. 1975).

318 94 So. 2d 744, 746 (Ala. 1957).

319 *Id.* at 750.

one.[320] Like Texas, Arizona considers the right of occupation a property right.[321] And at least one Georgia case has held that a person's "right to earn a living is not to be denied him without his day in court."[322] But other courts, for instance in Hawaii, have declared that the right to earn a living is not a fundamental right.[323]

New York courts have recognized this right,[324] and have even stated that "[m]onopolistic restrictions on the right to earn a living are odious devices."[325] Yet recently, the Supreme Court of New York stated that "[t]he right to do business has never been considered a fundamental right."[326] This confusion persists elsewhere. In Florida, for instance, where the Supreme Court has declared that "[t]he fundamental right to earn a livelihood in pursuing some lawful occupation is protected by the Constitution, and in fact, many authorities hold that the preservation of such right is one of the inherent or inalienable rights protected by the Constitution."[327] Citing the Supreme Court, the Eleventh Circuit has likewise said that one of the Fourteenth Amendment's protections is the right of the individual "'to engage in any of the common occupations of life.'"[328] Yet the Eleventh Circuit has also stated that "[t]he [Supreme] Court, however, has never held that the right to

320 *See* Conway v. State Bar of California, 767 P.2d 657, 675 n.7 (Cal. 1989) (Kaufman, J., dissenting). *See also* Sei Fujii v. State of California, 242 P.2d 617 (Cal. 1952) (restrictions on immigrants owning land interferes with right to earn a living).

321 Buehman v. Bechtel, 114 P.2d 227, 231 (Ariz. 1941).

322 Leakey v. Ga. Real Estate Comm'n, 55 S.E.2d 818, 819 (Ga. Ct. App. 1949).

323 Nagle v. Bd. of Ed., 629 P.2d 109, 116 (Haw. 1981) (citing Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976)).

324 *See, e.g.*, Ribotsky v. Lupkin, 452 N.Y.S.2d 806 (N.Y. Sup. Ct. 1982); Howell v. Benson, 432 N.Y.S.2d 835 (N.Y. Sup. Ct. 1980).

325 Di Carlo v. State Liquor Auth., 282 N.Y.S.2d 834, 836 (N.Y. Sup. Ct. 1967).

326 Ricketts v. City of New York, 688 N.Y.S.2d 418, 422 (N.Y. Sup. Ct. 1999) (quoting Tel. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp., 564 F. Supp. 880, 891 (N.D. Ill. 1982)). It is particularly interesting to compare this case with *Robinson v. Watkins*, 90 Eng. Rep. 165 (K.B. 1702), which involved practically the same facts—only, almost three centuries earlier. *See supra* text accompanying note 78. *Ricketts*, like *Temmer*, reveals a continuing problem that some authors have called "transit racism." *See* Robert D. Bullard et al., *The Costs and Consequences of Suburban Sprawl: The Case of Metro Atlanta*, 17 GA. ST. U. L. REV. 935, 967–70 (2001). Regulation of the taxicab industry has a profoundly negative impact on racial minorities, while benefiting established, politically powerful cartels. The power of taxi licensing extends even further. In 1955, Martin Luther King's Montgomery bus boycott was almost destroyed when city officials used the licensing laws to enjoin the carpool network which the boycotters established in order to get from one place to another without using the buses. The city argued that the boycotters were operating a taxi company without a license, and actually did get the injunction. As a result, for the last month of the boycott, the protesters were forced to walk. *See also* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 145, 193–94 (1989); WALTER E. WILLIAMS, THE STATE AGAINST BLACKS 75–86 (1982).

327 State *ex rel.* Hosack v. Yocum, 186 So. 448, 451 (Fla. 1939); *accord* Campos v. INS, 32 F. Supp. 2d 1337, 1347 (S.D. Fla. 1998).

328 Silverstein v. Gwinnett Hosp. Auth., 861 F.2d 1560, 1566 (11th Cir. 1988) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923))).

pursue a particular occupation is a fundamental right, and it has not applied strict scrutiny review to classifications affecting an individual's pursuit of his or her occupation."[329]

This, in fact, is the reason for such confusion. While it is sometimes politically expedient for courts to refer to the right of occupation as a fundamental right—and while previous generations very much thought it fundamental—applying the strict scrutiny which is used whenever government interferes with *other* fundamental rights would mean rolling back most of the vast governmental edifice which has been built upon *Carolene Products*.[330] We see then two great ironies. The first is that courts' reluctance to apply strict scrutiny in this matter has required that when courts *do* wish to protect the right to earn a living, they must do so under clauses of the Constitution, such as the Equal Protection Clause, or legal theories, such as Due Process, which were not primarily meant for that job. Yet this is precisely what the left complains of with regard to the economic substantive due process cases—that they added to the definition of "due process" rights which were not intended to be protected under that clause.

While courts often refer in *dicta* to the right to earn a living, they rarely step in to protect that right from the interference of groups legally protected from competition. This is due simply to a single reason: rational relationship scrutiny. As one commentator has written, "*Slaughter- House* would be a difficult case today, except that the hard questions would be hidden by the assumption, built into 'rational basis scrutiny,' that the states generally do not act for forbidden purposes."[331] But that assumption is a notorious and blatant fiction.[332]

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329 Jones v. Bd. of Comm'rs of the Ala. State Bar, 737 F.2d 996, 1000 (11th Cir. 1984). It is of course true that the Supreme Court has not applied strict scrutiny to infringements of this right since 1937.

330 As one commentator has put it:

> [E]mbracing economic substantive due process would require that liberals reject some deeply ingrained beliefs and practices. For example, they would have to abandon Progressive myths about the old Court, quit casting a blind eye on government's economic irrationality, partiality, and predatoriness, and stop winking at pluralist log-rolling. Worst of all, liberals would have to admit that the supposedly malign and ignorant reactionaries on the old Court knew things about business and government that they and their Progressive forbears were unwilling or unable to see.

Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 968–69 (1999) (internal citations omitted).

331 Harrison, *supra* note 136, at 1468 (emphasis added).

332 H.L. Mencken once wrote of Oliver Wendell Holmes:

> The weak spot in his reasoning, if I may presume to suggest such a thing, was his tacit assumption that the voice of the legislature was the voice of the people. There is, in fact, no reason for confusing the people and the legislature: the two, in these later years, are quite distinct. . . . The typical lawmaker of today is a man wholly devoid of principle—a mere counter in a grotesque and knavish game. If the right pressure could be applied to him he would be cheerfully in favor of polygamy, astrology or cannibalism.

This is the second great irony: although Holmes, Brandeis, and their descendants are often portrayed as enemies of formalism,[333] the rational basis test which they fashioned enshrines formalism *à outrance.* The *Carolene Products* presumption of constitutionality is a *prime* exercise in formalism. So long as the government's action bears some connection to a minimally rational economic policy, the Court refuses to look further, to the real motive or real effect of the policy. This is the very definition of formalism.

VIII. CONCLUSION

The Constitution was formed in large part to protect the individual's right to pursue a business without wrongful interference, a right that was "deeply rooted in this Nation's history and tradition."[334] Although this right is an old one, it embodies important liberal values of self-assertiveness and social mobility. The coming of the New Deal, and the enshrinement of its quack economic theories, required the abandonment of this long and important tradition, and a new deference to political regulation that ignored the fact that such regulatory powers are often exercised at the behest of special interest groups who prosper at the expense of those with less political power. It was to prevent this sort of political jockeying that the Constitution was written. Unfortunately, for many people today, the right to pursue happiness, by earning a living, is void where prohibited by law. That right, and those people, deserve to be protected by our courts today, just as they were protected by our courts for many centuries before the New Deal.

H.L. MENCKEN, A MENCKEN CHRESTOMATHY 260–61 (H.L. Mencken ed., 1962). If Holmes' views were generally accepted, Mencken wrote, "there would be scarcely any brake at all upon lawmaking, and the Bill of Rights would have no more significance than the Code of Manu." *Id.* at 260.

333 *See, e.g.*, Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

334 Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

APPENDIX A†

The following is a list of state cases between 1823—when *Corfield v. Coryell* was decided—and 1873—the year the *Slaughter-House Cases* were decided—in which the courts discussed or protected the common law right to earn a living.

Hayden v. Noyes, 5 Conn. 391, 397 (1824), *available at* 1824 WL 83, at *5 ("Every person has a common law right, to fish in a navigable river or arm of the sea, until, by some legal mode of appropriation, this common right is extinguished."); Smith v. Spooner, 20 Mass. 229, 230 (1825), *available at* 1825 WL 2067, at *2 ("Every man of full age and sound mind is at liberty to make contracts . . . unless by statute provision he is disabled. And disabling statutes of that nature should be construed strictly, for though founded in policy and a just regard to the public welfare, they are in derogation of private rights."); Dunham & Daniels v. Trustees of Rochester, 5 Cow. 462, 466 (N.Y. 1826) ("[I]t does not follow that any man is to depend, for the fair and innocent exercise of his business, on the will of the [city, or]; that they have the power of licensing his trade, at their pleasure; prohibiting it altogether; or crippling it by heavy charges and grievous penalties."); *In re* Nightingale, 28 Mass. 168, 174 (1831) (The challenged regulation "does [not] operate as an improper restraint of trade, but is a wholesome regulation of it."); Austin v. Murray, 33 Mass. 121, 126 (1834) ("[T]he law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation."); City of Hudson v. Thorne, 7 Paige Ch. 261 (N.Y. Ch. 1838) ("If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business."); Town of Columbia v. Beasly, 20 Tenn. 232, 240–41 (1839), *available at* 1839 WL 1286, at *4-5 ("The 5th plea alleges that the tax was imposed with a view to prohibit the defendant from pursuing a lawful occupation, and not for the purpose of raising a revenue. . . . A by-law for oppression is void."); Mobile v. Yuille, 3 Ala. 137, 139 (1841), *available at* 1841 WL 123, at *2 ("[T]he enjoyment of all the rights of property, and the utmost freedom of action which may consist with the public welfare,

† All citations and direct quotes in the appendices have been have been verified using the electronic versions of these materials available on Westlaw. *Chapman Law Review* is not responsible for errors that may be contained in the electronic versions.

is guarantied to every man, and no restraint can be lawfully imposed by the Legislature in relation thereto, which the paramount claims of the community do not demand, or which does not operate alike on all."); Rockwell v. Hubbell's Adm'rs, 2 Doug. 197, 200 (1846), *available at* 1846 WL 2864, at *2 ("'Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its own views of policy and humanity. It must reside in every state, to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community.'"); Whitney v. Bartholomew, 21 Conn. 213, 217 (1851), *available at* 1851 WL 574, at *1 ("The trade and occupation of carriage-making, or of a blacksmith, is a lawful and useful one; and a building erected for its exercise, is not a nuisance *per se*."); Mays v. Cincinnati, 1 Ohio St. 268, 273 (1853) ("[I]nterference with the natural right of acquisition and enjoyment guarantied by the constitution, can only be justified when public necessity clearly demands it."); People v. Toynbee, 11 How. Pr. 289 (N.Y. Sup. Ct. 1855) (striking down anti-liquor law as infringement of right to sell goods); State v. Wheeler, 25 Conn. 290, 292 (1856), *available at* 1856 WL 981, at *2 ("[W]e see no ground on which a prohibition of the owning or keeping of an article for the purpose of a sale, which the legislature had no rightful power to prevent, could be upheld."); *In re* New Orleans Draining Co., 11 La. Ann. 338, 352 (1856), *available at* 1856 WL 4729, at *15 (attorney arguing that "government cannot say to [a citizen] that he shall follow this or that occupation, because the government thinks that it will be either for his own, or the public good."); Davis v. City of New York, 14 N.Y. 506, 524 (1856) (holding that city government "had no power to grant to any person a [monopoly] franchise for transporting passengers on the public streets, for profit, for a single day, and the attempt to do so was absolutely void."); Prevost v. Greneaux, 60 U.S. 1, 4 (1856) (attorney arguing that "[s]o far as statutes for the regulation of trade impose fines or create forfeitures, they are doubtless to be construed strictly as penal, and not liberally as remedial laws."); Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19, 35 (1856), *available at* 1856 WL 912, at *10 ("[T]he policy of the law is to encourage trade, by the free competition of all who may choose to engage in it, and it cannot recognize a right in the plaintiffs to interfere for the purpose of preventing a public nuisance, on the ground of an interest they have, as competitors with the defendants, for the public patronage in this business."); *Ex parte* Newman, 9 Cal. 502, 517 (1858) ("The right to protect and possess property is not more clearly protected by the Constitution than the right to acquire.");

Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 547 (1858), *available at* 1857 WL 2157, at *5 ("Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity."); City of Davenport v. Kelley, 7 Iowa 102, 107 (1858), *available at* 1858 WL 230, at *4 (upholding regulation because "[i]t regulates, but does not restrain [trade], and as a regulation there is no conceivable objection to it."); Phelps v. Rooney, 9 Wis. 70 (1859), *available at* 1859 WL 2821, at *2 (court agreeing with counsel that "[a]ll statutes which impose restrictions on trade or common occupations, must be construed strictly."); Russell v. Sloan, 33 Vt. 656 (1861), *available at* 1861 WL 3363 (refusing to apply anti-liquor law to sale of "quack medicines" because law must be strictly construed); Drexel & Co. v. Commonwealth, 46 Pa. 31 (1863), *available at* 1863 WL 4920, at *4 ("Statutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be construed strictly."); Wreford v. People, 14 Mich. 41, 46 (1865), *available at* 1865 WL 2123, at *4 (Police "power can only be exercised to do away with what are legally nuisances, and does not authorize the council, as it could not, to interfere with what is not a nuisance in fact."); New Orleans, Jackson & Great N. R.R. Co. v. Bailey, 40 Miss. 395 (1866), *available at* 1866 WL 1889 (describing tort duties of those engaged in their "lawful calling"); City of Chicago v. Rumpff, 45 Ill. 90, 96 (1867), *available at* 1867 WL 5226, at *3 ("Hence their by-laws must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interest, of the corporation, are void. And of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly."); City of Bloomington v. Wahl, 46 Ill. 489, 492 (1868), *available at* 1868 WL 4914, at *2 ("The ordinance must be reasonable, uniform in application throughout the limits in which it has operation; it must not be in restraint of trade; it must not create oppressive monopolies, but must be calculated to advance the general welfare of the inhabitants of the municipality."); Ducat v. City of Chicago, 48 Ill. 172, 178 (1868), *available at* 1868 WL 5076, at *3 (Privileges and immunities clause means "that the citizens of all the States should have the peculiar advantage of acquiring and holding real as well as personal property, and that such property should . . . not be liable to any taxes or burdens which the property of the citizen is not subject to."); Hayes v. City of Appleton, 24 Wis. 542, 545 (1869), *available at* 1869 WL 2114, at *1 ("The selling of property at public auction being a lawful business . . . it follows that [the challenged regulation] is an unreasonable and unlawful interference with the freedom of trade, and that the ordinance is for that reason void.");

Pieri v. Town of Shieldsboro, 42 Miss. 493, 495 (1869), *available at* 1869 WL 3769, at *2 (city's order that lumberyard remove its lumber invalid because "It cannot be seriously contended that the corporate authorities of a town can, by an arbitrary ordinance, destroy private property by force, or compel the owner of it to have it removed, unless it was a nuisance, and so declared in the ordinance."); United States v. Singer, 27 F. Cas. 1082, 1084 (N.D. Ill. 1870) (No. 16, 292) (striking down a liquor taxation scheme for being "a series of restrictions and impositions, and a system of inquisition and espionage upon distilling—admitted by the act to be a lawful occupation—which if extended to all other kinds of business, would make the collection of taxes odious and oppressive and indeed well nigh intolerable."); Parrott v. Barney, 18 F. Cas. 1236, 1243 (C.C.D. Cal. 1871) (No. 10, 773) ("[W]hy should a person innocently ignorant of the qualities of a dangerous thing unconsciously brought upon his premises in the pursuit of a lawful calling, not only be compelled to sustain the damage suffered himself, but, also, that suffered by his neighbor from an accident resulting therefrom without his fault. . . . In my judgment, the law is not so rigorous and unreasonable."); Gale v. Village of Kalamazoo, 23 Mich. 344, 355 (1871), *available at* 1871 WL 5613, at *6 ("[Monopolies] are founded in destruction of trade, and cannot be tolerated for a moment."); Barling v. West, 29 Wis. 307, 315 (1871), *available at* 1871 WL 2973, at *4 (striking down ordinance requiring license to sell "lemonade, ice cream, cakes, fruit, etc., [because it] is a perfectly lawful trade, and its restraint or regulation is not demanded by the public welfare."); Moore v. Letchford, 35 Tex. 185, 216 (1871), *available at* 1872 WL 7381, at *17 (power to exempt certain items from seizure in bankruptcy "must reside in every state, to enable it to secure its citizens . . . in those pursuits which are necessary to the existence and well being of every community.").

In *Smith v. Foster*, 41 N.H. 215 (1860), the New Hampshire Supreme Court held a contract illegal for being made on the Sabbath, and drew a distinction between one's *ordinary* calling and one's *secular* calling, and held that "blue laws" were constitutional as restrictions on the latter, not the former. This was more fully explained in *George v. George*, 47 N.H. 27 (1866), *available at* 1866 WL 1962, at *1 (holding that making a will did not qualify as secular labor). Following this rule of strict construction, in *Ah Hee v. Crippen*, 19 Cal. 491 (1861), Justice Field, later a dissenter in the *Slaughter-House Cases*, held that a law requiring licenses for operating mines could not require the licensing of mines operated on privately held land.

APPENDIX B

For *many* years before *Lochner v. New York*, it was an established principle that: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health . . . and when it appears that [public health] is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen." Inhabitants of Watertown v. Mayo, 109 Mass. 315, 319 (1872).

See also Foster v. Essex Bank, 16 Mass. 245, 270–71 (1819); Town of Goshen v. Town of Stonington, 4 Conn. 209 (1822); Vanderbilt v. Adams, 7 Cow. 349 (N.Y. Sup. Ct. 1827); Coates v. City of New York, 7 Cow. 585 (N.Y. Sup. Ct. 1827); Wally's Heirs v. Kennedy, 10 Tenn. 554 (1831); *In re* Nightingale, 28 Mass. 168, 174 (1831); Baker v. Boston, 29 Mass. 184, 197–98 (1831); Glenn v. City of Baltimore, 5 G. & J. 424 (1833); Austin v. Murray, 33 Mass. 121, 125–26 (1834); *In re* Goddard, 33 Mass. 504, 509–11 (1835); Pierce v. State, 13 N.H. 536 (1843); Walker v. Bd. of Pub. Works, 16 Ohio 540 (1847); Green v. Savannah, 6 Ga. 1 (1849); Our House, No. 2 v. State, 4 Greene 172 (Iowa 1853); Mays v. City of Cincinnati, 1 Ohio St. 268, 272 (1853); Thorpe v. Rutland & Burlington R.R. Co., 27 Vt. 140 (1855); People v. Hawley, 3 Mich. 330 (1854); Westervelt v. Gregg, 12 N.Y. 202 (1854); Guy v. Hermance, 5 Cal. 73 (1855); People v. Toynbee, 11 How. Pr. 289 (N.Y. Sup. Ct. 1855); State v. Wheeler, 25 Conn. 290 (1856); Town Council of Winnsboro v. Smart, 45 S.C.L. (11 Rich.) 551 (S.C. Ct. App. 1858); City of New York v. Second Ave. R. Co., 21 How. Pr. 257 (N.Y. Sup. Ct. 1861); Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139 (1863); Ash v. People, 11 Mich. 347 (1863); City of New York v. Second Ave. R. Co., 32 N.Y. 261, 272–74 (1865); Coe v. Shultz, 2 Abb. Pr. (n.s.) 193 (N.Y. Sup. Ct. 1866); Roosevelt v. Godard, 52 Barb. 533 (N.Y. Sup. Ct. 1868); City of Bloomington v. Wahl, 46 Ill. 489 (1868); Hayes v. City of Appleton, 24 Wis. 542 (1869); Craig v. Kline, 65 Penn. 399 (1870); City of St. Louis v. Fitz, 53 Mo. 582 (1873); Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191 (1873); Weismer v. Village of Douglas, 64 N.Y. 91, 99 (1876); Inhabitants of Watertown v. Mayo, 109 Mass. 315, 319 (1872); People *ex rel.* Bolton v. Albertson, 55 N.Y. 50, 55 (1873); Toledo, Wabash & W. Ry. Co. v. City of Jacksonville, 67 Ill. 37 (1873); Farwell v. City of Chicago, 71 Ill. 269 (1874); Henderson v. Mayor of New York, 92 U.S. 259, 271 (1875); *In re* Deansville Cemetery Ass'n., 66 N.Y. 569 (1876); Shepperd v. Sumter County Com'rs, 59 Ga. 535 (1877); City of St. Paul v. Traeger, 25 Minn. 248 (1878); City of Baltimore v. Radecke, 49 Md. 217 (1878); Stuart v. Palmer, 74 N.Y. 183 (1878); *In re* Cheesebrough, 78 N.Y. 232 (1879); Lowry v. Rainwater, 70 Mo. 152 (1879); *In re* Ryers, 72 N.Y. 1, 8 (1878); Intoxicating Liquor Cases, 25 Kan. 751, 765

(1881); State v. Addington, 12 Mo. App. 214 (Mo. Ct. App. 1882), *aff'd*, 77 Mo. 110 (Mo. 1882); Joseph v. Randolph, 71 Ala. 499 (1882); State v. Hipp, 38 Ohio St. 199 (1882); *In re* Eureka Basin Warehouse & Mfg. Co., 96 N.Y. 42 (1884); State v. Mott, 61 Md. 297 (1884); State v. Bean, 91 N.C. 554 (1884); City of Mankato v. Fowler, 32 Minn. 364, 365–66 (1884); Miller v. Jones, 80 Ala. 89 (1885); Millett v. People, 7 N.E. 631 (Ill. 1886); *In re* Frazee, 30 N.W. 72 (Mich. 1886); Amperse v. Common Council of Kalamazoo, 26 N.W. 222 (Mich. 1886); State v. Divine, 4 S.E. 477, 482–83 (N.C. 1887); City of San Francisco v. Liverpool & London & Globe Ins. Co., 15 P. 380 (1887); Quintini v. Mayor of Bay St. Louis, 1 So. 625, 628 (Miss. 1887); People *ex rel.* Kuhn v. Common Council, 38 N.W. 470, 471–72 (Mich. 1888); People v. Haug, 37 N.W. 21, 29 (Mich. 1888) (Sherwood, C.J., dissenting); People v. Gillson, 109 N.Y. 389, 404–05 (1888); Ragio v. State, 6 S.W. 401 (Tenn. 1888); State v. Goodwill, 10 S.E. 285, 286 (W.Va. 1889); Chaddock v. Day, 42 N.W. 977, 978 (Mich. 1889); Hughes v. Recorder's Court, 42 N.W. 984, 984 (Mich. 1889); People v. Armstrong, 41 N.W. 275, 293 (Mich. 1889); Moore v. City of Minneapolis, 45 N.W. 719, 719 (Minn. 1890); City of Jacksonville v. Ledwith, 7 So. 885, 888–89 (Fla. 1890); State v. Mahner, 9 So. 480, 481 (La. 1891); *Ex parte* Tuttle, 91 Cal. 589, 591 (1891); People v. Wagner, 49 N.W. 609 (Mich. 1891); San Antonio & A.P. Ry. Co. v. Wilson, 19 S.W. 910, 912 (Tex. Ct. App. 1892); Moore v. City of St. Paul, 51 N.W. 219, 220 (Minn. 1892); State v. Dubarry, 11 So. 718, 719 (La. 1892); State *ex rel.* McCue v. Sheriff of Ramsey County, 51 N.W. 112, 113 (Minn. 1892); State v. Moore, 18 S.E. 342, 345 (N.C. 1893); *Ex parte* Whitwell, 32 P. 870, 872 (Cal. 1893); State v. Loomis, 22 S.W. 350, 352 (Mo. 1893); Commonwealth v. Fowler, 28 S.W. 786, 788 (Ky. 1894); Smiley v. MacDonald, 60 N.W. 355, 357 (Neb. 1894); Low v. Rees Printing Co., 59 N.W. 362, 364 (Neb. 1894); Ritchie v. People, 40 N.E. 454, 456 (Ill. 1895); *Ex parte* Jentzsch, 44 P. 803, 804 (Cal. 1896); Shaver v. Pennsylvania Co., 71 F. 931 (C.C.N.D. Ohio 1896); Chicago, Burlington & Quincy R.R. Co. v. State *ex rel.* City of Omaha, 66 N.W. 624, 628 (Neb. 1896); State v. Hunt, 40 S.E. 216, 217 (N.C. 1901); Price v. People, 61 N.E. 844, 846 (Ill. 1901); Inhabitants of Winthrop v. New England Chocolate Co., 62 N.E. 969 (Mass. 1902); Wenham v. State, 91 N.W. 421, 424–25 (Neb. 1902); City of Sonora v. Curtin, 70 P. 674, 675 (Cal. 1902); Iler v. Ross, 90 N.W. 869, 873 (Neb. 1902); Anderson v. State, 96 N.W. 149, 150 (Neb. 1903); *Ex parte* Dickey, 77 P. 924, 925 (Cal. 1904); People *ex rel.* Armstrong v. Warden, 76 N.E. 11 (N.Y. 1905).

This principle was not confined to state cases. In *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871), for instance (an eminent domain case) the Court rejected "[statutory]

construction [which] would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for *invasion of private right under the pretext of the public good*, which had no warrant in the laws or practices of our ancestors." *Id.* at 178 (emphasis added). As the Court explained in *Mugler v. Kansas*, the Supreme Court held: "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." 123 U.S. 623, 661 (1887). *See also* Brown v. Maryland, 25 U.S. 419, 444 (1827); United States v. Martin, 94 U.S. 400, 403–04 (1876); Shields v. Ohio, 95 U.S. 319, 324–25 (1877); Boyd v. United States, 116 U.S. 616, 635 (1886); Minnesota v. Barber, 136 U.S. 313, 320 (1890); Budd v. People, 143 U.S. 517, 531–32 (1892) and cases cited therein; Lawton v. Steele, 152 U.S. 133, 137 (1894); Holden v. Hardy, 169 U.S. 366, 389–90 (1898); Otis v. Parker, 187 U.S. 606, 608 (1903). Even Justice Oliver Wendell Holmes believed it proper to inquire whether the statute in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), was "justified as a protection of personal safety." *Id.* at 414. He found that it was not.

While this reasoning was not necessarily universal—see, for instance, *Wiggins Ferry Co. v. City of St. Louis*, 102 Ill. 560 (1882), and *Braun v. Chicago*, 110 Ill. 186 (1884)—the precedents were certainly strong enough to provide a foundation for *Lochner*.

APPENDIX C

The following is a list of federal cases between the 1873 *Slaughter-House Cases* and 1937's *Carolene Products* decision that address the common law right to earn a living. This list is obviously not complete, as I have intentionally left off cases discussed in the text and those which are already well known (*Lochner*, for instance).

Holden v. Hardy, 169 U.S. 366, 391 (1898) ("as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."); Williams v. Fears, 179 U. S. 270, 274 (1900) ("The liberty, of which the deprivation without due process of law is forbidden, 'means not only the right of the citizen to be free from the mere physical restraint of his person . . . [but also] to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation . . .'"); Atkin v. Kansas, 191 U.S. 207, 223 (1903) ("If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best,—as undoubtedly it is . . . ."); Chicago, Burlington & Quincy R.R. Co. v. McGuire, 219 U. S. 549, 566 (1911) ("the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution."); Murphy v. California, 225 U.S. 623, 628 (1912) ("The 14th Amendment protects the citizen in his right to engage in any lawful business . . . ."); Buchanan v. Warley, 245 U.S. 60, 78–79 (1917) ("Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color.") (citations omitted); New York Life Ins. Co. v. Dodge, 246 U.S. 357, 374 (1918) ("to contract is a part of the liberty guaranteed to every citizen."); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921) ("complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference . . . ."); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924) ("a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."); Terrace v. Thompson, 263 U.S. 197, 215 (1923) ("the Constitution protects . . . [the plaintiff] in his right to earn a livelihood by following the ordinary occupations of life.") (citations omitted); Norfolk & W. Ry. Co. v. Pub. Serv. Comm'n of W. Va., 265 U.S. 70, 74 (1924) ("The validity of regulatory mea-

sures may be challenged on the ground that they transgress the Constitution, and thereupon it becomes the duty of the court, in the light of the facts in the case, to determine whether the regulation is reasonable and valid or essentially unreasonable, arbitrary and void."); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 536 (1925) ("Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in . . . many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers.") (citations omitted); Weaver v. Palmer Bros. Co., 270 U.S. 402, 415 (1926) ("The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment."); Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 9 (1927) ("the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights . . . ."); Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 113 (1928) ("A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'").

APPENDIX D

The following state cases from the so-called "era of *laissez-faire*"—between 1873 and 1937—defend the right to earn a living.

See Joyce v. City of East St. Louis, 77 Ill. 156 (1875), *available at* 1875 WL 8278, at *2 (carriage licensing scheme must be strictly construed); Commonwealth v. Bacon, 76 Ky. 210, 214 (Ky. App. 1877), *available at* 1877 WL 7649, at *2 ("In this country . . . the right of the citizen to acquire, hold, and enjoy property is guaranteed by the fundamental law . . . ."); Bertholf v. O'Reilly, 74 N.Y. 509, 515 (1878) ("the right to liberty [includes an individual's] right to exercise his faculties and to follow a lawful avocation for the support of life; the right of property, the right to acquire power and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State."); Baltimore v. Radecke, 49 Md. 217, 230 (1878), *available at* 1878 WL 6549, at *6 (ordinance for prohibiting steam engines invalid because "it commits to the unrestrained will of a single public officer the power" to destroy businesses); City of St. Paul v. Traeger, 25 Minn. 248, 252 (1878) ("when, as in this case, the ordinance which is sought to be sustained operates in restraint of an occupation or pursuit useful in its character, and which is so recognized at common law and under the laws of the state, it is especially necessary to show that the authority for its passage has been expressly or otherwise unequivocally conferred."); *In re* Parrott, 1 F. 481, 498 (C.C.D. Cal. 1880) ("No enumeration would, I think, be attempted of the privileges, immunities, and exemptions of the most favored nation, or even of man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor. It is as sacred as the right to life, for life is taken if the means whereby we live be taken."); Intoxicating Liquor Cases, 25 Kan. 751, 761 (1881), *available at* 1881 WL 944, at *7 ("The law does not attempt to prescribe who may and who may not become druggists. That question each individual settles for himself."); State v. Hipp, 38 Ohio St. 199, 222 (1882) ("one who conducted such business in a lawful manner was entitled, under the law as it then existed, to the same protection which was accorded to dealers in other articles of personal property . . . ."); Butzman v. Whitbeck, 42 Ohio St. 223, 230–31 (1884) (law may not invest private landowner "with the vast discretion of determining whether the dealer upon his premises shall prosecute his business as a lawful traffic, or whether he shall remain under the condemnation of the law . . . . "); State v. Mott, 61 Md. 297, 308–09 (1884), *available at* 1884 WL 5915, at *6 ("it is well settled that a power simply to regulate does not embrace a power to prohibit or destroy a trade or occupation."); City of Mankato v. Fowler, 20 N.W. 361, 362 (Minn. 1884) ("the business of an auc-

tioneer is a lawful and useful one, and there would seem to be no reasonable warrant . . . for exacting so large a sum as a license fee, the result of which, it appears, is not to regulate but to suppress such business."); *In re* Jacobs, 98 N.Y. 98, 106–07 (1885) ("Liberty . . . means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights . . . are infringements upon his fundamental rights of liberty . . . ."); Sarrls v. Commonwealth, 83 Ky. 327, 331 (Ky. 1885) ("while the Legislature has the power to regulate the sale of liquors to be used as a beverage, or to prohibit its sale for that purpose altogether, it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as medicine."); People v. Marx, 2 N.E. 29, 34 (N.Y. 1885) ("Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition."); Amperse v. Common Council of Kalamazoo, 26 N.W. 222, 223 (Mich. 1886) ("The right of a married woman to engage in and carry on any legal business in her own right, and in her own name, is no longer an open question in this state."); Potter v. Common Council of Homer, 26 N.W. 208, 210 (Mich. 1886) (Where licensing board refuses license to qualified applicant, "[i]t is tyrannical as well as unlawful to hinder any one who is ready to furnish security from conducting his lawful business."); Godcharles & Co. v. Wigeman, 6 A. 354, 356 (Pa. 1886) ("[A person] may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."); People v. Gillson, 17 N.E. 343, 345 (N.Y. 1888) ("a person living under our Constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit."); *In re* Hauck, 38 N.W. 269, 276 (Mich. 1888) ("absolute prohibition cannot be enacted under a title to regulate . . . . "); People v. Haug, 37 N.W. 21, 27 (Mich. 1888) ("The great charter made it unlawful to impose any penalty or forfeiture which should deprive a man of what is translated his 'contentment,' or a person in any kind of business, whether commercial or otherwise, of the means of continuing that business."); People *ex rel.* Kuhn v. Common Council of Detroit, 38 N.W. 470, 471 (Mich. 1888) ("Liberty . . . means . . . to pursue such callings and avocations as may be most suitable to develop [a person's] capacities, and to give them their highest enjoyment."); State v. Fire Creek

Coal & Coke Co., 10 S.E. 288, 289 (W.Va. 1889) ("[one has] the right of managing his own private business . . . ."); *Ex parte* Kubach, 24 P. 737, 737 (Ca. 1890) ("'any person is [at] liberty to pursue any lawful calling . . . .'"); City of Jacksonville v. Ledwith, 7 So. 885, 888 (Fla. 1890) ("the sale of [goods] may, under this grant, be restricted to markets duly established under the other, where the regulations do not constitute an illegal restraint or a prohibition of the trade . . . ."); Commonwealth v. Perry, 28 N.E. 1126, 1127 (Mass. 1891) ("The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it."); Moore v. City of St. Paul, 51 N.W. 219, 220 (Minn. 1892) (declaring license requirement void because of the "arbitrary and unequal scale of charges as is provided for . . . ."); San Antonio & Aransas Pass Ry. Co. v. Wilson, 19 S.W. 910, 912 (Tx. App. 1892) ("Unquestionably, the legislature may subject any occupation, business, or class to reasonable regulations, when required by public interest and welfare, but in all illustrations of the exercise of this power it will be found there was some circumstance of threatened damage to the public that required the regulation. No well-considered case can be found sustaining a penalty on an ordinary contract, where public interest was not involved.") (citation omitted); *Ex parte* Theisen, 11 So. 901, 903 (Fla. 1892) (discussing "the ordinary vocations of life which a man has an inherent right to pursue, such as keeping a market, a dairy, or conducting a laundry, and the like . . . ."); State v. Dubarry, 11 So. 718, 719 (La. 1892) ("the ordinance is illegal and void, by reason of the provisions contained in the first section, which makes the establishment of private markets thereafter to depend upon the applicant obtaining 'permission of the city council.'"); Frorer v. People, 31 N.E. 395, 397 (Ill. 1892) ("The privilege of contracting is both a liberty and a property right . . . ."); State v. Costello, 23 A. 868, 869 (Conn. 1892) ("the act in question is one clearly in derogation of a common private right. According to the claim of the state, it disables a certain class of persons of full age, of sound mind, and in all respects legally capable of entering into a contract, from making a certain class of contracts. Such statutes are to be construed strictly, and in favor of the right."); Sherlock v. Stuart, 55 N.W. 845, 847 (Mich. 1893) ("any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away."); *Ex parte* Whitwell, 32 P. 870, 872 (Cal. 1893) ("the right of the citizen to engage in such a business, or follow such a profession, is protected by the constitution . . . ."); Braceville Coal

Co. v. People, 35 N.E. 62, 63 (Ill. 1893) ("[L]iberty, as that term is used in the constitution . . . embrace[s] the right of every man to . . . adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare."); State v. Moore, 18 S.E. 342, 345 (N.C. 1893) ("a man's right to liberty includes 'the right to exercise his faculties, and to follow a lawful vocation for the support of life.'"); Low v. Rees Printing Co., 59 N.W. 362, 364 (Neb. 1894) ("To forbid an individual or class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty . . . ."); Leep v. St. Louis, Iron Mtn. & S. Ry. Co. 25 S.W. 75, 77 (Ark. 1894) ("The right to acquire and possess property necessarily includes the right to contract, for it is the principal mode of acquisition, and is the only way by which a person can rightly acquire property by his own exertion. Of all the 'rights of persons' it is the most essential to human happiness."); Commonwealth v. Fowler, 28 S.W. 786, 787 (Ky. 1894) ("Every one has the right to follow an innocent calling without permission from the government."); *In re* Eight-Hour Law, 39 P. 328, 329 (Colo. 1895) ("The bill submitted also violates the right of parties to make their own contracts, [a] right guarantied [sic] by our bill of rights, and protected by the fourteenth amendment to the constitution of the United States."); Ritchie v. People, 40 N.E. 454, 455 (Ill. 1895) ("Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. . . . [T]he laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner.") (citation omitted); *Ex parte* Jentzsch, 44 P. 803, 805 (Cal. 1896) ("[the challenged law] works an invasion of individual liberty, the liberty of free labor which it pretends to protect."); Shaver v. Pennsylvania Co., 71 F. 931, 934 (C.C.N.D. Ohio 1896) ("employes [sic] . . . are capable of deciding for themselves whether they want to contract for such protection. It is not within the powers of a legislature to assume that this class of men need paternal legislation, and that, therefore, they will protect them by depriving them of the power to contract as other men may."); Keen v. City of Waycross, 29 S.E. 42, 43 (Ga. 1897) ("the law recognizes in no one a right to create or maintain a monopoly."); State v. Mahner, 9 So. 480, 480 (La. 1891) ("The ordinance is not general in its operation. It does not affect all citizens alike who follow the same occupation which it attempts to regulate."); Banta v. City of Chicago, 50 N.E. 233, 237 (Ill. 1898) (state may tax those occupations, among others "which, because of exceptional and particular reasons affecting public policy, are deemed proper subjects for supervision or regulation by the state."); Ruhstrat v. People, 57 N.E. 41, 43 (Ill. 1900) ("[The] enjoyment by the citizen, upon terms of

equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade . . . is a general part of his rights of liberty and property as guarantied [sic] by the fourteenth amendment . . . ."); City of Atlanta v. Stein, 36 S.E. 932, 933 (Ga. 1900) ("It cannot be seriously denied that the ordinance tended to defeat competition and encourage monopoly. . . . It is not within the power of municipal authorities to enact legislation of this kind."); Valentine v. Berrien Circuit Judge, 83 N.W. 594, 595 (Mich. 1900) ("The constitution guaranties [sic] to citizens the right to engage in lawful business, unhampered by legislative restrictions, where no restrictions are required for the protection of the public."); Hudspeth v. Hall, 38 S.E. 358, 359 (Ga. 1901) ("the creation or encouragement of a monopoly is opposed to public policy."); Price v. People, 61 N.E. 844, 846 (Ill. 1901) (upholding regulation because it "does not seek to prohibit the pursuit of the occupation of an employment agent by a private citizen, but only the regulation of that occupation."); City of Sonora v. Curtin, 70 P. 674, 675 (Cal. 1902) ("'[A]ny person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away.'") (quoting JUDGE COOLEY, CONSTITUTIONAL LIMITATIONS 744 (6th ed.)); Mathews v. People, 67 N.E. 28, 34 (Ill. 1903) (The Supreme Court interprets the Fourteenth Amendment to mean "that all persons should be equally entitled to pursue their happiness and acquire and enjoy property . . . ."); *Ex parte* Dickey, 77 P. 924, 925 (Ca. 1904) ("This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the constitution."); People *ex rel.* Armstrong v. Warden of N.Y., 76 N.E. 11, 12 (N.Y. 1905) ("The cases are abundant which hold that the individual has the right to carry on any lawful business, or earn his living in any lawful way, and that the legislature has no right to interfere with his freedom of action in that respect, or otherwise place restraints upon his movements."); Commonwealth v. Strauss, 78 N.E. 136, 137 (Mass. 1906) ("The rights relied upon under the fourteenth amendment to the Constitution of the United States . . . are . . . the right of every person to his life, liberty and property, including freedom to use his faculties in all lawful ways, 'to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or vocation . . . .'"); Wyeth v. Thomas, 86 N.E. 925, 927 (1909) ("The right to enjoy life, liberty and the pursuit of happiness is secured to every one under the Constitution of Massachusetts. This includes the right to pursue any proper vocation to obtain a livelihood."); City of Spokane v. Macho, 98 P. 755, 755 (Wash. 1909) ("The vice of the section under

discussion lies in this: That it makes an act criminal in one who may be engaged in a lawful business . . . ."); Columbia Trust Co. v. Lincoln Inst. of Ky., 129 S.W. 113, 115–16 (Ky. 1910) ("'Every one has the right to follow an innocent calling without permission from the government. . . .' It is useless to multiply authorities on so obvious a proposition."); State v. Withnell, 135 N.W. 376, 378 (Neb. 1912) ("While a city having authority 'to define, regulate, suppress and prevent nuisances' cannot arbitrarily use it to prohibit harmless and inoffensive private enterprises, the acts of the city council in exercising such police power may be held conclusive, if the subject of municipal legislation might or might not be a nuisance, depending upon conditions and circumstances."); Noe v. Town of Morristown, 161 S.W. 485, 486 (Tenn. 1913) ("[For] any occupation or business within common right . . . the Legislature is forbidden to create a monopoly."); People v. Brazee, 149 N.W. 1053, 1054 (Mich. 1914) ("'The Legislature of this state is not empowered by the Constitution to regulate contracts between its citizens who are engaged in legitimate commercial business . . . .'") (quoting Valentine v. Berrien Circuit Judge, 83 N.W. 594, 595 (Mich. 1900)); Rhodes v. J.B.B. Coal Co., 90 S.E. 796, 797–98 (W. Va. 1916) ("Another rule of interpretation is that a statute in derogation of the common law, which imposes restrictions upon trade or common occupation, should be construed strictly."); Osgood v. Tax Comm'r, 126 N.E. 371, 371 (Mass. 1920) ("Tax statutes must be construed strictly. The power to tax must be conferred by plain words or it does not exists. It is not to be extended by implication or by invoking the spirit of the law."); Hamilton v. Vaughan, 179 N.W. 553, 558 (Mich. 1920) (Fellows, J., dissenting) ("prohibition [of an occupation] must bear some reasonable relation to the public good, or the public health, or the public morals, or the public safety, or the public welfare. The right to regulate I concede; the right to prohibit I deny. . . . [T]he right of the state to regulate a business under its police power does not carry with it the right to destroy, the right to prohibit . . . ."); City of Waycross v. Caulley, 136 S.E. 139, 140 (Ga. 1926) ("The ordinance purports to grant an exclusive franchise to the individuals mentioned as grantees, which would deny a skilled butcher having an established business the right to slaughter at the abattoir or elsewhere his own animals for food to be used in the city. To the extent that the ordinance denies such right it creates a monopoly."); New York Cent. R.R. Co. v. Cent. New Eng. Ry. Co., 162 N.E. 324, 328 (Mass. 1928) ("[T]he act of Congress and the order of the Interstate Commerce Commission will not be construed to deprive the Boston & Albany Railroad Company . . . of its vested rights unless it appears by express words or plain implication that such was the intention of both Congress and the commission.").

A Farewell to Arms: Risk/Benefit Litigation Against Gun Manufacturers in California After the Repeal of Statutory Immunity

*Martin Baker**

I. INTRODUCTION

In 1983, the California Legislature, in an attempt to ward off impending litigation against gun manufacturers for damages arising from criminal misuse of their products, enacted Civil Code Section 1714.4.[1] The statute granted gun manufacturers immunity from product liability suits based on an imbalance of risk over

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1 The Statute states:

> Products liability actions; Firearm or ammunition not to be deemed defective in design on basis that benefits not outweighed by risk
>
> (a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.
>
> (b) For purposes of this section:
>
> (1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.
>
> (2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.
>
> (c) This section shall not affect a products liability cause of action based upon the improper selection of design alternatives.
>
> (d) This section is declaratory of existing law.

CAL. CIV. CODE § 1714.4 (Deering 1994) (repealed 2002).

> The Senate analysis described the bill's "purpose" as follows: (1) "to protect manufacturers and sellers of firearms from being held liable in tort for selling or furnishing a firearm that was used to cause an injury or death"; (2) "to preclude courts from using products liability theories to hold firearm manufacturers and dealers civilly liable to victims of firearms usage"; (3) "to prevent the courts from extending products liability laws to hold a supplier of a firearm liable in tort to persons injured by use of the weapon"; and (3) [sic] "to 'stop at birth' the notion that manufacturers and dealers are liable in products liability to victims of handgun usage."

See Merrill v. Navegar, Inc., 28 P.3d 116, 127 (Cal. 2001) (citing *Analysis of Assembly Bill No. 75 Before the Senate Comm. on the Judiciary*, 1983–1984 Reg. Sess. 2–3, 7).

benefits, but expressly permitted suits based on improper selection of design alternatives.[2]

Section 1714.4 proved effective in holding off an onslaught of suits[3] and protecting the businesses that had lobbied for its passage.[4] Most recently, in *Merrill v. Navegar, Inc.*[5]—the third and last case to reach the appellate level, and the only one to reach the California Supreme Court since the statute's enactment—the California Supreme Court held that the Section 1714.4 not only prohibited strict product liability suits, but also prohibited actions based on a negligence theory, such as negligent distribution or marketing, on the basis that these actions necessarily relied on a risk/benefit analysis and thus fell within the statutory bar.[6]

In September 2002, in direct response to the *Merrill* decision, Section 1714.4 was repealed.[7] This comment predicts that the imminent flood of lawsuits against gun manufacturers in California in the wake of repeal will likely be successful, despite the consistent reluctance of courts in jurisdictions without immunity statutes to impose liability based on risks outweighing benefits (or on any other theory).[8] This prediction is founded on the current state

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2 CAL. CIV. CODE § 1714.4 (Deering 1994) (repealed 2002).

3 *See, e.g.*, Moore v. R.G. Indus., Inc., 789 F.2d 1326 (9th Cir. 1986). The plaintiff's claim that the defendant's gun was "defectively designed because it [was] small, easily concealable, relatively inexpensive, and serves no useful social purpose" was rejected on the grounds that both Section 1714.4 *and* California common law precluded the imposition of strict product liability for a product that performed as it was intended. *Id.* at 1327. *See also* Whitfield v. Heckler & Koch, Inc., 98 Cal. Rptr. 2d 820, 830 (Ct. App. 2000) (holding that "the Legislature intended to preclude both courts and juries from engaging in any type of risk-benefit analysis when it comes to the design of firearms or ammunition").

4 From 1974 until 1983, annual handgun sales in California averaged 270,014 units. Between 1984 and 2001, annual sales averaged 280,959 units. *Dealer's Record of Sale (Calendar Year Statistics)*, Office of the Attorney General, State of California, Department of Justice, *available at* http://caag.state.ca.us/newsalerts/2002/02-024.htm (last visited Feb. 19, 2003) [hereinafter *Dealer's Record of Sale*].

5 28 P.3d 116 (Cal. 2001).

6 *Id.* at 127.

7 S.B. 682, 2001–2002 Reg. Sess. (Cal. 2002). The bill also added language to California Civil Code Section 1714 (dealing with negligence, generally) to expressly permit negligence actions against gun manufacturers: "The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section." CAL. CIV. CODE § 1714(a) (Deering Supp. 2003). *See* Jenifer Warren & Dan Morain, *Davis Signs More Curbs on Gun Makers*, L.A. TIMES, Sept. 26, 2002, Cal. Metro, at B8.

Recently proposed federal legislation, however, may effectively reinstate statutory immunity for gun manufacturers in California. H.R. 1036, 108th Cong. (2003). The proposed legislation, introduced primarily in response to municipal nuisance suits against gun manufacturers, provides a similar breadth of immunity to that previously provided by California Civil Code Section 1714.4. A significant difference is the inclusion of language expressly permitting negligent entrustment actions wherein "the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others." *Id.* § 4(5)(B). *See also* John Tierney, *A New Push to Grant Gun Industry Immunity from Suits*, N.Y. TIMES, Apr. 4, 2003, at A12.

8 *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148, 157 (2d Cir. 1997); Keene v. Sturm, Ruger & Co., 121 F. Supp. 2d 1063, 1069 (E.D. Tex. 2000); Halliday v. Sturm, Ruger & Co.,

of California product liability law, the apparent intent behind the enactment and repeal of Section 1714.4, and the comparative weight of risk and benefit evidence. In conclusion, this comment argues that the ability of juries to severely restrict the right of gun manufacturers to pursue a legal trade is not only compelled by law, but also morally justified in that the cost to society at large resulting from distribution of guns should be borne exclusively by those transacting in guns.

II. Gun Manufacturer Suits in California after *Merrill v. Navegar, Inc.* and the Repeal of Section 1714.4

A. The Claim Rejected in the *Merrill* Opinion

In *Merrill*, the California Supreme Court addressed the issue of whether a plaintiff could sue a gun manufacturer for injuries sustained as a result of criminal misuse of its product.[9] The *Merrill* plaintiffs' claim was presented as one of "negligent distribution," i.e., that the defendant knew, or should have known, that selling its product—a semi-automatic "assault-type" pistol[10]—to the general public would likely result in harmful criminal misuse.[11] The Supreme Court held that this claim was directed at the inherent qualities of the product, and that because an assessment of risk versus benefit is essential to the determination of a duty in negligence, the claim was really a product liability design defect action of the type expressly barred by Section 1714.4.[12] Thus the Court disposed of the negligence claim as falling within the scope of the statute, and did not directly address the possible viability of the claim absent a statutory bar.

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770 A.2d 1072, 1091–92 (Md. Ct. Spec. App. 2001), *cert. granted*, 778 A.2d 382 (Md. 2001), *aff'd*, 792 A.2d 1145 (Md. 2002); Forni v. Ferguson, 648 N.Y.S.2d 73, 73 (App. Div. 1996).

9 28 P.3d 116, 126 (Cal. 2001). The plaintiffs were relatives of victims of a shooting rampage by Gian Luigi Ferri that occurred in an office building in San Francisco. Ferri was armed with an Intratec TEC-9 (manufactured by Navegar) that he had purchased at a pawnshop in Nevada. While legally available in Nevada, the TEC-9 was not legally available for sale in California at that time. *Id.* at 119–20, 126.

10 An "assault weapon" is defined by federal statute as:

> (C) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of [the following characteristics]—
>
> (i) an ammunition magazine that attaches to the pistol outside of the pistol grip;
>
> (ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or
> silencer;
>
> (iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the
> shooter to hold the firearm with the nontrigger hand without being burned;
>
> (iv) a manufactured weight of 50 ounces or more when the pistol is unloaded

18 U.S.C. § 921(a)(30)(C) (2000 & Supp. 2003). The statute's definition also encompasses any one of a number of listed models including the Intratec TEC-9 and TEC-DC9.

11 Merrill v. Navegar, Inc., 28 P.3d 116, 124 (Cal. 2001).

12 *Id.* at 129–30.

B. Other Jurisdictions' Rejection of Gun Manufacturer Suits

In light of other jurisdictions' decisions, it appears that even after the removal of the statutory immunity granted by Section 1714.4, there are significant obstacles facing plaintiffs who seek redress from gun manufacturers. Courts outside California have rejected lawsuits against gun manufacturers on the following bases: a gun (or ammunition) is not defective if it performs as intended,[13] the market assumes the risk of misuse of a known dangerous product,[14] gun manufacturers cannot be held liable in negligence as long as the product is legally available and functions as intended,[15] and the weighing of risks against benefits of guns is a task for the legislature, not the courts.[16]

The highest court of only one state has held a gun manufacturer liable for criminal misuse of its product.[17] Acknowledging contrary precedent, the Maryland Court of Appeals held, as a matter of public policy, that manufacturers of "Saturday Night Specials"[18] *could* be held strictly liable for criminal misuse of their product.[19] The Maryland ruling was short-lived, as it was overruled by statute only three years later,[20] and it seems to have had little impact on out-of-state sales, despite the potential under Ma-

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13 *Keene*, 121 F. Supp. 2d at 1066–67 (finding no risk/benefit test in Texas); Halliday v. Sturm, Ruger & Co., 770 A.2d 1072, 1087–89 (Md. Ct. Spec. App. 2001), *cert. granted*, 778 A.2d 382 (Md. 2001), *aff'd*, 792 A.2d 1145 (Md. 2002) (holding no defect under either consumer expectation *or* risk/benefit theory when there is no malfunction).

14 Knott v. Liberty Jewelry & Loan, Inc., 748 P.2d 661, 664 (Wash. Ct. App. 1988) (citing Riordan v. Int'l Armament Corp., 477 N.E.2d 1293, 1295 (Ill. App. Ct. 1985)) (holding that there can be no liability for gun manufacturers when the general public "presumably can recognize the dangerous consequences in the use of handguns and can assume responsibility for their actions").

15 McCarthy v. Olin Corp., 119 F.3d 148, 157 (2d Cir. 1997). The court held that "New York does not impose a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product" despite foreseeabilty by manufacturer of misuse. *Id.* (quoting Forni v. Ferguson, 648 N.Y.S.2d 73, 74 (App. Div. 1996)).

16 Forni v. Ferguson, 648 N.Y.S.2d 73, 73 (App. Div. 1996) ("While there have been and will be countless debates over the issue of whether the risks of firearms outweigh their benefits, it is for Legislature to decide whether manufacture, sale and possession of firearms is legal.").

17 Kelley v. R.G. Indus., Inc., 497 A.2d 1143 (Md. 1985).

18 The Maryland Court of Appeals described "Saturday Night Specials" as "characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability . . . render[ing] the Saturday Night Special particularly attractive for criminal use and virtually useless for . . . legitimate purposes." *Kelley*, 497 A.2d at 1153–54.

19 *Id.* at 1159.

20 The Maryland statute states:

> A person or entity may not be held strictly liable for damages of any kind resulting from injuries to another person sustained as the result of the criminal use of any firearm by a third person, unless the person or entity conspired with the third person to commit, or willfully aided, abetted, or caused the commission of the criminal act in which the firearm was used.

MD. CODE ANN., art. 27 § 36-I(h)(1) (Michie 1996 & Supp. 2002).

ryland's long-arm statute[21] for suits arising from shootings in the state involving guns manufactured or sold in other states.

C. The Continued Relevance of the *Merrill* Holding

Although negligence and strict product liability suits against gun manufacturers have been largely unsuccessful outside California,[22] this does not necessarily mean that California state courts will now follow other jurisdictions and reject claims based on risk/benefit. There may be compelling reasons why California *should* allow such claims. Before dismissing *Merrill* as "bad law" overruled by the repeal of Section 1714.4, one should examine some of the language in the holding of that case. Writing for the majority, Justice Chin stated:

> [T]he availability of [risk/benefit based] negligence liability would effectively render Section 1714.4 useless. As the Court of Appeal majority observed, "the risk of harm from the criminal misuse of firearms is always present in a society such as ours, in which the presence of firearms is fairly widespread and many individuals possess the capacity to criminally misuse them." Thus, virtually every person suing for injuries from firearm use could offer evidence the manufacturer knew or should have known the risk of making its firearm available to the public outweighed the benefits of that conduct, and could therefore raise a triable issue of fact for the jury. In each of these cases, the jury would be asked to do precisely what section 1714.4 prohibits: weigh the risks and benefits of a particular firearm. The result would be to resurrect the very type of lawsuit the Legislature passed section 1714.4 to foreclose, in which the plaintiffs "asserted that the availability of 'Saturday Night Special' handguns to the general public cause[d] widespread damage and severe harm without conferring any substantial social benefit."[23]

The above passage strongly suggests that without Section 1714.4, California courts would be compelled to entertain risk/benefit lawsuits against gun manufacturers. The following language from the *Merrill* opinion further strengthens the implication that Section 1714.4 was the *only* reason for rejecting risk/benefit claims:

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21 The Maryland long-arm statute states:

> A court may exercise personal jurisdiction over a person, who directly or by an agent . . . [c]auses tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State.

MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b) (Michie 2002).

22 *See* cases cited *supra* notes 8, 14.

23 Merrill v. Navegar, Inc., 28 P.3d 116, 129–30 (Cal. 2001) (alteration in original).

> Because the Legislature, in section 1714.4, has precluded a weighing of the risks and benefits of selling a firearm to the general public in determining whether the firearm is defective, we conclude that neither a court nor a jury may undertake this same task simply because a plaintiff alleges and offers evidence the manufacturer knew or should have known the risks outweighed the benefits.[24]

Should other grounds exist under California law, one would expect the Court to have mentioned them at some point in its fourteen-page opinion, in order to prevent unnecessary litigation in the event that section 1714.4 would one day be repealed.[25]

California courts will now be forced to either devise other grounds for rejection, despite the conspicuous lack of guidance from the *Merrill* opinion (or any other binding California precedent),[26] or to accommodate an imminent barrage of risk/benefit lawsuits.

D. Future Scenarios for Gun Manufacturer Lawsuits in California

1. The New York Approach

Under New York product liability law, a product is defective when it is sold in a condition not reasonably contemplated by the ultimate consumer,[27] and when its utility is outweighed by the danger inherent in placing it into the stream of commerce.[28] In a recent case involving a suit against manufacturers of "hollow-point" ammunition, the United States Court of Appeals for the Second Circuit in *McCarthy v. Olin Corp.*[29] (applying New York common law) declared that a product which performs its intended function—in the case of guns or ammunition, to seriously wound—simply cannot be described as defectively designed.[30] This is the doctrinal trap that the *Merrill* plaintiffs sought to

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24 *Id.* at 130 (footnote omitted).

25 The Ninth Circuit and the California Court of Appeal have each stated that absent the statutory bar imposed by Section 1714.4, risk/benefit claims would nonetheless be precluded by existing common law. Moore v. R.G. Indus., Inc., 789 F.2d 1326, 1327 (9th Cir. 1986); Whitfield v. Heckler & Koch, Inc., 98 Cal. Rptr. 2d 820, 829–30 (Ct. App. 2000). The Supreme Court was presumably aware of these opinions (both predating *Merrill*), yet declined to follow a similar tack.

26 *See* cases cited *supra* note 3. A possible exception is the Ninth Circuit's opinion in *Moore*. In *Moore*, the Ninth Circuit held that a handgun that performs as "intended" cannot be found to be defective under California products liability common law. *Moore*, 789 F.2d at 1327. It is noteworthy that *Moore* is not cited in the California Supreme Court's *Merrill* opinion.

27 Robinson v. Reed-Prentice Div. of Package Mach. Co., 403 N.E.2d 440, 443 (N.Y. 1980).

28 *Id.*

29 119 F.3d 148 (2d Cir. 1997).

30 *Id.* at 155 (holding that "the primary function of the Black Talon bullets [used by "Long Island Railroad Killer" Colin Ferguson] was to kill or cause serious injury").

avoid by couching their claim in terms of negligence.[31] Under a "negligent distribution" approach, the claim is directed toward the defendant's conduct in making a non-defective, yet potentially harmful product available to a market that would likely misuse it.[32] The California Supreme Court, however, held that this claim was merely a product liability defect claim "in disguise" and that the focus remained on the product, not the defendants' conduct, despite the allegation being framed in terms of negligence.[33]

If California courts, post-repeal, continue to hold that a negligent distribution claim is simply a disguised design defect claim, such a claim would face a sturdy barrier should the courts ignore the implications of the *Merrill* holding and choose instead to follow the New York approach of refusing to find a defect in a product that performs its intended function.

2. California's Two-Part Barker Test as Applied to Firearms

a. Consumer Expectation and Safer Alternative Design

The New York approach is similar to the disjunctive two-part *Barker* test used in California,[34] which states that a product is defectively designed if it "fail[s] to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner" (the "consumer expectation" test), *or* if the benefits of the design are outweighed by the risk of inherent danger (the "risk/benefit" test).[35] The consumer expectation test has yet to be considered by the California Supreme Court in relation to gun manufacturers.[36] The plaintiffs in *Merrill* expressly avoided application of the consumer expectation test, apparently in an attempt to keep the focus of their claim on the defendant's conduct and away from defects generally.[37]

Although a consumer expectation defect claim was not expressly barred by Section 1714.4,[38] such a claim would likely have been futile, especially in light of the persuasive weight of the Sec-

31 *See* Merrill v. Navegar, Inc., 28 P.3d 116, 126 (noting that "contrary to the view of plaintiffs and the dissent," they could not avoid § 1714.4, "simply by reformulating their claim as one for negligent distribution to the general public").

32 *Id.*

33 *Id.*

34 Barker v. Lull Eng'g Co., 573 P.2d 443, 457–58 (Cal. 1978).

35 *Id.*

36 *But see* Whitfield v. Heckler & Koch, Inc., 98 Cal. Rptr. 2d 820, 829 (Ct. App. 2000) (describing the defendant-manufacturer's HK .308 assault weapon as a non-defective "well-made gun").

37 *Merrill*, 28 P.3d at 124.

38 The Statute excludes "a products liability cause of action based upon the improper selection of design alternatives." CAL. CIV. CODE § 1714.4(c) (Deering 1994) (repealed 2002).

ond Circuit's decision in *McCarthy*.[39] Post-repeal, the outlook for consumer expectation claims in California remains grim.

California courts, like those in New York, require that when using the consumer expectation test, a plaintiff show the availability of a feasible alternative design that would accomplish the purpose of the product in a safe manner.[40] In the context of firearms, this requirement raises a logical hurdle: What safer way *is* there to design a product intended to maim and kill? (Assuming, as courts have, that guns *are* intended for that purpose.) Despite the New York courts' reference to a product's "function,"[41] and the California courts' reference to "use" or "purpose,"[42] neither jurisdiction has attempted to form any semantic distinction between the various terms. Although such a distinction might seem crucial to an assessment of the validity of alternative designs, courts in both jurisdictions have looked solely at the product's ability to perform its basic mechanical function.[43]

Justice Calabresi, dissenting in *McCarthy*,[44] suggested that a safer alternative design for Black Talon bullets would be to remove the talons,[45] thereby removing the product's propensity to cause massive internal damage while retaining its ability to incapacitate a human target.[46] Although Justice Calabresi rejected the notion that a weapon's function is to cause the maximum amount of bodily injury,[47] he did not consider that the broader intended purpose of many weapons is to provide a reliable means of self-defense.

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39 119 F.3d 148, 155 (2d Cir. 1997).

40 Baker v. Chrysler Corp., 127 Cal. Rptr. 745, 749 (Ct. App. 1976); Voss v. Black & Decker Mfg. Co., 450 N.E.2d 204, 208 (N.Y. 1983).

41 *See, e.g.*, *McCarthy*, 119 F.3d at 155.

42 *See, e.g.*, *Baker*, 127 Cal. Rptr. at 748.

43 *See, e.g.*, *McCarthy*, 119 F.3d at 155 ("[T]he primary function of . . . Black Talon bullets was to kill or cause serious injury. There is no reason to search for an alternative safer design where the product's sole utility is to kill and maim."); Moore v. R.G. Indus., Inc., 789 F.2d 1326, 1327 (9th Cir. 1986) (criminally used handgun "performed as it was intended"). *But cf.* Sindell v. Abbott Labs., 607 P.2d 924, 937 (Cal. 1980) (prescription drug's intended purpose was to prevent miscarriage); Pike v. Frank G. Hough Co., 467 P.2d 229, 236 (Cal. 1970) (heavy machinery that could not be safely reversed without additional mirrors was "unreasonably dangerous for its intended use"). The distinction between function and purpose is not always an easy one. Consider a high-fashion shoe equipped with a large metal spike protruding from the toe. It may perform its *function* by clothing the foot, but if its *purpose* is to facilitate comfortable walking, it may fail miserably. Such a shoe might also pose a threat to third parties if it were to become popular amongst violent youths as a foot-borne weapon. As long as California courts continue to confuse purpose with function, any potential harm to the consumer or others would not render the product defective, no matter how foreseeable the harm, as long as the shoe effectively performs its intrinsic function of clothing the foot.

44 *McCarthy*, 119 F.3d at 157 (Calabresi, J., dissenting).

45 *Id.* at 173. The "talons" are six spikes on a bullet that extend 90 degrees upon impact. *Id.* at 152.

46 *Id.* at 152 (giving a graphic description of the Black Talons' effects).

47 *Id.* at 173 (Calabresi, J., dissenting).

The most effective weapon for the task of self-defense would seem to be a weapon capable of concealment, portability, and lethality.[48] It is quite likely, however, that it is exactly these qualities of guns that contribute to their collective negative effect on public health. Thus, the distinction between function and purpose becomes significant when one considers the contribution that the lethality of guns sold and purchased for the intended purpose of self-defense makes to the number of homicides and suicides in the United States.[49] When effective achievement of an intended use or purpose is looked at in this light, the better a gun performs its *function* of propelling bullets with lethal speed and accuracy; the less it achieves its intended *purpose* of providing a reliable means of preserving human lives. One commentator has suggested that a safer alternative design for a gun intended for self-defense would be one whereby the gun delivers a non-lethal, yet fully incapacitating stun.[50] Whether or not such a design is technically feasible, a simpler and even more radical alternative design is readily available to gun manufacturers—a gun that can only fire blanks. When one considers that for every time a gun is used to justifiably kill an assailant, a gun is used in over forty non-legitimate killings,[51] then a gun that fires only blanks would easily contribute more toward the goal of life preservation than one that fires traditional live ammunition. The problem with these examples is that they attempt to propose the next best thing to no gun at all, while at the same time proposing something that can still (barely) be described as a gun and thus meet the requirement of alleging that a feasible safer design exists. Such a problem would not arise were the purpose of guns not the complete opposite of their effect.

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48 Forty-six percent of gun owners (and three-quarters of those owning only a handgun) surveyed in 1994 possessed a gun primarily for protection against crime. Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, U.S. Department of Justice, National Institute of Justice: Research in Brief, at 3 (May 1997), *available at* http://www.ncjrs.org/pdffiles/165476.pdf.

49 *See About Four in Ten Americans Report Owning a Gun*, The Gallup Organization (Oct. 5, 2000), *available at* http://www.gallup.com/poll/releases/pr001005.asp [hereinafter Gallup Poll] (reporting that thirty-nine percent of Americans surveyed believed that having a gun in the house makes their home safer). However, the reality is somewhat different. *See* Arthur L. Kellermann, *Injuries and Deaths Due to Firearms in the Home*, 45 J. OF TRAUMA 263, 263–67 (August, 1998) ("The number of unintentional shootings, criminal assaults, and suicide attempts involving a gun kept in the home exceeded the number of self-defense and legally justifiable shootings by a ratio of 22 to 1."); Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 N. ENG. J. MED. 1084, 1087–88 (1993) (stating that a gun in the home substantially increases the likelihood of intra-familial homicide).

50 Carl T. Bogus, *Gun Litigation and Societal Values*, 32 CONN. L. REV. 1353, 1377 (2000).

51 *See Firearm Violence in California: Fact Sheet*, Physicians for Social Responsibility Los Angeles, *available at* http://www.psrla.org/FS-California.htm (last visited Apr. 17, 2003) [hereinafter *California Fact Sheet*] (citing California Department of Health Services, 2002) (2000 figures for California).

The likelihood that California courts will avoid the conceptual conundrum of function versus purpose by refusing to extend the definition of a gun's purpose beyond firing live ammunition need not render a defect claim futile. Under California law, a product liability claim may proceed on a risk/benefit theory alone.[52]

b. Risk/Benefit

Under risk/benefit prong of the *Barker* test, a product is defectively designed if the benefits of its design are outweighed by the risk of inherent danger, even when the product's design meets ordinary consumer expectations.[53] The California risk/benefit test differs from the New York test in that there is no requirement in California that the plaintiff show there is "something wrong" with the product before proceeding with a risk/benefit challenge.[54] The plaintiffs in *Merrill* might well have succeeded under California law with a risk/benefit product defect claim, but they were forced by the "products liability" limitation of Section 1714.4 to direct their claim toward the defendants' conduct and to characterize it as one of negligent distribution.[55]

3. Negligence as Applied to the Manufacture and Sale of Firearms

a. Negligent Entrustment

Justice Werdegar, the lone dissenter in *Merrill*, noted that the plaintiffs' negligent distribution claim closely resembled the more traditional doctrine of negligent entrustment.[56] Typically, a claim for negligent entrustment lies when a defendant sells, or otherwise transfers, a non-defective product or instrumentality to a person who could reasonably be foreseen to use that item in a harmful manner.[57] In the context of gun sales, this doctrine has been applied to sales to discernibly drunk or psychotic customers.[58] Negligent entrustment has also been applied to sales of a product to entire classes of customers, such as selling slingshots to

52 Barker v. Lull Eng'g Co., 573 P.2d 443, 457–58 (Cal. 1978).

53 *Id.*; Cavers v. Cushman Motor Sales, Inc., 157 Cal. Rptr. 142, 148 (Ct. App. 1979).

54 *See* McCarthy v. Olin Corp., 119 F.3d 148, 155 (2d Cir. 1997) (quoting Addison v. Williams, 546 So. 2d 220, 224 (La. Ct. App. 1989)).

55 *See* Merrill v. Navegar, Inc., 28 P.3d 116, 124 (Cal. 2001).

56 *Id.* at 134 (Werdegar, J., dissenting).

57 *See* Jacoves v. United Merch. Corp., 11 Cal. Rptr. 2d 468, 486 (Ct. App. 1992).

58 *See, e.g.*, Knight v. Wal-Mart Stores, Inc., 889 F. Supp. 1532, 1539 (S.D. Ga. 1995) (holding there is a duty not to sell to a mentally defective person); Cullum & Boren-McCain Mall, Inc. v. Peacock, 592 S.W.2d 442, 444 (Ark. 1980) (holding there was sufficient evidence for a negligence claim where a buyer acted strangely and wanted a gun that "would make a big hole"); Phillips v. Roy, 431 So. 2d 849, 852 (La. Ct. App. 1983) (holding there is a duty not to sell to a person "manifesting signs of instability"); Bernethy v. Walt Failor's, Inc., 653 P.2d 280, 283 (Wash. 1982) (en banc) (holding there is a duty not to sell to an intoxicated person).

children.[59] Justice Werdegar suggested that the entire gun-buying public would be a patently unfit customer class for certain types of firearms.[60] This analysis is very similar to the *Merrill* plaintiffs' characterization of their negligent distribution claim, except that it directs the focus even further away from the product's inherent danger, and more toward the relationship between the seller's conduct and the ultimate use of the product by the consumer. Such a claim, if framed carefully, might succeed before a California court, if only for selected classes of guns.

b. Risk/Benefit in Negligence

In the wake of section 1714.4's repeal, the distinction between a strict liability product defect claim and a negligence claim is largely moot. California, like many other states, incorporates its own version of the well-known "Hand Formula"[61] into its test for a duty in negligence.[62] This test weighs the risk of harm, or more accurately, the likelihood of harm multiplied by the severity of the harm, against the burden of preventing the harm.[63] This balancing test differs from the risk/benefit test used in product liability defect cases only in that the potential harm (or cost of compensation) is weighed against the cost of prevention of harm, rather than the value to society of the harmful product or activity. The similarity of the evidentiary requirements of both tests was noted in the *Merrill* opinion and used to bolster the Court's holding that a negligence claim necessarily employs risk/benefit analysis.[64]

4. Weighing Risk of Guns Versus Benefit of Guns

Whether or not a claim is framed in negligence or in strict product liability, the risk/benefit analysis is essentially the same; if the benefit of a product to society is outweighed by the risk of harm to society, then the product is defectively designed (or, in the case of negligent distribution, the product has been negligently placed on the market).[65] Measuring risk versus benefit is seemingly straightforward in the context of firearms. If it were a mat-

59 *See* Moning v. Alfono, 254 N.W.2d 759, 769–70 (Mich. 1977) (holding that that the manufacturer and distributor of a slingshot could be held negligent for marketing a slingshot directly to children). *But see* Bojorquez v. House of Toys, Inc., 133 Cal. Rptr. 483, 484 (Ct. App. 1976) (holding that there was no duty to refrain from selling slingshots to children, as the use of slingshots by children had been socially acceptable "since Old Testament times").

60 *Merrill*, 28 P.3d at 149 (Werdegar, J., dissenting).

61 United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). The "Hand Formula" is named after the author of the *Carroll Towing* opinion, Justice Learned Hand.

62 *See* Pike v. Frank G. Hough Co., 467 P.2d 229, 232 (Cal. 1970).

63 *See Carroll Towing*, 159 F.2d at 173.

64 *Merrill*, 28 P.3d at 125.

65 *See* Barker v. Lull Eng'g Co., 573 P.2d 443, 457–58 (Cal. 1978); *Pike*, 467 P.2d at 232.

ter of counting the number of lives saved by guns and comparing that to the number of unjustifiable deaths involving guns, then as a product class, guns would almost certainly fail the risk/benefit test.[66]

While it is tempting to stay with a lives saved versus deaths caused tally, the application of the risk/benefit test to firearms is, in actuality, somewhat more complex and harder to measure. For example, much of the self-defense benefit derived from gun ownership might arise from the mere possession of guns, as opposed to their actual discharge during a confrontation. One recent study conducted by Professors John Lott and David Mustard ("Lott/Mustard study") has suggested that the prevalence of gun ownership—and the accompanying likelihood that a potential crime victim may possess a gun—deters a significant amount of potentially violent confrontations.[67] Because the study's conclusion relies on abstract, unrealized benefits—i.e., the potential reduction in crime through increased defensive gun use, it is unlikely that it would fare well in a statistical duel against stark figures of deaths actually caused by guns.[68]

Despite the repeated disavowal by federal courts of a Second Amendment right to personal gun ownership,[69] California courts may still be loath to inhibit what many citizens nonetheless perceive to be a fundamental constitutional right.[70] The deeply ingrained feeling of communal empowerment among American gun owners might then provide another, albeit unquantifiable, factor to add to the benefit side of the formula.[71]

A trial based on litigation of risk versus benefit as factual issues would ultimately turn on the strength of statistical evidence. The few reported justifiable lethal uses of guns,[72] together with unreported uses of guns in self-defense and the academic guess-

66 There were seventy-three justified gun-related killings versus 3,019 gun-related suicides, homicides, and unintentional deaths in California during 2000. *California Fact Sheet*, *supra* note 51.

67 John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).

68 According to some critics in academia, another weakness of the Lott/Mustard study might be its flawed methodology. *See, e.g.*, Dan A. Black & Daniel S. Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUD. 209 (1998).

69 *See* Silveira v. Lockyer, 312 F.3d 1052, 1092–93 (9th Cir. 2003) (holding that the Second Amendment of the United States Constitution does not guarantee an individual right to possess firearms); Olympic Arms v. Buckles, 301 F.3d 384, 388–89 (6th Cir. 2002) (refusing to recognize a fundamental right to individual gun ownership or manufacture).

70 In a 2002 ABCNEWS.com poll, seventy-three percent of respondents who heard the Second Amendment recited verbatim said it guarantees the right to individual gun ownership. Daniel Merkle, *America: It's Our Right to Bear Arms*, ABCNEWS.com (May 14, 2002), *at* http://abcnews.go.com/sections/us/DailyNews/guns_poll020514.html [hereinafter ABCNEWS.com poll].

71 Thirty-nine percent of Americans surveyed in 2000 believed that having a gun in the house made the house safer. *See* Gallup Poll, *supra* note 49.

72 *See California Fact Sheet*, *supra* note 51.

work of the Lott/Mustard study,[73] would be pitted against copious, reliable evidence showing the huge volume of homicides, suicides, injuries, and accidental deaths attributable to the misuse of legally purchased firearms.[74]

The availability of other weapons (such as knives) to potential assailants necessitates a downward adjustment of gross firearm casualty figures to allow for those deaths and injuries that would still have occurred absent an available gun.[75] Assuming that knives are second in lethality to guns, and that they have a lethality rate approximately one fifth that of guns (not allowing for physical disparities between assailants and victims—a factor largely irrelevant to guns),[76] the annual homicide toll in California attributable to guns can be reduced to a net figure of 1,182, around eighty percent of the 1,478 gross reported gun-related homicides.[77] Therefore, the removal of guns would ultimately appear to prevent over 1,000 homicides annually in California.[78]

The Lott/Mustard study found that homicide rates fell by an average of 8.5 percent in states that legalized concealed handguns.[79] From this, it follows that, in a state such as California, which currently has strict concealed handgun laws, greater access to guns in the community would reduce the total annual number of homicides from 2,074[80] to 1,898, and the number of firearm homicides from 1,478[81] to 1,352.[82]

The findings of the Lott/Mustard study were distilled into a popular book entitled *More Guns, Less Crime*.[83] Any truth in that book's title is diminished by the statistical evidence that no guns

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73 Lott & Mustard, *supra* note 67.

74 *See California Fact Sheet*, *supra* note 51. In 2000, firearms killed 3,092 people in California. Of these deaths, 1,488 were suicides, 1,478 were homicides, 53 were unintentional, and 73 were legally justified or undetermined. *Id.*

75 *See, e.g.*, Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1114–15 (1991).

76 *Id.* (citing NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE TASK FORCE, FIREARMS AND VIOLENCE IN AMERICAN LIFE 41 (1969)).

77 This reduction ignores the implausibility of drive-by knifings replacing drive-by shootings.

78 The net amount of lives saved by removal of guns and the net amount of lives unjustifiably lost to guns can both arguably be adjusted downward on the assumption that the few annual justifiable gun killings would be replaced by an equivalent number of unjustifiable homicides if a gun were not available to perform each justifiable killing.

79 John R. Lott, Jr., *Rule of Law: More Guns, Less Violent Crime*, WALL ST. J., Aug. 28, 1996, at A13. *See also* Lott & Mustard, *supra* note 67.

80 This number is based on figures for 2000 from the Office of the Attorney General, State of California, Department of Justice. *California Crime Index Crimes Cleared, 1996–2001*, Office of the Attorney General, State of California, Department of Justice, *available at* http://caag.state.ca.us/cjsc/publications/candd/cd01/tabs/cd0115.pdf (last visited Apr. 17, 2003).

81 *California Fact Sheet*, *supra* note 51.

82 Assuming that an increase in concealed firearms would reduce all types of potential homicides in equal proportion.

83 JOHN R. LOTT, JR., MORE GUNS, LESS CRIME (Univ. of Chicago Press 1998).

equals roughly six times less crime than more guns.[84] Professors Lott and Mustard's argument is therefore not an argument in favor of the use of guns, but an argument in mitigation of the harm caused by guns.

Despite the speculative nature of calculating the amount of suicides that would not occur absent a readily available firearm, a study by the New England Journal of Medicine ("NEJM") determined that the presence of a gun in the home increased the risk of suicide approximately fivefold.[85] This finding supports the common-sense belief that because almost all non-gun suicide attempts require a longer interval between inception of the suicidal notion and completion of the act, removal of guns would reduce deaths by facilitating greater opportunities for reconsideration by the potential victim and intervention by third parties. In 2000, there were 2,969 suicides reported in California.[86] In 1,488 of these, a firearm was used.[87] Using the NEJM figures, the removal of guns from Californian households would therefore reduce the number of gun-related suicides by eighty percent, from 1,488 to 298, and the total number of suicides from 2,969 to 1,779,[88] leaving a net annual suicide toll attributable to guns of 1,190.

In 2000, there were fifty-three deaths in California attributable to accidental or unintentional shootings.[89] Despite the Lott/Mustard study's somewhat inexplicable finding that accidental gun deaths were lower in jurisdictions with liberal concealed gun laws,[90] it is unreasonable to assume that the removal of guns would do anything but completely eliminate deaths caused by accidental discharge of a gun.

Based on the above figures, the removal of guns from Californian society would prevent 2,425 unjustified deaths annually,[91] while current levels of gun ownership in California would prevent

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84 Specifically, six times less non-legitimate gun-related deaths (based on more guns reducing gross annual homicide by 8.5 percent, and the removal of guns reducing gross gun-related homicide by eighty percent). *See supra* notes 75–79 and accompanying text.

85 Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 N. ENG. J. MED. 467, 470 (1992). It is unclear whether this study accounts for guns purchased after the inception of the suicidal notion. The presence of those guns purchased specifically for the purpose of committing suicide would contribute to the total number of suicides only by increased lethality, not by ready availability. Another study found that as few as ten percent of firearm suicides were committed using a firearm purchased specifically for the act. Myron Boor, *Methods of Suicide and Implications for Suicide Prevention*, 37 J. CLINICAL PSYCHOL. 70, 74 (1981).

86 John L. McIntosh, *Rate, Number, and Ranking of Suicide for Each U.S.A. State, 2000*, American Association of Suicidology, *available at* http://www.suicidology.org/associations/1045/files/2000statepg.pdf (last visited Apr. 17, 2003).

87 *California Fact Sheet*, *supra* note 51.

88 *See* Kellermann et al., *supra* note 85, at 469.

89 *California Fact Sheet*, *supra* note 51.

90 Lott & Mustard, *supra* note 67, at 64.

91 If the combined net total of homicides, suicides, and accidental deaths attributable to guns is adjusted downward on the assumption that without guns, the seventy-three re-

only seventy-three,[92] rising to 249 prevented deaths (according to Professors Lott and Mustard) if concealed permit laws were liberalized.[93]

One offset to the economic harm to society caused by guns is based on the questionable observation that many homicide victims are habitual criminals, and/or welfare recipients, and would be a burden to society if they were to have continued living.[94] Even if this were true, it is likely that a jury would treat such evidence of economic offset as morally repugnant.

As complex as the factual issues are when it comes to measuring the risk versus the benefit of guns in society, a jury is ultimately left with the task of measuring the massive death toll attributable to firearms on the risk side, against the few reported uses of guns in self-defense, the arguable deterrent effect of undischarged guns, and the unquantifiable worth of guns for recreation on the benefit side.

Suits against gun manufacturers have largely been directed at the misuse of guns and ammunition that have a higher than average potential for lethality, for example, the Intratec TEC-9 semi-automatic "assault-type pistols,"[95] "Black Talon bullets,"[96] "Saturday night specials,"[97] etc. If liability is to be based on risk/benefit alone, the distinction is merely one of degree. While the ratio of risk to benefit may vary considerably across the broad spectrum of legally available firearms, it is unlikely that even the most benign class of firearm could tip the risk/benefit scales in its favor. Notwithstanding the Intratec TEC-9 and other excessively lethal weaponry, many guns have at least some potential for legitimate use. But the fact remains that the potential for self-defense is realized in minuscule proportion to the frequency of misuse,[98] leaving the overwhelming burden of outweighing the cost of thousands of unjustified killings almost entirely upon recreational use. The only realistic defenses to gun manufacturer suits in Cali-

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ported justifiable gun deaths would have been replaced by an equivalent amount of unjustifiable deaths, then 2,352 deaths would result. *See supra* note 78.

92 *California Fact Sheet*, *supra* note 51. This figure is based on the assumption that the seventy-three reported justifiable gun deaths prevented an equivalent amount of unjustifiable deaths.

93 Lott & Mustard, *supra* note 67.

94 JOSH SUGARMANN, EVERY HANDGUN IS AIMED AT YOU 160–61 (2001). *See also* Paul H. Blackman, *The Federal Factoid Factory on Firearms and Violence: A Review of CDC Research and Politics* (paper presented at the annual meeting of the Academy of Criminal Justice Sciences, Chicago, Ill., March 1994), *available at* http://www.saf.org/journal/7_factoid.html (last visited Apr. 17, 2003).

95 Merrill v. Navegar, Inc., 28 P.3d 116, 119 (Cal. 2001).

96 McCarthy v. Olin Corp., 119 F.3d 148, 151 (2d Cir. 1997).

97 Moore v. R.G. Indus., Inc., 789 F.2d 1326, 1327 (9th Cir. 1986); Kelley v. R.G. Indus., Inc., 497 A.2d 1143, 1146 (Md. 1985).

98 *See California Fact Sheet*, *supra* note 51. *See also supra* note 66.

fornia, therefore, lie outside of risk/benefit analysis in the unpredictable world of public policy.

E. Public Policy Against Gun Manufacturer Liability

1. Deference to the Legislature

The courts of more than one state have rejected the application of risk/benefit analysis in gun cases in deference to legislative judgment on the societal value of firearms, even when that judgment is presumed from silence.[99] The notion that the absence of prohibitive legislation supercedes a judicial determination of negative net social utility will always remain attractive to courts that are unwilling to apply precedent that conflicts with a deeply ingrained social acceptance of a product that is nonetheless patently dangerous.

The California Legislature, however, has *not* been silent on the issue of regulation of gun sales, whether by state courts or by local governments. The Legislature has made its position clear by an affirmative legislative action—the repeal of a statute expressly prohibiting risk/benefit product liability actions against gun manufacturers.[100] This in itself should be sufficient evidence that the Legislature approves of civil suits against gun manufacturers based on risk/benefit theories. Any attempt to replace Section 1714.4 with a statute expressly allowing risk/benefit suits against gun manufacturers would be unnecessary, as those suits will presumably be treated the same as those against any other manufacturer.

Furthermore, in *California Rifle & Pistol Ass'n v. City of West Hollywood*,[101] the California Court of Appeal held that statutes governing licensing, permit issuance, and registration of guns showed intent by the Legislature to regulate only those fields, and not the field of gun sales.[102] Therefore, because the Legislature has abdicated the role of regulating gun sales and limiting liability of gun manufacturers, California courts are not only free to decide the issue of gun manufacturers' liability without deference to the Legislature, but are obligated to do so—even if it would indirectly result in a de facto state-wide ban on gun sales.

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99 *See, e.g.*, Forni v. Ferguson, 648 N.Y.S.2d 73, 73 (App. Div. 1996) ("While there have been and will be countless debates over the issue of whether the risks of firearms outweigh their benefits, it is for Legislature to decide whether manufacture, sale and possession of firearms is legal.").

100 S.B. 682, 2001–2002 Reg. Sess. (Cal. 2002) (repealing CAL. CIV. CODE § 1714.4).

101 78 Cal. Rptr. 2d 591 (Ct. App. 1998).

102 *Id.* at 605.

2. Assumption of Risk by the Market

The Washington Court of Appeal, in *Knott v. Liberty Jewelry & Loan, Inc.*,[103] held that gun manufacturers could not be held liable when the general public "presumably can recognize the dangerous consequences in the use of handguns and can assume responsibility for their actions."[104] This policy-based imposition of an assumption of risk defense ignores the fact that most plaintiffs seeking redress for gun-related injuries are not consumers. This begs the question: For what actions should these victims take responsibility?

3. Criminal Intervention Abrogates Duty

It is unlikely that California courts will consider criminal misuse to be an intervening act that abrogates the duty of a gun manufacturer to avoid distribution to a class of customers, most of whom show no signs of intent to misuse the product. Typically, a defendant has no duty to prevent harm to the plaintiff by a third party absent a "special relationship" between the plaintiff and the defendant.[105] But in the case of gun manufacture and distribution, it is not nonfeasance, but active misfeasance—the distribution of a product to a class of consumer that collectively carries a substantial risk of criminal misuse—that creates the risk of danger to the plaintiff.[106] Thus, the link between the plaintiff's injuries and the defendant's affirmative conduct remains unbroken by foreseeable criminal misuse. The weight and availability of statistical evidence showing the volume of crimes (and other misuse) committed using legally purchased guns[107] easily refutes any claim by a manufacturer-defendant that such acts by a consumer (or foreseeable transferee) are unforeseeable. In fact, any seller of firearms having a basic familiarity with the relevant statistics should know that every gun he sells has a roughly 1 in 160 chance of being used in the commission of an unjustified killing.[108]

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103 748 P.2d 661 (Wash. Ct. App. 1988).

104 *Id.* at 664 (quoting Riordan v. Int'l Armament Corp., 477 N.E.2d 1293 (Ill. App. Ct. 1985)).

105 RESTATEMENT (SECOND) OF TORTS § 315 (1965). Section 315 states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id.

106 *See* Merrill v. Navegar, Inc., 28 P.3d 116, 143 (Cal. 2001) (Werdegar, J., dissenting).

107 *See California Fact Sheet*, *supra* note 51.

108 No figures are available for the amount of guns currently in circulation in California. A somewhat reliable estimate can be made, however, based on an extensive national survey conducted in 1994, which found that approximately 192 million guns were in circulation nationwide at that time. Cook & Ludwig, *supra* note 48, at 1. In 1994, there were

III. The Propriety of Judicial Regulation of Firearm Sales

A. The Economic Effect on the Industry

If California courts were to allow risk/benefit lawsuits against gun manufacturers, the flood of litigation might well be brief, when one considers how many lawsuits the gun industry can afford to lose. In 2000, over three thousand lives were lost in California as a result of non-legitimate gun use.[109] Under the California long-arm statute,[110] and constitutional personal jurisdiction jurisprudence,[111] victims of gun violence in California may sue in California, under California law, no matter where the gun was manufactured or sold,[112] provided that the gun manufacturer

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38,505 firearm deaths nationwide. *WISQARS Injury Mortality Reports, 1981–1998*, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *available at* http://webapp.cdc.gov/sasweb/ncipc/mortrate9.html (last visited Apr. 17, 2003).

Assuming that the ratio of guns to deaths is the same for California in 2000 as it was for the nation in 1994 (i.e., guns in California today carry the same risk as guns across the nation did in 1994), then a figure of approximately fifteen million guns in circulation in California in 2000 can be derived from the 3,092 gross firearm deaths reported for that year. *California Fact Sheet*, *supra* note 51.

During the period from 1991 to 2000, an average of 465,375 guns were sold annually in California. *Dealer's Record of Sale*, *supra* note 4. Assuming that annual sales, as well as the total amount of guns in circulation, have remained fairly steady over time, the useful life of a gun can be estimated at roughly thirty-nine years.

The chance of any one gun in California causing an unjustified killing during one year can therefore be calculated by dividing the fifteen million guns in circulation by the net annual non-legitimate gun deaths—2,425 for the year 2000. *California Fact Sheet*, *supra* note 51. The chance of killing in one particular year—1 in 6,186—increases to a chance of approximately 1 in 160 of the gun being used to cause a non-legitimate killing at any time during a thirty-nine-year useful life.

One manufacturer has admitted to being well-informed of the likelihood of misuse, while at the same time denying any responsibility. Carlos Garcia, owner of Navegar, Inc., the manufacturer of the Intratec TEC-9, is quoted in the California Supreme Court's *Merrill* opinion as saying: "I know some of the guns going out of here end up killing people, but I'm not responsible for that." Merrill v. Navegar, Inc., 28 P.3d 116, 138 (Cal. 2001) (Werdegar, J., dissenting).

109 The exact number of lives lost was 3,092 (1,488 were suicides, 1,478 were homicides, and 53 were accidental). *California Fact Sheet*, *supra* note 51. When adjusted downward for causation, the net total is approximately 2,352. *See supra* Part II.D.5.

110 Cal. Civ. Proc. Code § 410.10 (Deering 1991 & Supp. 2003). *See also* Benefit Ass'n Int'l, Inc. v. Superior Court, 54 Cal. Rptr. 2d 165, 168 (Ct. App. 1996) ("[I]f a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State.") (quoting Southeastern Express Sys. v. S. Guar. Ins. Co., 40 Cal. Rptr. 2d 216, 219 (1995)) (alteration and emphasis in original).

111 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

112 *When* the gun was manufactured or sold may be controversial. Following the 1998 repeal of Civil Code Section 1714.45 granting tort immunity to tobacco manufacturers, the California Supreme Court held that immunity did not extend to conduct occurring prior to the enactment of the statute. *See* Naegele v. R.J. Reynolds Tobacco Co., 50 P.3d 769, 775 (Cal. 2002); Myers v. Philip Morris Cos., 50 P.3d 751, 763 (Cal. 2002).

or retailer regularly conducts business in California.[113] Because all major American gun manufacturers (as well as some foreign manufacturers) regularly conduct business in California,[114] the only way for a manufacturer to avoid liability for injuries in California would be to either cease selling firearms to the public nationally, or to withdraw from all commercial contact with the state.

The economic cost of gun-related deaths and injuries in California has been estimated at over $300 million annually.[115] Even when this figure is adjusted to account for those deaths and injuries that would have occurred if the assailant (or suicide victim) had not had access to a gun,[116] the financial burden if transferred to the gun industry would add over $100 to the price of every gun sold in California,[117] or if applied to nationwide gun sales, $6 to every gun sold.[118] This calculation assumes that the dollar amount of jury verdicts would be equivalent to the cost of victims' medical care alone, and that the volume of gun sales would remain steady, despite the increased cost of liability being passed on to the consumer. The reality for gun manufacturers would likely be far bleaker.

B. Risk/Benefit Liability as a Restraint on the Right to Contract

Such a devastating, and possibly fatal, assault on the gun industry might be seen by some as an unjustifiable restraint on the ability of merchants and consumers to enter into lawful contracts. A prominent critic of the risk/benefit strict product liability doctrine, Professor Richard Epstein, has called for the abolition of risk/benefit analysis on the grounds that it is not only an infringement on the right to contract, but it is also inefficient, arbitrary,

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113 It is under this principle that the plaintiff's in *Merrill* were able to sue a defendant corporation based in Florida for injuries arising in California from a firearm sold in Nevada.

114 "Weapons from nearly 650 manufacturers were sold in California — but just 20 companies accounted for 83.8 percent of all sales. Eleven of these companies are based in the United States, including three from California. Imports accounted for about 40 percent of medium- and large-caliber guns." *Calif. Handgun Study to Fortify Crime Prevention Effort*, Newswise (Sept. 19, 2002), *available at* http://www.newswise.com/articles/2002/9/HANDGUNS.UCM.html.

115 *Firearm-Related Violence: Costs*, Pacific Center for Violence Prevention (Dec. 6, 1996), *available at* http://www.pcvp.org/pcvp/firearms/facts/guncost2.shtml.

116 *See supra* Part II.D.5.

117 This amount is based on annual sales in 2000 of 386,210 units. *See Dealer's Record of Sale*, *supra* note 4.

118 This amount is based on annual manufacture and importation of 4.7 million guns. Garen J. Wintemute, *Where the Guns Come From: The Gun Industry and Gun Commerce*, 12 CHILDREN, YOUTH, & GUN VIOLENCE 55, 58 (2002), *available at* http://www.futureofchildren.org/usr_doc/tfoc_12-2e.pdf.

and unnecessary.[119] Professor Epstein's view is that unless a product is defectively manufactured, i.e., prone to malfunction, or unless its dangerous propensity is misrepresented to the consumer, then the market should decide its fate.[120] Thus, the consumer is free to either assume the known risk of danger inherent in the product, or to boycott the product. This argument might work for cigarettes—as long as secondhand smoke injuries can be reduced without an adverse impact on the market—and for many other dangerous products, but in the case of firearms, it is unreasonable, if not morally indefensible, to suggest that the economic "right" of the consumer and merchant to enter into a consensual bargain outweighs the threat of harm to non-consumers.

Gun advocates have compared the risk/benefit analysis of gun sales to other popular products that present an inherent risk of danger, such as cars, swimming pools, bathtubs, aspirin, and even household kitchen products.[121] Most of these products, however, have unique and widespread social utility that cannot be more safely derived through feasible alternative means. The social utility of guns is limited to self-defense and recreation. Self-defense has been proven to be a largely illusory function of guns,[122] and the recreational value of guns, while unique, is limited to relatively few consumers[123] and has little value to society as a whole.

The fundamental question is who should bear the cost to society of a consensual, legal transaction between two parties? Should it be society at large? Or should it be the parties to the transaction? The threat that internalizing the cost of the transaction poses to the viability of the transaction itself is not a justifiable reason for the parties to the transaction to pass the cost on to the largely gunless general population, simply to preserve a right to conduct a lawful business.

The libertarian mantra of individual responsibility cannot be used to justify sales of a legal product if the seller and purchaser—both of whom reap the benefit of the transaction—remain unwilling to accept the responsibility of compensating those who are not

119 Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2202–03 (1989) [hereinafter Epstein, *The Unintended Revolution*]; Richard A. Epstein, *The Risks of Risk / Utility*, 48 OHIO ST. L.J. 469, 474–77 (1987) [hereinafter Epstein, *The Risks of Risk / Utility*].

120 *See generally* Epstein, *The Unintended Revolution*, *supra* note 119.

121 *See, e.g.*, Paul Craig Roberts, *Talking Points: Facts About Guns*, Libertarian Party News Online (Sept. 2002), *available at* http://www.lp.org/lpnews/0209/talkingpoints2.html; Karen Selick, *The Legitimate Uses of Firearms* (Jan. 1995), *available at* http://www.karenselick.com/CL9501.html.

122 In 2000, only 73 gun deaths were reported as the result of legally justified intervention or undetermined intent. *See California Fact Sheet*, *supra* note 51.

123 "[A]bout 35 percent of gun owners (15 million people, 8 percent of the adult public) hunted in 1994, and about an equal percentage engaged in sport shooting other than hunting." Cook & Ludwig, *supra* note 48, at 2–3.

a party to the transaction but who are inevitably and foreseeably harmed by it. If those likely to be injured by a product were primarily the consumers, then it would be logically and morally sound to allow consumers the right to decide for themselves whether the benefits of the purchase outweigh the risks. California courts, however, have long held that as long as that decision puts non-consumers at risk, the cost of injuries to non-consumers must be "borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[124]

Professor Epstein's argument for consumers deciding safety is particularly problematic when applied to sales of firearms. On the one hand, he argues that liability should attach when there is differential knowledge at the time of purchase regarding the danger posed by a product's use.[125] On the other hand, he proposes that the risk of harm posed by a product that is free of patent physical defects should be gauged by common knowledge among the general public or the consumers.[126]

In the context of guns, "common knowledge" of the dangers of firearms[127] differs substantially from the actual risk of harm as known only to an informed few, including those who manufacture guns and nonetheless represent them as a reliable means of self-defense.[128] Not only is the gun manufacturers' knowledge of the true risks superior to that of the consumers, it is also misrepresented to the consumer. According to Professor Epstein, however, neither of these facts matters, as it is the "common knowledge" of consumers as a whole that should draw the line between dangerous and *unreasonably* dangerous products.[129]

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124 Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962).

125 Epstein, *The Risks of Risk/Utility*, *supra* note 119, at 474.

126 Epstein, *The Unintended Revolution*, *supra* note 119, at 2212. *See also* Cronin v. J. B. E. Olson Corp., 501 P.2d. 1153 (Cal. 1972). In *Cronin*, the California Supreme Court appeared to adopt into California common law, as part of what would later become the consumer expectation prong of two-part *Barker* test, the following language from comment i to Section 402A of the Restatement (Second) of Torts: "[D]angerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the as to its characteristics." *Id.* at 1161 (emphasis added). The court, however, rejected the "unreasonably dangerous" terminology of the Restatement as overreaching, at least insofar as it relates to consumer expectation. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)). *But see* Soule v. Gen. Motors Corp., 882 P.2d 298, 309 n.5 (Cal. 1994) ("*Barker* . . . strongly implies that the consumer expectations test does not apply when the degree of safety a product should exhibit under particular circumstances is a matter beyond the common experience and understanding of its ordinary users.").

127 This is reflected by the number of Americans who purchase guns believing them to provide a safe and effective means of self-defense. *See* Gallup Poll, *supra* note 49.

128 This differential knowledge is apparent from the frank testimony of Carlos Garcia, owner of Navegar, Inc. *See* Merrill v. Navegar, Inc., 28 P.3d 116, 138 (Cal. 2001) (Werdegar, J., dissenting).

129 Epstein, *The Unintended Revolution*, *supra* note 119, at 2212.

Professor Epstein argues that the only alternative to the objective "common knowledge" standard would be to use the subjective knowledge of each consumer-plaintiff on a case-by-case basis; a standard that would be formless, uncertain, and generate excessive litigation.[130] In an effort to protect the merchant's right to enter into what merely *seems* to be an evenly matched bargain, Professor Epstein fails to consider the more reasonable alternative to either gauge of unreasonable dangerousness—*actual* risk of harm.[131] As a result of this deference to widespread ignorance determining standards of safety, a seller or manufacturer would never be held responsible for harm caused by misuse of a physically non-defective product by the consumer, whether to a third party or the consumer, even when that harm is not just foreseeable but inevitable.

C. The Effect on the Market

The idea that the market should regulate itself—rather than *be* regulated by legislation or by tort liability—is simply not feasible in the context of firearms. A blanket ban would likely face insurmountable voter resistance.[132] Legislative attempts to regulate firearm sales have so far been severely hindered by the impracticality of listing models or classes of banned firearms,[133] and have been successful only in limiting access to a few excessively lethal types of guns,[134] while leaving the rest readily available to the general public. Thus, the market has been largely free, since its inception, to regulate itself.

Whether or not the widespread belief among gun owners (and many non-gun owners) that guns provide a reliable means of self-defense[135] is the product of misrepresentation or ignorance, there

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130 *Id.* at 2213.

131 *See supra* Part II.D.5.

132 Almost three-quarters of Americans believe that the Second Amendment guarantees an individual right to bear arms. ABCNEWS.com poll, *supra* note 70.

133 For example, the Intratec TEC-DC9 was introduced to evade a District of Columbia ban on its virtually indistinguishable predecessor, the TEC-9. *See* Merrill v. Navegar, Inc., 28 P.3d 116, 135 n.2 (Cal. 2001) (Werdegar, J., dissenting). *See also* Harrott v. County of Kings, 25 P.3d 649, 653 (Cal. 2001) (discussing difficulty of identifying particular weapons as banned by statute).

134 In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2000 (codified as amended at 18 U.S.C. §§ 921–922 (2000 & Supp. 2003)). The Act banned the manufacture, sale, and possession of nineteen types of assault weapons, as well as others with certain characteristics. In California, the State Legislature enacted the Roberti-Roos Assault Weapons Control Act of 1989, prohibiting the advertising, manufacture, sale, and possession of certain assault weapons in California. CAL. PENAL CODE §§ 12275.5, 12276 (Deering 1992 & Supp. 2003). As of 2002, the following six states have some kind of statewide assault weapon ban: Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York. *The Assault Weapons Ban: Questions & Answers*, Brady Center (Aug. 2002), *available at* http://www.bradycampaign.org/facts/gunlaws/awb.asp.

135 *See* Gallup Poll, *supra* note 49.

remains a large portion of the public that is willing to continue purchasing a product that has been proven to put themselves and others at considerable risk of harm. As long as potential consumers perceive no risk to themselves, the market will not diminish absent external regulation.

If regulation by jury were to drive the gun market out of California,[136] Californians would still be able to legally buy guns in many other states. The gun industry might survive, but Californians' ability to purchase guns would be severely hindered. It could be argued that while gun ownership among law-abiding citizens in California would decline, ownership among the criminal population—most of whom would rather buy a gun illegally in California than travel out of state—would not. This point is succinctly made by a popular bumper sticker which declares, "If guns are outlawed, only outlaws will have guns."[137]

This argument assumes that the elimination of the legal gun market in California would not ultimately reduce the amount of guns available on the black market in California, and also that a significant portion of homicides are committed by people who would be willing to purchase a gun on the street. Studies have shown, however, that relatively few homicides (which, in themselves, comprise a minority of all non-legitimate gun deaths) are committed by "criminals" and that the large majority of homicides are committed by "law-abiding citizens"—usually against a family member.[138] Also, it would be inapposite to characterize the 1,190 annual suicides in California attributable to guns[139] as committed by "criminals." Therefore, even if guns remain in the hands of criminals, and even if there are less guns available for self-defense, as long as a substantial portion of "law-abiding citizens" are

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136 Justice Werdegar, dissenting in *Merrill*, addressed the likelihood and propriety of a de facto ban by jury as follows:

> [A] jury's finding in a product defect action that a particular product is defective because the risks of injury arising from the design outweigh the design's benefits does not "ban" the product. While bearing strict liability for injuries arising from such a product, the defendant in such a case may legally continue to produce and distribute it. And even when such decisions will, in the long run, effectively drive a product from the market, California courts and juries are empowered to make them.

Merrill v. Navegar, Inc., 28 P.3d 116, 147 (Cal. 2001) (Werdegar, J., dissenting) (citations omitted).

137 *Available for sale at* http://www.campingsurvival.com/bumsticandwa.html. For a sardonic commentary on the inherent irony of this message (and other pro-gun bumper sticker assertions) see Norman Townsend, *Understanding the Redneck Point of View*, FC Bytes, *at* http://www.fc.peachnet.edu/webzine/backbytes/features10/redneck.htm (last visited Apr. 17, 2003).

138 *See* Arthur L. Kellermann & Donald T. Reay, *Protection or Peril?: An Analysis of Firearm-Related Deaths in the Home*, 314 N. ENG. J. MED. 1557, 1557–60 (1986) (discussing a study of 743 firearm deaths reported over a 6-year period in King County, Washington).

139 *See California Fact Sheet*, *supra* note 51. This is a net figure adjusted downward for causation. *See also supra* Part II.D.5.

deterred from purchasing guns by a statewide sales ban, there would still be a substantial net gain in lives saved.

IV. Conclusion

In the absence of any statutory immunity for gun manufacturers, California courts will certainly have to allow *some* risk/benefit lawsuits for injuries resulting from the misuse of firearms. Whether the repeal invites a flood or a trickle, the factual issue of risks versus benefits should be quick and easy to resolve. Far from being left with "neither rule nor compass to guide [them],"[140] juries will merely have to decide how many deaths would be an acceptable price to pay for the recreational value of guns. At the very least, assault-type weapons like the Intratec TEC-9, as a class, would fail this test.[141] It is even possible that juries may find, as an issue of fact, that *any* gun fails the test. Whether such a result would force the demise of the American gun industry remains to be seen.

The imposition of tort liability upon manufacturers is not a betrayal of the traditional role of tort law as primarily compensatory. It has long been the role of juries to determine the societal value of private conduct by weighing the risks and benefits of that conduct—whether in terms of negligence or strict product liability. That the sale of guns has defied effective statutory and self-regulation only emphasizes the need for juries to play a decisive role in the regulation of gun sales, as well as providing a means of compensation to injured plaintiffs.

In California, it can no longer be claimed that the majority of the electorate—including those who do not own guns—tacitly share responsibility for the cost of widespread gun ownership in the state. It might be true that the failure of the Legislature to enact a law banning all civilian gun possession fairly represents the will of the people to permit continued gun ownership, but that does not mean that the people of California are willing to continue sharing the financial burden imposed on the state and its citizens as a result of gun sales to California residents and visitors.

The people of California have stated, through the repeal of Civil Code Section 1714.4, that the right to buy and sell guns may be regulated by the imposition of costs incurred from foreseeable misuse of the guns upon those who benefit the most from the

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140 Epstein, *The Unintended Revolution*, *supra* note 119, at 2211.

141 *See* Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 154–55 (Ct. App. 1999). The California Court of Appeal quoted the declaration of expert witness, Police Chief Supenski, in which he stated that the Intratec TEC-DC9 is "completely useless" for hunting, is never used by competitive or recreational shooters, "has no legitimate sporting use," has no practical value for self-defense due to its weight, inaccuracy and firepower, and is instead designed to engage multiple targets during rapid sustained fire. *Id.*

transaction. All that remains is for the California courts to follow the command of legislative action and legal precedent, and allow juries to determine whether the survival of the gun industry is worth the annual sacrifice of thousands of Californians.

Water in the West: Vested Water Rights Merit Protection under the Takings Clause

*Kathryn M. Casey**

> "The fundamental maxims of a free government seem to require that the rights of personal liberty and *private property should be held sacred.*"[1]

I. INTRODUCTION

Property rights are a fundamental aspect of liberty in the United States.[2] The protection of individuals' "settled, justified expectations"[3] in their property rights is integral to this concept. In fact, property owners' expectations associated with long-standing property rights continue to be a significant consideration in takings jurisprudence.[4] The Takings Clause of the Fifth Amendment provides, in part, "nor shall private property be taken for public use, without just compensation."[5] This clause is implicated

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1 Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) (emphasis added).

2 *See* Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature's Boundaries*, 73 S. CAL. L. REV. 927, 997 (2000) ("Modern interpretations of property norms primarily focus on the relationship between property and political and economic freedom, justifying property rights because of their importance to individual liberty."); David L. Callies, *Property Rights Since* Penn Central: *Regulatory Takings, Investment-Backed Expectations, and Economically Beneficial Use: How Perspectives on Property Rights Have Changed From* Penn Central *to* Lucas, 171, 173 (A.L.I.-A.B.A. Course of Study, Oct. 17, 1996) (recognizing that property rights have always been fundamental to and part of the preservation of liberty and personal freedom in the United States); Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 Sw. U. L. REV. 627, 638 (1988) ("To the Framers [of the Constitution], identifying property with freedom [and liberty] meant that if you could own property, you were free. Ownership of property was protected.").

3 Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 327 (2002).

4 *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding investment-backed expectations are one consideration in a three-prong test used to determine if a regulatory taking has occurred).

5 U.S. CONST. amend. V. If a taking occurs, the government must justly compensate the property owner. In other words, the property owner is entitled to receive the "fair mar-

whenever property is "taken" by the government. Throughout American history, takings jurisprudence has primarily focused on eminent domain in relation to real property.[6] The United States Supreme Court has fashioned several distinct tests for determining when government action amounts to a taking.[7] While these tests have provided guidance for courts deciding takings cases involving land rights, the appropriate analysis for takings cases relating to water rights is less clear.

In many parts of the western United States,[8] water is a limited, and even scarce, resource. Consequently, water rights are very valuable in those regions. The Prior Appropriation Doctrine, based on the concept of "first in time, first in right," has therefore emerged as the most suitable water allocation scheme.[9] Water users in the West have used the Prior Appropriation Doctrine for over a century to secure vested property rights in water, and have thus developed significant expectations regarding its use.[10] Continued population expansion in the western United States, however, has led to a significant increase in governmental regulation of water.[11] As a result, a struggle has ensued over the allocation and regulation of water in the West.[12] This ongoing struggle is exemplified by the recent case of *Hage v. United States*.[13] This comment addresses the same issues confronted by the *Hage*

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ket value" of the property on the date of the taking. United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979). *See generally* George W. Miller, *Natural Resources Development and Takings Litigation*, 33 (A.L.I.-A.B.A. Course of Study, Jan. 7, 1999) (discussing "just compensation").

6 *See* Michael Allan Wolf, *Pondering* Palazzolo: *Why Do We Continue to Ask the Wrong Questions?*, 32 ENVTL. L. REP. 10367 (2002).

7 *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding regulation that deprives landowner of *all* economically viable use of property is a *per se* regulatory taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding permanent physical occupations of property constitute a *per se* physical taking); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding temporary physical invasions may constitute a physical taking in some circumstances); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (establishing a three-prong test to determine whether a diminution in economically viable use constitutes a regulatory taking).

8 In this comment the "western United States" encompasses the eleven western states: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

9 Marcus J. Lock, *Braving the Waters of Supreme Court Takings Jurisprudence: Will the Fifth Amendment Protect Western Water Rights from Federal Environmental Regulation?*, 4 U. DENV. WATER L. REV. 76, 77 (2000). *See also* 2 WATERS AND WATER RIGHTS § 12.02(b) (Robert E. Beck ed., 1991) [hereinafter 2 WATER RIGHTS].

10 *See* Sean E. O'Day, San Carlos Apache Tribe v. Superior Court: *Rejecting Legislative Favoritism in Water Right Allocations*, 4 U. DENV. WATER L. REV. 29, 29 (2000).

11 *See* Chris Bromley, *A Political and Legal Analysis of the Rise and Fall of Western Dams and Reclamation Projects*, 5 U. DENV. WATER L. REV. 204, 208 (2001); David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 9 (2001).

12 Getches, *supra* note 11, at 8.

13 35 Fed. Cl. 147 (1996); 35 Fed. Cl. 737 (1996); 42 Fed. Cl. 249 (1998), *rescinded in part by* 51 Fed. Cl. 570 (2002).

Court. That is, should water rights be afforded protection under the Takings Clause, and if so, what level of protection is appropriate? The position taken in this comment is that water rights merit *significant* protection.

It appears that at least one federal judge is in agreement with this position. At the very minimum, Judge Loren A. Smith, the presiding judge in *Hage v. United States,* has brought the issue of vested water rights to the forefront of takings jurisprudence. Moreover, Judge Smith's decision in *Hage* secured at least one victory for appropriators of "old" vested water rights by holding that vested water rights and corresponding ditch rights-of-way *are* "property interests" subject to protection under the Takings Clause.[14] This holding provides the core of the discussion section of this comment. To appreciate the complexity of the water rights issues addressed in *Hage*, however, some historical and contextual background is necessary and is, therefore, provided for the reader.

Section II of this comment provides an in depth discussion of *Hage*, including the facts, procedural history, and the court's analysis of the issues as of the publication of this comment. *Hage* epitomizes the tension that exists between the federal government and individuals who possess water rights in the public domain. Accordingly, the discussion of *Hage* is critical in providing the background and context through which one can understand the issues analyzed in the later sections of this comment.

Section III provides an overview of the historical development and scope of water rights. The overview illustrates that enforcement of the Prior Appropriation Doctrine has consistently secured and protected expectations in water rights.[15] This section also describes the process by which one acquires a vested water right, and how the timing of appropriation can have a significant impact on the value of that right. Finally, an explanation of the inherent differences between land and water as natural resources is included, highlighting the unique constitutional considerations presented by takings disputes involving water rights.

Section IV of this comment discusses constitutional protections, specifically the Due Process Clause and the Takings Clause,[16] that provide protection to water rights and private property interests. Two opposing ideologies are discussed: first, the republican-positivist tradition,[17] and second, the federalist-natural

14 *Hage*, 35 Fed. Cl. at 172 ("[W]ater rights are not 'lesser' or 'diminished' property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution.").

15 *See* discussion *infra* Part III.

16 U.S. CONST. amend. V.

17 Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 226 (1995).

law tradition.[18] On the one hand, supporters of the republican-positivist tradition embrace the Public Trust Doctrine and the allocation of natural resources to further the public good, even if such focus results in the diminution of private property rights and associated expectations.[19] On the other hand, the federalist-natural law tradition encourages increased protection of private property interests and expectations, while advocating against governmental regulation that could compromise those interests.[20] The latter tradition welcomes the position taken by the *Hage* court thus far, and is consistent with the notion that the scope of water rights should be far-reaching. In that vein, the discussion will show why water rights, although different in nature from land rights, should receive important consideration in the context of takings jurisprudence.

Finally, Section V discusses the relevant physical and regulatory takings tests that are traditionally invoked in land-rights cases and applies those standards to the takings claims posed in *Hage*.[21] The Supreme Court has found it necessary to set precedent requiring monitoring of government activity in the area of land use regulation.[22] This section discusses why the *Hage* court should take the next logical step and elevate the level of protection afforded to vested water rights to conform with the existing framework for takings cases involving land. When such a framework is applied to takings disputes involving water, long-standing expectations associated with water rights are preserved. The comment concludes with some final thoughts from the author.

II. CASE OVERVIEW: *Hage v. United States*

> Most Americans would tell you today that the western lands belong to them, they are 'public.' But the old-timers still alive who came from the families that first settled these lands will tell you a different story . . . . How the West changed from an area governed by state property law to one strangled by federal rules and regulation is a lesson to the rest of America. How the West and America climbs out of this hole, is what Hage v. United States is all about.[23]

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18 *Id.*

19 *Id.*

20 *Id.*

21 *See* cases cited *supra* note 7 (articulating the appropriate cases that have outlined tests for physical and regulatory takings).

22 *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

23 Margaret Hage Gabbard, *For Land & Liberty: The Story Behind* Hage v. United States, *at* http://www.stewardsoftherange.org/hage_v_us/hage_v_us-bkgnd.htm (last visited Mar. 17, 2003). The Stewards of the Range website was created after the filing of *Hage v. United States* and is intended to provide information related to the progression of the case, as well as raise money for the litigation fees incurred by the Hages.

A. The Hages and Pine Creek Ranch

In the Spring of 1978, Wayne and Jean Hage[24] purchased Pine Creek Ranch (the "Ranch"), which consisted of approximately 700,000 acres located in the high desert mountains of central Nevada.[25] The Ranch was an "old cow outfit steeped deep in western tradition – tough horses, good cowhands, and family."[26] Indeed, the Hages used the Ranch to operate a complex ranching operation with over 2,000 head of cattle.[27] To operate the Ranch economically, the Hages depended on government owned rangeland, water in the Toiyabe National Forest, and ditch rights-of-way (easements across federal lands) to transport the water.[28] A revocable grazing permit was granted to the Hages in 1978, allowing them to graze the cattle during certain times of the year on six specific allotments located within the Toiyabe National Forest.[29]

The Hages claim that not long after they purchased the Ranch they were beset by the "rabid environmental agenda that was spreading across the nation."[30] Within two months of the Hages' purchase, the National Park Service offered to buy the Ranch for only half of the price originally paid by the Hages.[31] Over the next twelve years, the Hages allegedly faced "relentless harassment" from the United States Forest Service and the Bu-

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24 For purposes of uniformity, plaintiffs Wayne and Jean Hage are referred to as "the Hages" throughout the course of this comment. Sadly, however, Jean Hage passed away shortly after the Hages' summary judgment victory in 1996. Gabbard, *supra* note 23. Jean Hage's estate is thereafter listed as a co-plaintiff in the 1998 and 2002 *Hage* opinions.

25 Hage v. United States, 42 Fed. Cl. 249 (1998). *See also* David Morgan, *The Revealing Story of a Rancher and the National Debt*, ASHEVILLE TRIB., Oct. 29, 1999. The Ranch stretches eighty miles from North to South and encompasses over 1,100 square miles. Gabbard, *supra* note 23.

26 Gabbard, *supra* note 23.

27 Hage v. United States, 35 Fed. Cl. 147, 153 (1996). *See also* Gabbard, *supra* note 23.

28 *Hage*, 35 Fed. Cl. at 153.

29 *Id.* The Bureau of Land Management (BLM) is responsible for the administration of grazing on federal lands, and oversees the granting of permits. The BLM "leases approximately 170 million acres of public land for grazing purposes." Brian L. Frank, *Cows in Hot Water: Regulation of Livestock Grazing Through the Federal Clean Water Act*, 35 SANTA CLARA L. REV. 1269, 1269 (1995). The term for a grazing permit administered by the BLM is ten years. *Hage*, 35 Fed. Cl. at 153 n.1. Each permit establishes general provisions and requirements for the use of federal land for grazing. The Hages' permit also included individualized terms, dictating the number, kind, and class of livestock permitted to graze, as well as the period of use. *Id.* at 153. The Hages were responsible for maintenance and improvements on the federal land, and were also required to graze at least ninety percent of the permitted number of cattle. *Id.* at 153–54. Failure to abide by permit requirements resulted in termination or revocation of the permit: "[T]his grazing permit may be revoked or suspended, in whole or in part, for failure to comply with any of the provisions and requirements specified . . . . [T]he grazing privilege will terminate 'whenever the area described in this permit is needed by the Government for some other form or use.'" *Id.* at 153.

30 Gabbard, *supra* note 23.

31 *Id. See also* Wayne Hage, *Rancher Wins Fight for Rights*, 18 THE NEW AMERICAN 10 (May 20, 2002), *at* http://www.thenewamerican.com/tna/2002/05-20-2002/vo18no10_rancher.htm.

reau of Land Management. Those agencies were reportedly encouraged by a number of active environmental groups.[32] Much of this alleged harassment related to two of the Hages' cattle grazing allotments and ditch rights-of-way.

1. Table Mountain Allotment

In 1979, the Hages opposed the Nevada Department of Wildlife's introduction of elk into the Table Mountain allotment of the Toiyabe National Forest.[33] The Hages claimed that the elk consumed water and forage needed for their cattle, and that elk hunters interfered with their cattle's ability to graze and move about the federal land.[34] The government responded that the Hages needed to "share" the usage of public rangelands.[35] Later, in 1988, the Forest Service claimed that the Hages were in violation of their grazing permit, thus requiring that the Hages remove their cattle from the Table Mountain allotment by September 1988.[36] Subsequently, in 1989, the Forest Service notified the Hages that twenty percent of their cattle allotment would be suspended for that year.[37] The Forest Service then cancelled twenty-five percent of the Hages' grazing permit in 1990 and suspended another twenty percent of the remaining Table Mountain allotment for a period of two years.[38]

2. Meadow Canyon Allotment

The Hages also experienced problems with the Meadow Canyon allotment, another one of their allotments in the Toiyabe National Forest. In 1980, the Forest Service "diverted the flow of water" in the Meadow Canyon allotment, and allegedly used the water as a "domestic water supply" for the Forest Service's guard station.[39] The Hages claimed to have appropriated all of this

32 Gabbard, *supra* note 23.

33 *Hage*, 35 Fed. Cl. at 154.

34 *Id.*

35 *Id.*

36 *Id.* The Hages subsequently removed the majority of cattle by October 22, 1988. *Id.*

37 *Id.* This notification followed a "show cause" letter sent to the Hages in early 1989. The letter asked the Hages to illustrate why the Forest Service should not reduce the permitted number of cattle by twenty percent. The Forest Service also accused the Hages of "excess use of the rangeland" during the one-month period in 1988 when the permit was expired. *Id.*

38 *Id.* at 155. This action followed the Hages' failure to graze any of their cattle during the 1990 season without notice to the Forest Service. The Forest Service deemed this inaction "non-use" and a violation of the 1984 grazing permit. Consequently, the Forest Service sent the Hages a second "show cause" letter. Upon the Hages response to the letter and request for an evidentiary hearing, the Forest Service implemented the twenty-five percent cancellation and twenty percent suspension. *Id.* at 154–55.

39 *Id.* at 155. Specifically, the "district ranger [in Meadow Canyon] decided they would pipe the water from the spring, through a newly installed $50,000 water purification facility, into [the Forest Service Ranger Station]." Morgan, *supra* note 25. The water was

water, and requested a water rights adjudication to prevent the Forest Service's diversion.[40] During a subsequent field hearing, the Nevada state water engineer acknowledged the Hages' "ownership [of water] and the Forest Service's illegal confiscation."[41] Undeterred, the Forest Service demanded in 1990 that the Hages remove their cattle from the Meadow Canyon allotment because of alleged "serious range deterioration."[42] Despite the Hages' initial efforts to remove the cattle, the Forest Service informed the Hages that any cattle or livestock found on the Meadow Canyon allotment after November 12, 1990, would be confiscated and impounded.[43] In 1991, the Forest Service suspended the Hages' permit for five years and decreased by thirty-eight percent the number of cattle allowed on the allotment.[44] The Forest Service also twice impounded cattle found grazing on the Meadow Canyon allotment during the summer of 1991.[45]

3. Ditch Rights-of-Way

The Hages also contended ownership of ditch rights-of-way, which allowed for the transportation of water for stock watering, irrigation, and domestic purposes.[46] Although the Forest Service acknowledged those rights-of-way and their importance for water transportation, the parties disagreed as to the scope of the rights under the Act of 1866.[47] In 1986, the Forest Service notified the Hages that it reserved authority to regulate vested ditch rights-of-way, and would require pre-approval for any ditch maintenance.[48]

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diverted from Meadow Spring to Q (McAffee) Spring. The Forest Service claimed that Meadow Spring was experiencing contamination. *Hage*, 35 Fed. Cl. at 155.

40 *Hage*, 35 Fed. Cl. at 155.

41 Morgan, *supra* note 25. Despite the state water engineer's determination that the Hages possessed ownership interests in the water on Meadow Canyon, the "Forest Service has maintained a fence around the spring so that cattle and wildlife [could not] drink, and the water [was] still being piped into the ranger's [station]." *Id.*

42 *Hage*, 35 Fed. Cl. at 155. In August 1990, the Forest Service sent a "show cause" letter requesting that the Hages illustrate why their permit should not be cancelled (based on their failure to remove 100% of their cattle from the Meadow Canyon allotment). *Id.*

43 *Id.* Between August and November 1990, the Hages removed sixty-two percent of their cattle from the Meadow Canyon allotment. However, 128 cattle head (thirty-eight percent) remained on the allotment. *Id.*

44 *Id.* The thirty-eight percent reduction is equivalent to the percentage of cattle found on the allotment in October 1990. *Id.*

45 *Id.* According to the Hages, the Forest Service brought in over thirty riders to round up the cattle. Half of the riders were armed with semi-automatic rifles and wore bulletproof vests. The Hages allege that the riders ran a bull and cow to death before presenting the Hages with a bill for their "confiscation expense." Gabbard, *supra* note 23.

46 *Hage*, 35 Fed. Cl. at 156.

47 *Id.*

48 *Id.* In July 1991, Wayne Hage and his employee, Lloyd Seaman, were arrested and convicted for violation of the Forest Service regulations after cutting and removing trees adjacent to the ditch rights-of-way. The Ninth Circuit subsequently reversed the conviction. *Id. See* United States v. Seaman, 18 F.3d 649 (9th Cir. 1994).

B. The Hages' Claims

On September 26, 1991, the Hages filed suit in the United States Court of Federal Claims[49] in Washington, D.C., alleging "constitutional, contractual and statutory causes of action."[50] The Hages argued that they possessed a property interest in their "grazing permit, water rights, ditch rights-of-way, forage on the rangeland, cattle and ranch."[51] Moreover, they maintained that the actions of the Forest Service and federal government constituted an unlawful deprivation of those rights.[52] Specifically, the Hages claimed:

> First . . . the suspension and cancellation of the grazing permit deprived them of their right to graze their cattle. Second . . . they were deprived of their water rights by the Forest Service canceling and suspending their permit and diverting and using their water. Third . . . the [federal government] took their property interest in the ditch rights-of-way by forbidding [them] access to the ditches. Fourth . . . non-indigenous elk consumed forage and drank water reserved for [their] cattle in violation of [their] property rights. Fifth . . . when the Forest Service impounded [their] cattle, [the federal government] took [their] personal property. Sixth . . . by canceling and suspending portions of their grazing permit and interfering with their water rights, ditch rights-of-way, and forage, [the federal government] . . . deprived [them] of all economic use of their ranch.[53]

In addition, the Hages claimed that grazing permits are contracts and that the cancellation or suspension of the permits resulted in a breach of contract entitling them to damages.[54] The Hages also sought compensation under 43 U.S.C. § 1752(g)[55] for the improvements they made to federal rangeland.[56] The Hages later filed an amended complaint including a claim of ownership in the 752,000 acre surface-estate adjacent to the Ranch.[57]

C. The *Hage* Court's Analysis and Holding

In 1996, after a contentious battle between the parties, the *Hage* court concluded that: (1) the United States Court of Federal Claims had jurisdiction to hear the Hages' claims; and (2) the

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49 *Hage*, 35 Fed. Cl. at 156. Almost all takings claims against the United States must be brought in the United States Court of Federal Claims (CFC). For an extensive discussion of the CFC, see Robert Meltz, *Takings Claims Against the Federal Government*, 475 (A.L.I.-A.B.A. Course of Study, Sept. 30, 1999).

50 *Hage*, 35 Fed. Cl. at 156.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 43 U.S.C. § 1752(g) (1986).

56 *Hage*, 35 Fed. Cl. at 156.

57 Hage v. United States, 42 Fed. Cl. 249, 249 (1998).

Hages' claims were ripe for review.[58] Next, the court discussed the Hages' complaint in light of the federal government's motion for summary judgment. As previously noted, the initial complaint argued three theories of recovery: (1) the grazing permit created a binding contract between the Hages and the federal government, which the federal government breached; (2) the federal government's actions constituted a taking of the Hages' property without just compensation; and (3) the Hages were entitled to compensation for improvements they made to the Toiyabe National Forest.[59] The Court addressed each claim individually.

1. A Grazing Permit is a License, Not a Contract

The court concluded as a matter of law that a grazing permit does not create a binding contract between two parties.[60] The court noted in its decision that a grazing permit's language and characteristics are indicative of a license, rather than a contract.[61] In addition to determining that the permit was not a binding contract, the court also found that the Forest Service, acting as an agent of the federal government, did not possess the requisite authority to bind the federal government contractually.[62] Consequently, the Hages' permit did not give rise to contractual rights or duties, but only granted the Hages "certain exclusive privileges based upon historical grazing practices."[63] Because this had been the original contention of the federal government, the court granted that aspect of the federal government's motion for summary judgment.

2. Property Interest in the Grazing Permit and the Rangeland

The Hages had argued that because their grazing permit was issued "in recognition of rights which existed prior to the creation of the Toiyabe National Forest," they possessed a protected property right in the permit.[64] The court rejected this argument and held in favor of the federal government, finding that the Hages did not possess a protected property interest in either the permit or

58 Hage v. United States, 35 Fed. Cl. 147, 160–63 (1996) (addressing both defendant's and plaintiffs' claims regarding jurisdiction and ripeness before reaching its conclusions).

59 *Id.* at 165.

60 *Id.* at 166.

61 *Id.* The court stated that a license "creates a personal or revokable [sic] privilege allowing a specific party to utilize the land of another for a specific purpose but does not vest any title or interest in such property in the licensee." *Id. See also* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 404 (1950). In the alternative, a contract is "analogous to a lease . . . and creates a vested property interest against the world." *Hage*, 35 Fed. Cl. at 166. *See also* ARTHUR LINTON CORBIN, 3A CORBIN ON CONTRACTS § 686 (1960).

62 *Hage*, 35 Fed. Cl. at 166.

63 *Id.*

64 *Id.* at 168.

the actual rangeland itself.[65] The court enumerated two reasons for this finding. First, the Hages were unable to demonstrate vested property rights in the rangeland under the Act of 1866.[66] Second, a "grazing permit is a right created by the government, and was never intended to be a compensable property right."[67]

Furthermore, the court found that the permit granted only a "preference to use the allotment before the government gave the right to another."[68] Thus, the value of the Hages' "fee lands and water rights must be valued independently of any value added by any appurtenant grazing permits or grazing preferences."[69] Although the revocation of the permit may have caused a significant diminution in value of the Hages' Ranch, the court emphasized that "investment-backed expectations and reliance on the privilege to graze do not, in themselves, create a property interest in the rangeland or the permit,"[70] regardless of "how seemingly unjust the consequences"[71] to the Hages.

3. Vested Property Interest in the Water

In 1996, the court found that "the right to appropriate water can be [a] property right" protected under the Fifth Amendment.[72] Indeed, constitutional traditions mandate that water rights, "which are as vital as land rights," receive equal protection under the Fifth Amendment to the Constitution.[73] If the federal government re-routed the Hages' water such that they could not make beneficial use of their water rights, the federal government could not reasonably argue in the alternative that the Hages' water rights were taken due to lack of use.[74] Ultimately, the court found that the Hages had demonstrated ample evidence indicating own-

65 *Id.* at 170–71.

66 *Id.* at 170.

67 Bradshaw v. United States, 47 Fed. Cl. 549, 553 (2000). *See also* Alves v. United States, 133 F.3d 1454, 1457 (Fed. Cir. 1998) (holding grazing permits do not constitute compensable property under the Fifth Amendment); United States v. Fuller, 409 U.S. 488, 492 (1973) (holding that the government is not required to compensate for value it itself created when issuing a grazing permit).

68 *Hage*, 35 Fed. Cl. at 170. In short, a preference "grants a party the right of first refusal, not a property right in the underlying land." *Id.*

69 Hage v. United States, 51 Fed. Cl. 570, 587 (2002).

70 *Hage*, 35 Fed. Cl. at 171.

71 *Hage*, 51 Fed. Cl. at 587 (citing Hage v. United States, 35 Fed. Cl. 147, 169 (1996)).

72 *Hage*, 35 Fed. Cl. at 172.

73 *Id.* Specifically, the court stated:

> *Amici* provides no reason within our constitutional tradition why water rights, which are as vital as land rights, should receive less protection. This is particularly true in the West where water means the difference between farm and desert, ranch and wilderness, and even life and death. This court holds that water rights are not "lesser" or "diminished" property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution.

Id.

74 *Id.* at 173.

ership of vested water rights, and allowed the takings claim to proceed.[75]

In 1998, the court published a brief preliminary opinion in which it held that the Hages did meet the threshold test of ownership, and successfully demonstrated a valid property interest in their vested water rights.[76] In 2002, the court issued a final factual opinion in which it articulated the extent and scope of the Hages' water rights.[77] Based on a preponderance of the evidence, the court found that the Hages and their predecessors had appropriated and maintained vested water rights in several "ditches, wells, creeks, and pipelines . . . that cross their land and grazing areas as well as the Monitor Valley, Ralston, and McKinney allotments."[78]

4. Vested Property Interests in Act of 1866 Ditch Rights-of-Way

The Hages also claimed that the federal government "took" their property when it denied them access to their 1866 Act ditches.[79] In 1996, the court granted the Hages the opportunity to substantiate ownership of vested ditch rights-of-way, such that their "desired use and maintenance of [those] rights [did] not exceed the scope of their property interest, [thus] requiring a special use permit."[80] The 1998 preliminary opinion stated that "implicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water."[81] Furthermore, the court defined the scope of the Hages' ditch rights-of-way as including the "ground occupied by the water and fifty feet on each side of the marginal limits of their 1866 ditch."[82]

In 2002, the final factual opinion confirmed that the Hages successfully established that they, together with their predecessors in interest, had created and used "a subset" of the claimed 1866 ditches prior to the creation of the Toiyabe National Forest in 1907.[83] In addition, the Hages presented evidence demonstrat-

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75 *Id.*

76 *See* Hage v. United States, 42 Fed. Cl. 249 (1998).

77 Hage v. United States, 51 Fed. Cl. 570, 570 (2002).

78 *Id.* at 576.

79 *Id.* at 580. The Hages claim that the federal government's denial of access to the 1866 Act ditches "is a physical takings claim because . . . the government has physically barred them from the land, with threat of prosecution for trespassing if they enter federal lands to maintain their ditches." *Id.* at 580 n.13. *See also infra* text accompanying note 92 (discussing the validity of this takings claim).

80 Hage v. United States, 35 Fed. Cl. 147, 174 (1996).

81 Hage v. United States, 42 Fed. Cl. 249, 251 (1998).

82 *Hage*, 42 Fed. Cl. at 251.

83 *Hage*, 51 Fed. Cl. at 583. The Hages "proved that only a subset of their vested water rights actually constitute[d] 1866 Act Ditches." *Id.* The following are 1866 ditches:

ing that those same ditches had been consistently maintained and used since 1907.[84] Undisputed trial testimony regarding "historic use of [those] ditches for livestock watering," and congressional intent expressed when passing the 1866 Act, revealed that "the United States intended to 'respect and protect the historic and customary usage of the range.'"[85] In accordance with congressional intent, the court affirmed several of the Hages' claimed vested ditch rights-of-way.[86]

The opinion further stated that, although the federal government had a right to *reasonably* regulate the Hages' vested ditch rights-of-way that traverse federal land, the federal government did not have the right to deny the Hages access to their vested water rights "without providing a way for them to divert that water to another beneficial purpose if one exist[ed]."[87] The court emphasized that the government cannot cancel grazing permits in an attempt to prohibit individuals from acquiring water by rerouting it for another valid and beneficial use.[88] Quintessentially, the Hages "ha[d] a right to go onto the land and divert the water."[89]

5. No Property Right in the 752,000 Acre Surface-Estate

In 1997, the Hages amended their original complaint to include a claim to 752,000 acres of surface-estate for grazing.[90] Essentially, the acreage at issue reflected the area encompassed in their previously permitted grazing allotments.[91] Although the Hages relied on a long and extensive line of federal laws dating back to the eighteenth century,[92] the court was not persuaded to find in favor of the Hages.[93] Instead, the court found that while

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Andrew's Creek Ditch, Barley Creek Ditch, Borrego Ditches, Combination Pipeline, Corcoran Ditch, Meadow Creek Ditch, Pasco or Tucker Ditch, Pine Creek Irrigating Ditch, Spanish Spring Pipeline, and White Sage Irrigation Ditch. *Id.*

84 *Id.*

85 *Id.* at 581 (quoting Hage v. United States, 42 Fed. Cl. 249, 251 (1998)).

86 *Id.* at 584. The following are not 1866 ditches, and thus did not give rise to vested rights: Baxter Spring Pipeline, Corcoran Pipeline, Desert Entry Ditch, Hot Well Ditch, Mount Jefferson Spring and Pipeline, and Salisbury Well Pipeline. *Id.*

87 *Id.* "'[R]easonable' regulation is defined as regulation which neither prohibits the ranchers from exercising their vested rights nor limits their exercise of those rights so severely as to amount to a prohibition." Elko County Bd. of Supervisors v. Glickman, 909 F. Supp. 759, 764 (D. Nev. 1995). *See also* Hage v. United States, 51 Fed. Cl. 570, 584 (2002).

88 *Hage*, 51 Fed. Cl. at 584.

89 *Id.*

90 Hage v. United States, 42 Fed. Cl. 249, 249 (1998).

91 *Hage*, 51 Fed. Cl. at 588.

92 *Id.* The Hages relied on the following federal acts in their claim to the 752,000 acre surface-estate: The Ordinance of May 20, 1785; Kearney's Code and the Treaty of Guadalupe-Hidalgo; the Act of 1866; the Desert Lands Act of 1877; the Act of 1888; the Act of 1890; the Act of 1891; the Forest Service Organic Administration Act; the Livestock Reservoir Siting Act; The Stock Raising Homestead Act; the Taylor Grazing Act; and Nevada's Three Mile Grazing Rule. *Id.* at 588–91.

93 *Id.* at 592. The court stated that the Hages "ha[d] no right to the 752,000 acre surface estate that they claim[ed]." *Id.*

the Hages did have a right to physically go on the federal land to access the water, they did not possess a property right in the surface-estate.[94] The court was unconvinced that Congress ever intended to divide up the surface-estate. The court made this finding despite federal statutes relied on by the Hages, which contain savings clauses that mandate that later enacted laws cannot change vested rights.[95] Specifically, the court did not find any indication that "Congress intended to give away vast acreages of the public land when the largest amount cited in any of [the specified federal acts] was 640 Acres."[96]

6. Confiscation of the Hages' Cattle May be a Regulatory Taking

The federal government claimed to have rightfully confiscated the Hages' trespassing cattle under the terms of the grazing permit.[97] The Hages argued, in opposition, that the federal government's ludicrous demands under the permit resulted in a taking of their cattle without compensation.[98] The court stated that, unlike the Hages' takings claims pertinent to the possession and scope of the water rights, ditch rights-of-way, and forage rights, "the scope of the property rights in the cattle is easily ascertainable."[99] The court deferred its analysis of this takings issue until the Hages' other potential property rights were defined via a limited initial evidentiary hearing.[100]

7. The Hages are Entitled to Proceed with a 43 U.S.C. § 1752(g) Claim for Compensation

Finally, the court found that under 43 U.S.C. § 1752(g),[101] the Hages were entitled to compensation for authorized permanent improvements on their allotments if the federal government cancelled the permit with the intention of devoting the land to "another public purpose."[102] The Hages alleged that the government did not cancel their grazing permit in order to devote the rangeland to another public purpose, but in fact was "preserv[ing] the forest in a 'pristine' condition to maximize its value to environmentalists, fishermen and recreationalists."[103] This claim did not

94 *Id.* at 591.
95 *Id.*
96 *Id.* at 592.
97 Hage v. United States, 35 Fed. Cl. 147, 176 (1996).
98 *Id.*
99 *Id.* at 178.
100 *Id.*
101 "Under 43 U.S.C. § 1752(g), a party is entitled to compensation for the value of improvements constructed on the rangeland when the government devotes the land to another public purpose." *Id.* at 178 n.16.
102 *Hage*, 35 Fed. Cl. at 179.
103 *Id.* at 178–79.

require the Hages to establish a taking, and the court will determine compensation during the takings phase of the case.[104]

D. The Next and Final Step in the *Hage* Trial

In January 2002, Judge Smith issued a final factual opinion.[105] In sum, the court held that the Hages do possess vested rights to use water in the Southern Monitor Valley, and in the Ralston and McKinney allotments. The court also found that the Hages owned vested ditch rights in ten ditches and pipelines under the 1866 Act.[106] The court did, however, grant the federal government's Motion to Dismiss regarding the Hages' surface-estate and grazing permit claims.[107]

Although the *Hage* litigation has resulted in four opinions over the course of six years, the court has only determined what property rights the Hages actually possess. The next and final stage of the *Hage* case will address whether the Hages' water rights and ditch rights-of-way were actually taken by the federal government such that just compensation is due.[108] Beginning in the Spring of 2003, the Hages must proffer evidence to establish: "1) [that they] had a beneficial use for the water prior to the government revoking their grazing permits and 2) that there was a taking of [their] right to use their vested water right."[109] Essentially, the Hages are required to show that they could have put the water to beneficial use if the federal government had not "deprived them of access to prevent them from using the water."[110]

The next section of this comment will discuss the nature and scope of property rights in water, as well as how water rights are acquired under the Prior Appropriation Doctrine. An understanding of the principles underlying Nevada water law, as well as how Nevada courts treat water rights, is crucial to determining the extent of the Hages' vested water rights in the context of their takings claims.

III. Nature and Scope of Property Rights in Water

For centuries property rights have played a critical role in defining a society's fundamental relationship with its foundation

104 *Id.* at 179–80. In order to prevail, the Hages must illustrate that (1) the federal government "cancelled the permit not to enforce the permit terms but rather to have access to the water and allotments for use by the Forest Service, elk, hunters, fishermen, or tourists;" and (2) "such use actually does devote the allotment to another 'public purpose' within the meaning of 43 U.S.C. § 1752(g)." *Id.* at 179.

105 Hage v. United States, 51 Fed. Cl. 570, 572 (2002).

106 *Id.* at 592.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

> ecosystem. In colonial America, for example, the expectation of property rights in land contributed to the development of America's capitalist economy, private property system, [and] republican political structure . . . . On a more global scale, the quest for water resources and rights has had similarly profound effects.[111]

Unlike land, a person cannot "own" water in its natural state.[112] Instead, federal and state governments are required to regulate water and other natural resources to ensure that allocation and conservation of such is executed in the best interest of the public.[113] Generally, resource allocation systems are based on principles of private property and policies that "define and allocate private rights of use, control, exchange, and expectation of gain."[114]

The regulation of water, as well as other types of real property, typically falls within state jurisdiction. Three legal doctrines for water allocation are observed in the United States: (1) the common law Riparian Doctrine;[115] (2) the Prior Appropriation Doctrine;[116] and (3) the Hybrid System (based on a combination of the Riparian and Prior Appropriation Doctrines).[117] Nevada, like the majority of states in the western United States, recognizes the

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111 Butler, *supra* note 2, at 927–28 (citations omitted).

112 1 WATERS AND WATER RIGHTS § 6.01(b) (Robert E. Beck ed., 1991) [hereinafter 1 WATER RIGHTS].

113 Getches, *supra* note 11, at 6–8.

114 Butler, *supra* note 2, at 934.

115 1 WATER RIGHTS, *supra* note 112, § 6.01(a). Under the Riparian Doctrine, the water in a river belongs only to the owners of land bordering the waterway. JOSEPH SAX ET AL., LEGAL SOURCES OF WATER RESOURCES: CASES AND MATERIALS 9 (3d ed. 2000) [hereinafter SAX ET AL., WATER RESOURCES]. When there is a shortage of water supply, riparian states "ration the water among the riparians according to a broad reasonableness standard." *Id.* The Riparian Doctrine has been adopted by "almost all of the states bordering on or east of the Mississippi River." *Id.* These states include: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. *Id.*

116 2 WATER RIGHTS, *supra* note 9, § 12.01. Under the Prior Appropriation Doctrine, "available water generally is allocated on a first-come, first-served basis to anyone (whether riparian or not) who puts the water to a beneficial offstream use." SAX ET AL., *supra* note 115, at 9. The Prior Appropriation Doctrine has been adopted by the arid inland states of the West. *Id.* These states include: Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. *Id.* at 9, 281.

117 Hybrid states are "[t]hose conterminous states that border the Pacific Ocean or straddle the Hundredth Meridian," and include: California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. SAX ET AL., *supra* note 115, at 9. Today, riparian rights remain important only in California, Nebraska, and Oklahoma. *Id.* The other hybrid states "initially adopted the common law but later abolished it, or essentially abandoned it, and appropriation dominates in them." *Id.*

Prior Appropriation Doctrine for the administration of water rights.[118]

A. Historical Development of the Prior Appropriation Doctrine Under State Law

In the early nineteenth century, the influx of settlers in the western United States gave rise to legal conflicts regarding the right to use water.[119] The common law Riparian Doctrine, recognized in the eastern United States, did not satisfactorily address the high demand for water in the arid western states, such as Nevada.[120] Indeed, the "hydrologic, climatic, and geologic conditions of the West" prompted westerners to seek a more fitting water allocation regime.[121] They found this regime in the Prior Appropriation Doctrine and its recognition of the first in time, first in right notion.[122] Under the Prior Appropriation Doctrine, "the date of the appropriation determines the appropriator's priority to use the water, with the earliest user having the superior right."[123] As such, senior appropriators "reasonably expect[] that *no part* of their rights [will] be lost to junior appropriators . . . [who will] bear the entire burden under the rule that first in time is first in right as between appropriators."[124]

The Prior Appropriation Doctrine "originally functioned as a simple, judicially enforced, system to divide small streams for a region sustained by mining, livestock grazing, and eventually irri-

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118 SAX ET AL., *supra* note 115, at 9. *See also* 1 WATER RIGHTS, *supra* note 112, § 8.02(b); United States v. Humboldt Lovelock Irr. Light & Power Co., 97 F.2d 38, 42–44 (9th Cir. 1938).

119 Lock, *supra* note 9, at 77. "Referring to the rough hewn western settler's deep felt importance of water . . . Samuel Clemens . . . noted that 'in the west whiskey is for drinkin' and water is for fightin'.'" Nicholas Targ, *Water Law on the Public Lands: Facing a Fork in the River*, 12 NAT. RESOURCES & ENV'T 14, 14 (1997).

120 Targ, *supra* note 119, at 14; Jones v. Adams, 6 P. 442, 447 (Nev. 1885); Reno Smelting, Milling & Reduction Works v. Stevenson, 21 P. 317, 322 (Nev. 1889) ("Our conclusion is that the common-law doctrine of riparian rights is unsuited to the condition of our state."); Twaddle v. Winters, 85 P. 280, 284 (Nev. 1906) (stating that the way of life in Nevada would be "strangled by the enforcement of the riparian principle").

121 Lock, *supra* note 9, at 77; *Twaddle*, 85 P. at 284 ("[T]he law of ownership of water by prior appropriation . . . is essential under our climatic conditions to the general welfare, and that the common law regarding the flow of streams . . . is unsuitable under our sunny skies, where the lands are so arid.").

122 2 WATER RIGHTS § 12.02(b). "The fundamental principles governing original acquisition of property rights reward the first laborer, first discoverer, and first captor." Butler, *supra* note 2, at 934. Indeed, "[b]y awarding property rights to the first possessor, the common law of property is giving 'significance and form to what might seem the quintessentially individualistic act: the claim that one has, by possession, separated for oneself property from the great commons of unowned things.'" *Id.* at 935 (quoting Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 88 (1985)) (internal quotation marks omitted).

123 Hage v. United States, 35 Fed. Cl. 147, 172 (1996).

124 Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L.J. 423, 433 (1995).

gation."[125] In the late twentieth century, however, the Doctrine transformed from a "simple allocation instrument [to] a mature mixed administrative-property regime."[126] Today, all western states, with the exception of Colorado, employ an administrative permit system to create and enforce water rights and priorities under the Prior Appropriation Doctrine.[127]

B. Acquiring a Vested Right in Water Under the Prior Appropriation Doctrine

Generally, "[o]ne acquires a property right (an appropriation) by taking the water of a natural stream and applying it to a 'beneficial use' in a non-wasteful manner with due diligence."[128] Thus, water rights under the Prior Appropriation Doctrine are contingent upon the *use* of the water, and are subject to limitations.[129] The *Hage* court reiterated this idea, noting that a water right only "vests" when the water is actually put to beneficial use.[130] The vested right commences either on the date that the appropriator puts the water to beneficial use, or when the appropriator begins work on a ditch or flume with the intent to divert the water under the Doctrine of Relation.[131] In Nevada, "a vested water right is one that was used continuously prior to 1905 to the present and is specifically protected by statute."[132] Furthermore, "[b]eneficial use [is] the basis, the measure and the limit of the right to the use

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125 A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 770 (2001) [hereinafter Tarlock, *Future of Prior Appropriation*].

126 *Id.* at 771.

127 A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 881 (2000) [hereinafter Tarlock, *Rule, Principle, or Rhetoric?*]. "State institutions 'originally evolved to support new appropriations of water and to protect those appropriations once achieved.' Now, the same institutions . . . continu[e] to protect vested water use rights." Jeffrey J. Clayton, *"Here is a Land Where Life is Written in Water": Re-Writing Western Water Law in the 21st Century*, 5 U. DENV. WATER L. REV. 525, 529 (2002).

128 SAX ET AL., WATER RESOURCES, *supra* note 115, at 98.

129 Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 269 (1990) [hereinafter Sax, *The Future of Water Law*]. Sax states that "[t]he very terminology of water law reveals . . . limitation[s on water rights]: terms such as 'beneficial,' 'non-wasteful,' 'navigation servitude,' and 'public trust' all import an irreducible public claim on waters as a public resource, and not merely as a private commodity." *Id.*

130 Hage v. United States, 51 Fed. Cl. 570, 592 (2002).

131 Irwin v. Strait, 4 P. 1215, 1215 (Nev. 1884). The Court specifically stated:

> In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam or ditch or flume, or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence.

Id.

132 Bradshaw v. United States, 47 Fed. Cl. 549, 552 (2000). *See also* NEV. REV. STAT. § 533.085 (2001).

of water."[133] A use is deemed beneficial if: (1) the purpose for the use is permissible; and (2) the use is not wasteful in amount.[134]

In addition, rights under the Prior Appropriation Doctrine are often limited to a right to divert and use a certain quantity of water.[135] In Nevada, however, a party may "appropriate *any* amount of water, including the *entire* flow of a spring, to be put to beneficial use."[136] Although appropriators may acquire an exclusive vested water right by demonstrating "beneficial use" of the diverted water,[137] such a right does not equate to sole private ownership.[138] Appropriators can possess a private property right to use the water, but the "ownership of the resource itself remains in the public."[139] Thus, vested water rights under the Prior Appropriation Doctrine can best be characterized as "usufructuary" as opposed to "possessory."[140] Although usufructuary water rights are not absolute property rights, they have "always been treated as transferable property rights,"[141] and continue to be "among the most valuable property rights known to the law."[142] This is partic-

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133 NEV. REV. STAT. § 533.035 (1995).

134 SAX ET AL., WATER RESOURCES, *supra* note 115, at 124. Historically, "irrigation, manufacturing, power production, and domestic and municipal" uses of water have been considered beneficial. Use of water for recreational or aesthetic purposes has been the source of controversy regarding beneficial use. *Id. See also* United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983). The court stated that "[t]here are two qualifications to what might be termed the general rule that water is beneficially used .... First, the use cannot include any element of 'waste' .... Second ... the use cannot be 'unreasonable' considering alternative uses of the water." *Id.*

135 2 WATER RIGHTS, *supra* note 9, § 12.02.

136 Hage v. United States, 35 Fed. Cl. 147, 173 (1996) (emphasis added). "Rights to the use of water are restricted to the amount which is necessary for irrigation and other beneficial purposes. A water user does not have the right to the entire flow of a stream or spring *unless* that entire flow is being put to beneficial use." *Id.* (emphasis added) (citing NEV. REV. STAT. § 533.030 (1995); NEV. REV. STAT. § 533.060 (1995)).

137 Twaddle v. Winters, 85 P. 280, 285 (Nev. 1906) (granting plaintiffs the "exclusive right to use" and the "exclusive use" of ditches and water at issue).

138 Bergman v. Kearney, 241 F. 884, 893 (D. Nev. 1917) ("Water is not capable of permanent private ownership; it is the use of water which the state permits the individual to appropriate. The water itself ... belongs to the public."). Essentially, "[w]hile the owner of a water right has a vested interest in that right, the right itself is something less than the full ownership of property because it is a right not to the corpus of the water but to the use of the water." Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 315 (D.C. Cir. 1938).

139 Lock, *supra* note 9, at 82–83 (quoting Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999)) (citation omitted).

140 Jan G. Laitos, *Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause*, 60 U. COLO. L. REV. 901, 911 (1989). Unlike a right of pure ownership, a "usufructuary" right is defined merely as a right to divert and use water in a beneficial manner. Margaret Z. Ferguson, *Instream Appropriations and the Dormant Commerce Clause: Conserving Water for the Future*, 75 GEO. L.J. 1701, 1711 (1987). *See also* Tarlock, *Rule, Principle, or Rhetoric?*, *supra* note 127, at 897 ("All water rights are usufructuary; they are rights to the use of water and do not confer ownership of a stream or aquifer.").

141 Tarlock, *Future of Prior Appropriation*, *supra* note 125, at 777.

142 Lock, *supra* note 9, at 81 (quoting White v. Farmers' Highline Canal & Reservoir Co., 43 P. 1028, 1030 (Colo. 1896)). *See also* Strait v. Brown, 1881 WL 4108, at *3 (Nev. 1881) ("There is ... no difficulty in recognizing a right to the use of water flowing in a stream as private property.").

ularly true in the western United States, where "[t]he belief that water is a form of property is deeply rooted in [western] traditions."[143]

Furthermore, mere ownership of land does not give rise to any water right in prior appropriation states like Nevada, as it does in jurisdictions that recognize the common law Riparian Doctrine. In fact, most appropriators, like the Hages, do not own the land adjacent to their water rights. In such cases, it is necessary to obtain "legal access across other peoples' land to get to the water in order to appropriate it, and to carry it to the place of use" via a ditch right-of-way or other type of easement.[144] Moreover, a vested right to divert water actually "carries with it *the right to go upon the land* through which the ditch or flume is conducted."[145]

C. Federal Statutes Related to Water Rights

Prior to the legitimization of appropriative rights through states' laws, "the federal government by silent acquiescence approved the rule—evidenced by local legislation, judicial decisions, and customary law and usage—'that the acquisition of water by prior appropriation for a beneficial use was entitled to protection.'"[146] In addition, for over a century, the United States has formally acknowledged the validity of vested water rights obtained pursuant to state law.[147] This recognition was codified in the Mining Act of 1866. In pertinent part, the Act states that:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.[148]

The 1866 Act expressly recognized Congress's intent to protect water and ditch rights established in western states under the Prior Appropriation Doctrine.[149] An amendment to the Act in 1870 (Placer Act of 1870), confirmed that those possessing vested

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143 David Abelson, *Water Rights and Grazing Permits: Transforming Public Lands into Private Lands*, 65 U. COLO. L. REV. 407, 419 (1994).

144 SAX ET AL., WATER RESOURCES, *supra* note 115, at 99.

145 Vansickle v. Haines, 1872 WL 3542, at *17 (Nev. 1872) (emphasis added).

146 State of Colo. Dept. of Natural Res. v. S.W. Colo. Water Conservation Dist., 671 P.2d 1294, 1305 (Colo. 1983) (quoting Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154 (1935)). *See also* Lock, *supra* note 9, at 80.

147 *See* Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 614 (1978) (private water rights on federal lands are governed by state and local law and custom).

148 The 1866 Mining Act, codified at 30 U.S.C. § 51 (1986 & Supp. 2002); 43 U.S.C. § 661 (1986 & Supp. 2002).

149 2 WATER RIGHTS, *supra* note 9, § 11.03(a).

water rights in the public domain would maintain priority over all subsequent appropriators, *including the federal government* and its grantees.[150] Finally, in the Desert Land Act of 1877, Congress legislated that the right to use water in certain western states and territories "depend[s] upon [a] bona fide prior appropriation [of water]," and that all surplus water "shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes *subject to existing rights*."[151] "Together, these statutes sanctioned the states' and territories' customary system for allocating water, thereby ensuring productive economic use of the western lands through security in water rights."[152]

In light of the effect of the 1866 Act and the 1870 Amendment, it is clear why the Hages' claim to vested water and ditch rights-of-way rested so heavily upon the Act. In essence, the United States' Toiyabe National Forest was created "subject to" the vested water rights and ditch rights-of-way of 1866 appropriators, including the Hages and their predecessors. Thus, under the Prior Appropriation Doctrine, the federal government may only obtain a *junior appropriative right* to the Hages' senior water rights.[153] This outcome is significant because it demonstrates the federal government's inability to secure a vested right in the water appropriated by the Hages without providing compensation or demonstrating that the Hages failed to put the water to a beneficial use.

D. Historical Protection of Senior Appropriators under Nevada Case Law

In the nineteenth century, the Nevada Supreme Court prioritized the protection of individual property rights over the interests of the public good. This emphasis on protecting private property

150 The Placer Act of 1870, ch. 235, 16 stat. 217 (portions of the Act survive at 30 U.S.C. § 52 (1986 & Supp. 2002), and at 43 U.S.C. § 661 (1986 & Supp. 2002)). The Placer Act states: "[A]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the [1866 Act]." *Id.* *See also* A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOOK IN LAW AND PUBLIC POLICY 107 (5th ed. 2002) [hereinafter TARLOCK ET AL., WATER RESOURCE MANAGEMENT] .

151 Desert Land Act, Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321 (1986 & Supp. 2002)) (emphasis added). *See also* Targ, *supra* note 119, at 15.

152 Targ, *supra* note 119, at 15.

153 *Id.* at 16. The federal government must undergo equivalent procedures and requirements as any other appropriator. *See, e.g.*, NEV. REV. STAT. § 533.010 (Michie 1995 & Supp. 2001); United States v. New Mexico, 438 U.S. 696, 702 (1978). Where water is needed only to serve a secondary purpose, "Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator." *Id.*

rights is evident in early Nevada case law. In an 1872 case, the Nevada Supreme Court proclaimed:

> But that the interests of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the state should be sacrificed to the weal of the many, is a doctrine which it is to be hoped will never receive sanction from the tribunals of this country.[154]

Even into the early twentieth century, when conservation of natural resources emerged as an important consideration, the court remained committed to protecting appropriators' vested water rights and their associated expectations. Basically, the court took the position that conservation "should be encouraged by all legitimate means, but not to the extent of depriving the owner of water already acquired by prior application to a beneficial use."[155]

As decided by the Supreme Court of Nevada, "ownership in water can be acquired by prior appropriation and use."[156] The court has recognized several beneficial uses of water. For example, the use of water for irrigation has been accepted as a useful purpose in Nevada. The court specifically stated that an appropriator may "secure[] the right to the use of sufficient water to irrigate such land . . . such use being a beneficial one."[157] Irrigation has been acknowledged as a beneficial use for agricultural purposes, as well as for the production of grass "to be gathered and cured as feed for stock."[158] In addition, the use of water for domestic purposes and stock watering have also been recognized as beneficial uses of water.[159] Nevada's early recognition of irrigation, stock watering, and domestic uses of water as beneficial purposes under the Prior Appropriation Doctrine will be important for the Hages' argument that alternative beneficial uses of the water existed. Furthermore, the Hages' position as the senior appropriator of the water will strengthen their argument of priority over the federal government in the takings phase of the litigation.

In addition, a string of cases demonstrate the Nevada Supreme Court's willingness to protect senior appropriator's rights

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154 Vansickle v. Haines, 1872 WL 3542, at *6 (Nev. 1872).

155 Tonkin v. Winzell, 73 P. 593, 595 (Nev. 1903).

156 Mosier v. Caldwell, 1872 WL 3550, at *1 (Nev. 1872).

157 Rodgers v. Pitt, 129 F. 932, 942 (D. Nev. 1904). *See also* Jones v. Adams, 6 P. 442, 444 (Nev. 1885) ("[T]he right to use water for the purpose of irrigation [has been] expressly recognized.").

158 *Rodgers*, 129 F. at 942 (quoting Smyth v. Neal, 49 P. 850, 851 (Or. 1897)).

159 Bliss v. Grayson, 56 P. 231, 235–41 (Nev. 1899). In *Bliss*, the court stated that both parties in the litigation had "acquired a right to the use of the waters of the Humboldt River for beneficial purposes." *Id.* at 240. In their complaints, both parties argued a valid appropriation for irrigation, *watering stock*, and for *domestic purposes*. *Id.* at 235–36.

over junior appropriators,[160] the federal government, riparian proprietors,[161] and all others. The court has protected these rights regardless of whether the appropriation was made directly or through the agency of another.[162] If, however, the senior appropriator only appropriated a portion of the water in a stream or other watercourse, or only used the water seasonally, others could validly claim the residue or the entirety of the water when it was not being used.[163] According to the Nevada Supreme Court, the Prior Appropriation Doctrine confers a duty upon the federal and state governments to protect vested water rights.[164] As stated by the court, "[i]f the law were otherwise the right to the use of water would rest upon a very frail foundation."[165] The emphasis on protecting the rights of senior appropriators is still observed today.

Though over one hundred years have passed since the inception of the Prior Appropriation Doctrine, it "remains deeply entrenched in the states and in the courts."[166] Furthermore, as

160 *See, e.g.*, Lobdell v. Simpson, 1866 WL 1628 (Nev. 1866) (holding that the first appropriator of water on public land is entitled to the full quantity appropriated by him); Barnes v. Sabron, 1875 WL 4031, at *8 (Nev. 1875) (holding that the first appropriator of Currant Creek waters has the right to insist that the water be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use); Jerrett v. Mahan, 17 P. 12, 15–16 (Nev. 1888) ("If plaintiff first appropriated the waters in question . . . the law gave him the right to continue their exclusive use."); Roeder v. Stein, 42 P. 867, 868 (Nev. 1895) ("[I]f the appropriation has been made before others acquire rights in the stream, after that no change can be made to their detriment."); Rodgers v. Pitt, 129 F. 932, 942 (D. Nev. 1904) (Defendant was not entitled to any waters of the Humboldt river. "To hold otherwise would be to take away from complainant, whose predecessors in interest had made a prior appropriation and diverted the water to a beneficial use, the quantity of water to which he was entitled, and give to the defendants . . . water to which they never were entitled."); Doherty v. Pratt, 124 P. 574 (Nev. 1912) (holding that junior appropriators may not interfere with a prior appropriator's rights or dam, unless the interference is necessary—and then, the interference may not injure the rights of the prior appropriator); Campbell v. Goldfield Consol. Water Co., 136 P. 976 (Nev. 1913) (holding that a party who has not made an appropriation of water has no right as against an existing appropriator).

161 *Bliss*, 56 P. at 241 ("It is now the settled doctrine of this state that a person can acquire the right to use the waters flowing in a stream . . . by appropriation, as against riparian proprietors or other persons.").

162 Prosole v. Steamboat Canal Co., 140 P. 720, 723 (Nev. 1914). *See also* Pincolini v. Steamboat Canal Co., 167 P. 314, 314 (Nev. 1917) ("[P]laintiffs had the same rights to water transported in the ditch owned by appellant, by reason of prior appropriation in themselves and their predecessors in interest, as would be the case were they appropriators direct from a natural stream.").

163 Barnes v. Sabron, 1875 WL 4031 (Nev. 1875). The court stated:

> We think the rule is well settled, upon reason and authority, that if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person, or persons, may not only appropriate a part, or the whole of the residue and acquire a right thereto, as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him.

Id. at *14.

164 Reno Smelting, Milling & Reduction Works v. Stevenson, 21 P. 317, 321 (Nev. 1889) ("The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and state governments to protect.").

165 Ronnow v. Delmue, 41 P. 1074, 1075 (Nev. 1895).

166 Tarlock, *Future of Prior Appropriation*, *supra* note 125, at 773.

water law becomes more complicated, the "strict enforcement of water rights assumes an even greater importance."[167] Overall, case law demonstrates the Nevada Supreme Court's willingness to protect vested water rights, which is a significant consideration when takings disputes involving water arise. Without question, this will be a critical point when the court considers the Hages' takings claims, as Nevada courts have traditionally encouraged the protection of senior appropriators' vested water rights.

E. Prior Appropriation Doctrine Protects Water Rights Holders' Expectations

"The core idea of prior appropriation is the protection of investment-backed expectations from the risks of variable water years and perhaps now global climate change."[168] Appropriative rights are based on priority and originated in the "first in time, first in right" concept. In fact, the notion of priority is a "foundational principle of property law and has many powerful justifications."[169] The protection of property rights holders' expectations continues to be the "best justification for priority" under the Prior Appropriation Doctrine.[170]

Possessors of vested water rights "need clear, consistent rules that do not invite challenges to claimed entitlements" of appropriated water.[171] Although many courts have interpreted the primary purpose of water allocation schemes as the creation of "certain, exclusive property rights . . . the real function should be to *protect the expectation of the water users* to a sufficient supply to support the underlying beneficial use."[172] Indeed, a system of priority protects legitimate expectations, as the Prior Appropriation Doctrine "promotes investment by giving security of use."[173]

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167 *Id.*

168 Tarlock, *Rule, Principle, or Rhetoric?*, *supra* note 127, at 884.

169 *Id.* at 885.

170 *Id.*

171 *Id.* at 886. *See also* Tarlock, *Future of Prior Appropriation*, *supra* note 125, at 776 ("Any water allocation regime requires a set of reasonably predictable property rules."); Butler, *supra* note 2, at 936 ("The importance to property law of promoting certainty is evidenced by its impact on a wide range of laws affecting natural resources, including . . . water.").

172 Tarlock, *Rule, Principle, or Rhetoric?*, *supra* note 127, at 908 (emphasis added).

173 *Id.* at 886 (quoting CHARLES J. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM 6 (National Water Commission, Legal Study No. 5, 1991)). The United State Supreme Court also recognized the importance of affording security to appropriators in *Arizona v. California*, 460 U.S. 605, 620 (1983). The Court stated: "The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights." *Id. See also* RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 83, 155 (1998).

IV. Constitutional Protections Afforded to Property and Water Rights

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[174]

Like many other rights, property rights are included under the United States Constitution's umbrella of protections. Indeed, the Constitution provides for two significant means of protecting one's property. First, the Due Process Clauses of the Fifth and Fourteenth Amendments afford a broad protection of property rights. Second, the Takings Clause of the Fifth Amendment provides just compensation for real property—a more narrow facet of the many property interests that have developed over time. While these avenues of protection differ in scope and purpose, both require that a court "first ascertain the existence and nature of the underlying property interest and then determine whether the government's action with respect to that property interest has violated constitutional requirements."[175]

A. The Due Process Clause

The Fifth Amendment of the United States Constitution provides: "No person shall . . . be deprived of . . . property, without due process of law."[176] The later-enacted Fourteenth Amendment extends an individual's due process protection to State activity.[177] The United States Supreme Court has recognized both substantive and procedural protection under the Constitution. Pursuant to these Amendments, a Due Process claim will succeed where it can be shown that government action has worked a deprivation of a "protected property interest without adequate procedural safeguards."[178] If a court finds this to be the case, the regulation or activity complained of will be invalidated as unconstitutional.

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174 Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

175 Stephen J. Massey, Note, *Justice Rehnquist's Theory of Property*, 93 Yale L.J. 541, 542 (1984).

176 U.S. Const. amend. V.

177 U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of . . . property, without due process of law.").

178 Massey, *supra* note 175, at 544. *See also* Sax et al., Water Resources, *supra* note 115, at 111 ("[W]ater rights are property rights protected by the due process clause of the federal constitution.").

Historically, the Supreme Court has divided procedural due process claims into three distinct categories: "(1) entitlements based on the fulfillment of criteria under which the government provides a benefit; (2) entitlements based on the inapplicability of the exclusive conditions under which the government may deprive the beneficiary of the benefit; and (3) substantial property interests based on traditional criteria of ownership."[179] Significantly, only the third category merits protection under both the Due Process Clause and the Fifth Amendment's Takings Clause.[180] *Hage*, however, does not address potential violations of due process rights.

B. The Takings Clause

The Fifth Amendment to the United States Constitution states that private property shall not be taken for public use without just compensation.[181] This right to compensation for a taking under the Fifth Amendment is recognized as one of the "principal foundations of American liberty, and it is no less fundamental than the rights secured by the First Amendment or the other amendments of the Bill of Rights."[182] According to the United States Supreme Court: "The Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[183]

Like the Due Process Clause, the Takings Clause was made applicable to the states via the Fourteenth Amendment.[184] Unlike the Due Process Clause, however, when a court finds a regulation unconstitutional pursuant to the Takings Clause, the remedy is just compensation, not invalidation of the regulation. Thus, "[n]ot all takings are unconstitutional; it is the absence of just compensation that makes a taking unconstitutional."[185]

Property that cannot be taken without just compensation includes "common law property, such as realty and personalty, and its ancillary forms."[186] In addition, the Supreme Court has fre-

179 Massey, *supra* note 175, at 543 (citations omitted). *See* Parratt v. Taylor, 451 U.S. 527 (1981); Bishop v. Wood, 426 U.S. 341 (1976); Mathews v. Eldridge, 424 U.S. 319 (1976).

180 Massey, *supra* note 175, at 543–44.

181 U.S. CONST. amend. V.

182 Stearns Co. v. United States, 34 Fed. Cl. 264, 271 (1995). *See also* Dolan v. City of Tigard, 512 U.S. 374 (1994).

183 Armstrong v. United States, 364 U.S. 40, 49 (1960). *See also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978).

184 Chi., Burlington, & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897).

185 Susan M. Stedfast, *Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management*, 29 ENVTL. L. 881, 884–85 (1999).

186 Massey, *supra* note 175, at 544–45 (citations omitted).

quently recognized that property in the context of the Takings Clause includes the entire "group of rights inhering in the citizen's [ownership]."[187] Though some takings cases do not involve an actual dispute over the ownership of property, many takings cases do.[188] The litigants in those cases, like the Hages in *Hage v. United States*, seek clarification of the precise essence of the underlying property right. In such cases, "the claimant must establish that prior law had created reasonable expectations that the contested action defeated."[189] Thus, it is necessary to establish a property right before a court can consider whether a taking has occurred.

Generally, a taking under the Fifth Amendment occurs in one of two sets of circumstances. In the first instance, a taking can occur when the government directly intrudes on private property by physically taking possession of it, or by asserting title or some other dominion over it ("physical taking").[190] In the second instance, a taking can occur when the government regulates property so extensively that a constructive possession of the property results ("regulatory taking").[191] To qualify as a regulatory taking, it is necessary that the "government regulation lowers the value or interferes with the use of property interests without actually taking physical possession or usurping legal title."[192] In regulatory takings analyses, two lines of cases[193] have emerged: (1) partial-takings cases;[194] and (2) total-takings cases.[195]

1. Takings Disputes Involving Water

One might assume that a contested governmental activity would conveniently fit into either the physical taking category or the regulatory taking category. However, Supreme Court precedent is not totally clear on the matter, making the question of

187 *Penn Cent.*, 438 U.S. at 142 (Rehnquist, J., dissenting) (citing United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)).

188 Massey, *supra* note 175, at 545. "When private loss and governmental involvement are clear, the disputed issue is whether the loss that the government has inflicted amounts to a 'taking' for which it must pay compensation." *Id.*

189 *Id.*

190 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). *See also* Stedfast, *supra* note 185, at 884; GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 4.5 (2002).

191 Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The Supreme Court first recognized the term "regulatory taking" in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 651 (1981). *See also* Stedfast, *supra* note 185, at 884; Nancy Kubasek, *From the Environment*, 31 REAL EST. L.J. 157, 157 (2002).

192 COGGINS & GLICKSMAN, *supra* note 190, § 4.5.

193 Kubasek, *supra* note 191, at 157.

194 Partial takings cases are governed by the analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

195 Total takings cases were first recognized in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

whether a specific governmental action gives rise to a taking under the Fifth Amendment difficult to answer. The answer becomes even less clear when the property right at issue is water.[196]

The Hages' claim for compensation under the Takings Clause involves vested property interests in water, ditch rights-of-way, and adjacent forage on public lands.[197] Their claim relies upon the split-estate theory. Under this theory, the federal government maintains title to the public lands, but various types of private interests, such as water rights, can be severed from the public domain and acquired by private property owners.[198] Basically, "the acquiescence of the federal government in the prior appropriation of western public lands and resources has conferred a property interest on those who occupied and made beneficial use of those resources."[199]

2. Competing Ideologies: The Role of Expectations in Takings Involving Water

A discussion of water rights would not be complete without noting the numerous limitations imposed on those possessing vested water rights. Two competing traditions in American legal history shape property rights expectations: (1) the republican-positivist tradition, and (2) the federalist-natural law tradition. An analysis of these traditions helps to explain the relationship between limitations on property rights and the existing expectations of property owners regarding those rights in the context of takings jurisprudence.[200]

a. Republican-Positivist Tradition and the Public Trust Doctrine

The republican-positivist tradition places emphasis on "the relationship between the individual and the civil community and holds that all claims to property are subject to an implied public interest limitation."[201] Supporters of the republican-positivist tra-

196 Lock, *supra* note 9, at 110.

> For the better part of this century, a landowner wishing to sue the government for taking his property without just compensation has faced an uncertain task. In analyzing the taking of a water right, the application of a real property based takings framework to the proscription of a usufructuary right only compounds this uncertainty.

Id. *See also* COGGINS & GLICKSMAN, *supra* note 190, § 4.5 ("The confusion can be exacerbated . . . because the original or paramount government ownership often negates or curtails the asserted private property interest at issue.").

197 Hage v. United States, 35 Fed. Cl. 147, 150 (1996).

198 Hage v. United States, 51 Fed. Cl. 570, 573 (2002). *See also* Hage, *supra* note 31.

199 Patrick Austin Perry, *Law West of the Pecos: The Growth of the Wise-Use Movement and the Challenge to Federal Public Land-Use Policy*, 30 LOY. L.A. L. REV. 275, 296 (1996).

200 A. Dan Tarlock, *Local Government Protection of Biodiversity: What is its Niche?*, 60 U. CHI. L. REV. 555, 558 (1993) [hereinafter Tarlock, *Local Government*].

201 Mandelker, *supra* note 17, at 226.

dition focus more on the furtherance of the public good than on preservation of private property rights. This theoretical focus has persisted even when its practical effect has been increased regulation of property rights and devaluation of expectations associated with those rights. Water is seen "as a necessary and common [media] for community development . . . [and has] been held subject to the perceived societal necessities of the time and circumstances."[202]

The Public Trust Doctrine, which emerged from Roman law and English common law,[203] was incorporated in United States law when the original thirteen states adopted English common law.[204] Today, this doctrine "recognizes a pre-existing right of the State in the flow of its rivers."[205] Thus, private interests in water have been recognized as being "subject to a servitude and a trust in favor of the public."[206] The basic argument promulgated by supporters of this doctrine is that private rights in water have never existed, in spite of longstanding contrary assumptions. The rationalization is that water has been a part of the public trust from "time immemorial."[207] Some legal theorists and commentators have even argued that the Public Trust Doctrine should convert into an expansive easement on all private property.[208] The logical implication of such an easement would be a substantial limitation on the scope of the Takings Clause.

b. Federalist-Natural Law Tradition and the Wise-Use Movement

"The federalist-natural law tradition holds that property rights generate firm expectations entitled to judicial protection from excessive government regulation."[209] Proponents of this theory "emphasize the importance of an unencumbered right to use private property, and guard this right with the same fervor as those who support individual civil freedoms."[210] In contrast to the republican-positivist tradition, supporters of this tradition en-

202 Sax, *The Future of Water Law*, *supra* note 129, at 269.

203 Andrew H. Sawyer, *Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust*, 50 OKLA. L. REV. 311, 313 (1997). *See also* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 284 (1997); Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 718 (1983). The Supreme Court first recognized the Public Trust Doctrine in 1892. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436–37 (1892).

204 Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 VT. L. REV. 81, 84 (1995).

205 Sax, *The Future of Water Law*, *supra* note 129, at 269.

206 *Id.*

207 James S. Burling, *Protecting Property Rights in Aquatic Resources After* Lucas, 349, 372 (A.L.I.-A.B.A. Course of Study, June 11, 1997).

208 *Id.* at 373.

209 Mandelker, *supra* note 17, at 226.

210 Archer & Stone, *supra* note 204, at 81.

courage the entitlement-to-property theory, in which takings law is organized "under the premise that the protection of private property rights is the dominant purpose in taking[s] law."[211] Furthermore, they argue that the Public Trust Doctrine should not be used to undermine traditional and commonly understood expectations of private property rights.[212] If a property right, such as the Hages', was created prior to the creation of the public trust, later application of a newly defined public trust would carry with it momentous takings implications.[213] In essence, when a takings dispute arises, an argument in favor of the public trust should not be used to extinguish property interests acquired before the public trust even existed. The positions assumed by the federalist-natural law tradition were later expounded upon with the creation of the Wise-Use movement.

The Wise-Use movement, which has been described as a "volatile mix of traditional conservative ideology blended with some revolutionary proposals to open public lands to greater private exploitation,"[214] takes the federalist-natural law perspective to an extreme level. While Wise-Use supporters may advocate a more hard-line interpretation of the federalist-natural law theory, both perspectives support decreased regulation and natural resource limitations. In addition, both perspectives promote increased protection of individuals' expectations regarding their private property rights.

Viewing property rights from either the federalist-natural law tradition or Wise-Use perspective, one could argue that differences in land rights and water rights should not lead to a devaluation of an individual's expectation in protecting a property interest in water. It follows that supporters of this argument have claimed that increased government regulation of public lands constitutes a taking under the Fifth Amendment when economic activities and expectations of public land users are negatively impacted.[215]

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211 Mandelker, *supra* note 17, at 228.

212 Burling, *supra* note 207, at 374.

213 *Id.* at 375.

214 Perry, *supra* note 199, at 276 (quoting LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHT MOVEMENT 11 (John D. Echeverria & Raymond Booth Eby eds., 1995)). The Wise-Use movement is represented by a "coalition of property owners, natural resource industries, trade associations, and conservative political interest groups, all of whom profess an ideological and economic interest in the continued utilization of public lands" and resources. *Id.*

215 CHARLES F. WILKINSON & MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 54 n.269 (1987).

V. DISCUSSION

A. The Future of Vested Water Rights and Takings Jurisprudence

As the preceding background suggests, there are various policy and legal arguments that can be made regarding water rights and takings. Obviously, water is a uniquely different resource than land. Those differences, however, should not require the application of different tests when takings issues arise. The *Hage* court stated: "The property involved in this case is atypical of most takings litigation. It is not land or minerals at a specific time, but rather the usage of water which ebbs and flows throughout the year."[216] Water can be distinguished from land in a number of ways, including its usufructuary nature, its natural flow,[217] and the public's continued interest in its allocation and conservation. Traditionally, appropriators did not have a right to waste water,[218] create a nuisance with it, or even let it sit idly. These policies still hold true today. For example, a cessation in beneficial use by a right holder can result in the termination of the right itself.[219] "Nevertheless, the right to appropriate water can be [a] property right."[220] In fact, when a water right vests, "it becomes a constitutionally protected property interest which can be sold, leased, or otherwise alienated."[221]

As a result of the inherent differences between land and water, takings cases involving water present a number of unique constitutional considerations.[222] As previously noted, some of the questions that arise regarding these constitutional considerations are: (1) What is the scope of water rights and to what extent are they constitutionally protected?; and (2) Are the standards for determining when property has been taken the same for water as for land? These questions are very important to rights holders in regions where water is a scarce commodity. The answers to these questions will likely dictate the future of takings cases where water rights are at issue. The next section of this comment offers answers to those questions.

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216 Hage v. United States, 51 Fed. Cl. 570, 573 (2002).

217 Hage v. United States, 35 Fed. Cl. 147, 172 (1996). "Unlike real property, water is only rarely a fixed quantity in a fixed place." *Id.*

218 *See* United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983) (stating that the use of water cannot include any waste or be unreasonable).

219 *See In re* Manse Spring, 108 P.2d 311, 315 (Nev. 1940) (holding that an appropriator with a vested water right can lose that right by voluntarily abandoning it).

220 *Hage*, 35 Fed. Cl. at 172.

221 Lock, *supra* note 9, at 81–82 (quoting D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 ENVTL. L. 1, 5 (1991)).

222 SAX ET AL., WATER RESOURCES, *supra* note 115, at 316. *See also Hage*, 35 Fed. Cl. at 172 ("Flowing water presents unique ownership issues because it is not amenable to absolute physical possession.").

The position taken in this comment is that the scope of vested water rights and corresponding ditch rights-of-way should be interpreted extremely broadly. Indeed, unless courts afford water rights significant protection under the Takings Clause, the security of investment and priority guaranteed by the Prior Appropriation Doctrine will be compromised. In addition, the reasonable expectations of senior appropriators regarding property interests in water will be defeated unless water rights are protected.[223] As shown above, inherent rights and expectations do in fact exist regarding the use of water, and like any other property right, these rights should be protected. As such, applying the existing takings framework developed in land disputes to water disputes may be the most effective way of protecting both water rights and senior appropriators' expectations. From the holdings thus far in *Hage*, it appears that the court does intend to protect the Hages' vested water rights under such a framework.

B. What the Court in *Hage* Should Do

In *Hage*, the United States Court of Claims rejected the long-standing argument that a usufructuary right in water is subject to lesser constitutional protection than a property interest in land. Specifically, the court held:

> *Amici* provides no reason within our constitutional tradition why water rights, which are as vital as land rights, should receive less protection [than land rights]. This is particularly true in the West where water means the difference between farm and desert, ranch and wilderness, and even life and death. This court holds that *water rights are not "lesser" or "diminished" property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution.*[224]

This language is a strong indication that the court will ultimately grant the Hages' water rights significant protection under the Takings Clause. If indeed the Hages meet their burden of proving a valid "beneficial use" of the water, and the court remains consistent with the above holding, the probable result is that the takings standards applied in the next phase of the case will be the same as if land had been at issue. If that is the case, the *Hage* court is

223 Grant, *supra* note 124, at 461 ("Viewed loosely, the longstanding appropriation doctrine policy of security of investment leaves no room for the public trust doctrine to curtail water rights without just compensation.").

224 Hage v. United States, 35 Fed. Cl. 147, 172 (1996) (emphasis added). *See also* David Abelson, *Water Rights and Grazing Permits: Transforming Public Lands into Private Lands*, 65 U. COLO. L. REV. 407, 407 (1994) ("From the Zuni and Tohono O'odham Indians, to James Marshall's gold strike on January 24, 1848, to the great cattle drives of the 1800's, *water has been critical for survival and economic viability in the West.*") (emphasis added) (citations omitted).

likely to find that many of the government's actions against the Hages were constitutionally impermissible.

Thus far, the court has recognized the Hages' vested property rights in both the water and 1866 Act ditches.[225] As noted, the court has previously recognized those rights as equally important as rights vested in land.[226] Before addressing the Hages' takings claims, however, it is necessary to demonstrate that the Hages, after the revocation of their grazing permit, would in fact have been able to put their water to beneficial use if the federal government had not either diverted it, or hindered access to it.[227]

1. Beneficial Use of the Hages' Water

For over one hundred years, the Hages and their predecessors put the appropriated water and ditch rights-of-way to beneficial use by providing a water supply to cattle in conjunction with a ranching operation.[228] When the federal government validly revoked the Hages' permit to graze cattle on the public domain,[229] the use of the water for that purpose no longer existed. Thus, the question remains: if the federal government had not denied the Hages access to the water, could the Hages have put the water to *another* beneficial use? It appears from the available facts of this case that the Hages could have readily done so.[230] In fact, there are at least two other ways in which the Hages could have made beneficial use of the water.

Initially, it is important to point out that the Hages used the water for "irrigation, stock watering and *domestic purposes*,"[231] even prior to the revocation of the grazing permit. Accordingly, the domestic purpose remained a beneficial use after the revocation of the grazing permit. Additionally, the Hages could have continued to water stock on the Ranch. As discussed above, the Nevada Supreme Court has recognized that the use of water for domestic purposes and for stock watering are beneficial uses.[232] Therefore, the Hages had at least two, and possibly three, beneficial uses for the water.

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225 Hage v. United States, 51 Fed. Cl. 570, 591 (2002).

226 *Hage*, 35 Fed. Cl. at 172.

227 *Hage*, 51 Fed. Cl. at 592 ("Essentially, the [Hages] must demonstrate they could have used the water if the government had not deprived them of access to prevent them from using the water. The [Hages] have a right to the water so long as they can put it to beneficial use.").

228 *Hage*, 35 Fed. Cl. at 153.

229 *Id.* at 166–67.

230 *See* Jeffrey J. Weschsler, Note, *This Land is our Land: Ranchers Seek Private Rights in the Public Rangelands*, 21 J. LAND RESOURCES & ENVTL. L. 461, 484 ("[T]he value of Hage's water right was not completely eviscerated by the revocation of the grazing permit because Hage retains legal options for the use of his water.").

231 *Hage*, 35 Fed. Cl. at 153 (emphasis added).

232 Bliss v. Grayson, 56 P. 231, 235–41 (Nev. 1899).

In addition, it is likely that the Hages could have made a beneficial use of the water by selling it. Under Nevada's system of appropriation, state agencies are permitted to appropriate water for instream flows.[233] Under the current permit system, however, those agencies typically have very low junior priorities and are subject to the senior's appropriation rights.[234] Thus, Nevada, as well as other states utilizing the Prior Appropriation Doctrine, allow for the "purchase or leasing of existing water rights for instream flow purposes."[235] In addition, "willing-buyer, willing-seller acquisition programs" exist through which private nonprofit organizations or governmental agencies buy or lease existing senior water rights.[236] Therefore, the Hages, as senior appropriators with vested water rights, could have sold or leased their water rights. Assuming that the Hages are able to demonstrate that another beneficial use for the water existed, potential physical and regulatory takings arguments merit discussion.

2. Analysis of the Hages' Takings Claims under the Existing Framework Applied in Land Cases

a. Physical Takings

Courts deciding cases involving permanent physical occupations of property apply the standard set forth by the United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*[237] In *Loretto*, the Court required that a building owner be compensated for two cable boxes and corresponding wires that were affixed to the roof of her building and alongside the exterior walls pursuant to a local New York ordinance.[238] As a result of *Loretto*, a permanent physical occupation of private property is now deemed a *per se* taking under the Fifth Amendment.[239] The Court recognized that in this type of case, "the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than per-

233 SAX ET AL., WATER RESOURCES, *supra* note 115, at 114. When appropriation results in an inadequate supply of flowing water, wildlife is negatively impacted. As a result, "states have created mechanisms that allow for the ownership of instream water rights." Jack Sterne, *Instream Rights and Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 203 (1997). Whereas traditional water rights grant the appropriator the right to "remove" a certain quantity of water for a beneficial use, "instream rights entitle the owner to have a quantity of water left in place to support wildlife and recreational uses." *Id.*

234 SAX ET AL., WATER RESOURCES, *supra* note 115, at 114.

235 *Id.*

236 *Id.* at 115.

237 458 U.S. 419 (1982).

238 *Id.* at 422, 441.

239 "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

haps any other category of property regulation."[240] Therefore, when the government physically occupies property, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[241]

In addition, the Supreme Court's holding in *United States v. Causby*[242] suggests that *Loretto*'s bright-line rule is not limited to physical occupations of land. In *Causby*, the Court found a physical taking of an easement in property in the context of airspace. The Court held that the United States committed "an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it" when it flew its airplanes frequently and directly above the plaintiff's land.[243] The Court's application of land takings jurisprudence to airspace supports the argument that such a framework may also be applicable to water.

A second category of physical takings cases does not recognize a *per se* rule, but nevertheless requires just compensation for some temporary physical invasions.[244] In *Kaiser Aetna v. United States*, the Court required that a landowner be compensated for the government's imposition of a navigational servitude that required public access to a pond.[245] The landowner in *Kaiser Aetna* reasonably relied on government consent when he connected the pond to the navigable water at issue. The Court's emphasis was on the landowner's right to exclude, which is historically "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[246] The Court held that the servitude "[would] result in an actual physical invasion of the privately owned marina . . . . And[,] even if the Government physically invade[d] only an easement in property, it must nonetheless pay just compensation."[247]

As the Court emphasized in both *Loretto* and *Kaiser Aetna*, "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his

240 *Loretto*, 458 U.S. at 441.

241 *Id.* at 435 (citing Andrus v. Allard, 444 U.S. 51, 65–66 (1979)).

242 328 U.S. 256 (1946).

243 *Id.* at 265.

244 *Loretto*, 458 U.S. at 435 n.12 ("The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude."). Cases involving temporary physical invasions are not afforded protection via a *per se* takings rule as denoted in *Loretto*, but rather require a more complex balancing test to determine if a taking has occurred. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82–84 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979).

245 *Kaiser Aetna*, 444 U.S. at 180.

246 *Id.* at 176.

247 *Id.* at 180.

property."[248] While the *Hage* case involves a property interest in water as opposed to land, the Hages' expectations involving their rights are not considerably different from those in *Loretto* and *Kaiser Aetna*. Water rights, as mentioned above, are usufructuary in nature and are technically "owned" by the public.[249] A reasonable expectation still remains, however, that the government and third parties will not be permitted to physically occupy, invade, or completely deny the rights holder use of the water itself. An examination of the facts in *Hage*, using the standards set out in *Loretto* and *Kaiser Aetna*, shows that the government has arguably physically "taken" the Hages' water rights in two distinct respects.

The first of the two potential physical takings occurred when the Forest Service physically denied the Hages access to the water. The Forest Service diverted the flow of water in the Meadow Canyon allotment, and subsequently used the new water source as a domestic water supply for the Guard Station located on the public domain.[250] The government's re-routing of water effectively denying an appropriator's vested rights constitutes a *per se* permanent physical taking under *Loretto*. In order to refute this allegation, the government will have to prove that the reason for re-routing the water was to prevent waste as a result of water contamination downstream,[251] or for some other legitimate reason.

The second of the two potential physical takings occurred when the Forest Service denied the Hages access to water, which had always been available to them through the 1866 Act ditches. The government physically barred the Hages from going on federal land to access ditch rights-of-way that served as the only means of accessing the water. As the *Hage* court articulated in 2002, such interference gives rise to a physical takings claim.[252]

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248 *Loretto*, 458 U.S. at 436. *See also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1228 (1967).

249 Bergman v. Kearney, 241 F. 884, 893 (D. Nev. 1917) ("[W]ater itself . . . belongs to the public.").

250 Hage v. United States, 35 Fed. Cl. 147, 155 (1996).

251 *Id.* Specifically, the Forest Service claimed that Meadow Spring was contaminated. *Id.* The facts do not indicate whether further evidence was brought forth to validate this claim. In addition, however, the Forest Service failed to obtain the State Engineer's approval for this change in diversion. *Id.* This fact potentially suggests that the Forest Service's failure to observe procedure evidences bad faith.

252 Hage v. United States, 51 Fed. Cl. 570, 580 n.13 (2002). Specifically, the Hages claim that the "government took their property when it prevented them access to their 1866 Act ditches." *Id.* at 580. The court responded that this claim "is a physical takings claim because [the Hages] argue[d] the government . . . physically barred them from the land, with threat of prosecution for trespassing if they enter[ed] federal land to maintain their ditches." *Id.* at 580 n.13. In addition, the court noted that this was "not an idle threat," as "the government unsuccessfully prosecuted Mr. Hage for maintaining the White Sage Ditch." *Id.* The Ninth Circuit overturned the government's initial conviction of Mr. Hage in this instance. *Id.*; United States v. Seaman, 18 F.3d 649 (1994).

The court emphasized that a "physical taking occurs when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a 'practical ouster of [the owner's] possession.'"[253] Because this rationale could readily be applied to the facts in *Hage*, it would appear that the *Hage* court will likely find a taking as to this issue.

Another argument put forth by the Hages was that a physical taking occurred when the federal government permitted non-indigenous elk and other wildlife to drink the water, as well as forage on the land adjacent to the ditch rights-of-way.[254] The United States Court of Federal Claims addressed a similar takings issue in *Bradshaw v. United States*.[255] In *Bradshaw*, the plaintiffs alleged a taking when the Bureau of Land Management allowed horses to forage on their grazing allotments as well as drink from springs in which the plaintiffs claimed to possess vested rights.[256] The court sought guidance from the Federal Circuit, the Tenth Circuit, and the Supreme Court.[257] Ultimately, the court held that the federal government is not liable for damage or depletion of privately owned rights on federal land caused by horses or other animal trespassers.[258] Given the factual similarities between *Hage* and *Bradshaw*, it is likely that this physical takings claim will fail.

Alternatively, the Hages might argue a *temporary* physical taking occurred when the government allowed non-indigenous elk to drink from water in the public domain in which the Hages possessed vested water rights. In fact, this argument is somewhat analogous to that posed in *Kaiser Aetna*. Like the plaintiff in *Kaiser Aetna*, the Hages' rights were subjected to temporary physical invasions. However, the argument as presented in this case is rather weak. The weakness lies in the fact that "the right to exclude" has never been associated with vested water rights. In light of the *Kaiser Aetna* distinction, as well as the precedent set by *Bradshaw*, it would be difficult for the Hages to show that the federal government had a duty to keep elk and other wildlife from

253 *Hage*, 51 Fed. Cl. at 576 (quoting Northern Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1879)).

254 Hage v. United States, 35 Fed. Cl. 147, 156 (1996).

255 47 Fed. Cl. 549 (2000).

256 *Id.* at 554.

257 *Id.* at 553–54. *See* Alves v. United States, 133 F.3d 1454 (Fed. Cir. 1998); Mountain States Legal Found. v. Hodel, 799 F.2d 1423 (10th Cir. 1986). In *Mountain States*, the plaintiffs alleged a taking when the Bureau of Land Management failed to prevent a trespass of wild horses on the plaintiffs' land. The court held that the wild horses were not "instrumentalities of the federal government whose presence constitutes a permanent governmental occupation" of the plaintiffs' property. *Id.* at 1428. The court based its holding on a long line of cases where courts have determined that damage to private property by protected wildlife does not constitute a compensable taking. *Id.* at 1428–31. *See also* Kleppe v. New Mexico, 426 U.S. 529 (1976).

258 *Bradshaw*, 47 Fed. Cl. at 554.

drinking water and foraging on land that is considered part of the public domain.

b. Regulatory Takings

Over the last century, government regulation of private property has increased dramatically. In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court recognized the necessity of articulating parameters for such regulation.[259] As a result of *Pennsylvania Coal*, private property may be "regulated to a certain extent," but a regulation that "goes too far . . . will be recognized as a taking."[260] Over eighty years ago, the Court recognized that the United States was "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[261]

i. Regulation that Denies Landowner All Economically Viable Use of Property is a *Per Se* Taking under the Fifth Amendment

In *Lucas v. South Carolina Coastal Council*, the Supreme Court created a *per se* rule requiring just compensation when a private landowner is denied *all* economically viable use of his or her property as a result of government regulation.[262] This *per se* rule is triggered when "total deprivation of beneficial use is . . . the equivalent of a physical appropriation."[263] The only instance in which the *per se* rule may be overcome is where a private landowner is denied use interests that were not originally part of the property title at issue.[264] Nuisance uses, as well as limitations on uses prescribed by background principles of state property law inherent in a landowner's title, fall into this exception category.[265]

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259 Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

260 *Id.* at 415. *See also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) (finding that *Pennsylvania Coal* "is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'").

261 *Pa. Coal*, 260 U.S. at 416.

262 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030–31 (1992).

263 *Id.* at 1017. The Court stated:

> Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," in a manner that secures an "average reciprocity of advantage" to everyone concerned.

Id. at 1017–18 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

264 *Lucas*, 505 U.S. at 1027.

265 *Id.* at 1029. The Court articulated that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the re-

In making this determination, the Court listed several factors to be considered:

> [T]he degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, . . . [whether] a particular use has long been engaged in by similarly situated owners[,] . . . [and whether] other landowners, similarly situated, are permitted to continue the use denied to the claimant.[266]

Only upon the determination that the denied use is already prohibited will the government escape an obligation to pay compensation. Otherwise, the government is required to compensate private landowners when regulation operates to deny all economically viable use of private landowners' real property.

The majority opinion in *Lucas* has been characterized as "arguably the most important expression of an expectations-oriented understanding of property."[267] The Court drew a clear distinction between real and personal property, emphasizing that historically, "greater traditional protection of rights to make productive economic use of real property" has been afforded.[268] This principle stems from "the American people's time-honored and judicially respected expectations of greater security in real property."[269] Furthermore, the Court gave "great weight to the traditional understandings of citizens with respect to the scope and content of property rights."[270] Given the history of water allocation under the Prior Appropriation Doctrine and the clear expectations

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strictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* The Court also stated, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. Overall, *Lucas* establishes three exceptions to the *per se* taking rule: "1) restrictions that inhere in the title to the property itself; 2) restrictions upon the use of property deriving from background principles of state property law; or 3) restrictions grounded in nuisance law." Archer & Stone, *supra* note 204, at 112.

266 *Lucas*, 505 U.S. at 1030–31.

267 Arnold, *supra* note 3, at 328. *See also* Butler, *supra* note 2, at 929–30.

> Although the precise meanings and expectations attributed to private property norms may vary from group to group or person to person, the norms generally involve a belief in the existence or necessity of certain key attributes . . . . Basic characteristics of property include: a preference for private ownership; exclusivity, or the power and right to exclude others; free transferability, or the right to alienate property; and *a reasonable expectation of gain, including the right to conduct an economically viable use free from unfair government or private interference.*

Id. (emphasis added).

268 Arnold, *supra* note 3, at 329.

269 *Id.*

270 *Id.*

placed upon priority of use, the Court's discussion of expectations in *Lucas* is arguably relevant to situations involving appropriator's expectations in vested water rights, and should be considered in takings disputes involving those rights. Moreover, *Lucas* raises several regulatory takings arguments that may benefit the Hages.

The categorical *per se* rule that emerged from *Lucas* will be especially helpful to the Hages in the upcoming takings phase of the trial. The Hages argued that the excessive regulation of their 1866 Act ditch rights-of-way essentially precluded access to the water. In its 2002 opinion, the court recognized that the Hages "ha[d] a right to go onto the land and divert the water."[271] If, in fact, the federal government's regulation precluded the Hages from accessing the ditches, it would be impossible for the Hages to physically obtain *any* of the water in order to put it to beneficial use. Under *Lucas*, this is a *per se* taking that requires compensation.

In addition, the Hages contended that regulation requiring a "special permit" granting access to the ditches was a taking.[272] The Hages do not dispute that the ditch rights-of-way are subject to reasonable Forest Service regulation, including the "need to obtain special use permits when necessary."[273] Although rights-of-way on public lands are subject to reasonable regulation by the Forest Service, such regulation may not "prohibit[] the ranchers from exercising their vested rights nor limit[] their exercise of those rights so severely as to amount to a prohibition."[274] From the Hages' perspective, the special permit requirement is a surreptitious method of denying access to the ditches and the water contained therein. Given the troubled relationship between the Hages and the Forest Service, it seems highly unlikely that the Forest Service would ever grant such a permit. Therefore, the taking of the Hages' right to access the ditches and maintain them at a level consistent with their property interest may require just compensation.

Lastly, the Hages argue that the federal government's physical impounding of their cattle is a regulatory taking.[275] The Hages did sign the grazing permit, which incorporated the Forest Service's regulations "permitting impoundment and sale of livestock under specific conditions."[276] Congress and the Bureau of Land

271 Hage v. United States, 51 Fed. Cl. 570, 584 (2002).

272 *Id.* at 584.

273 *Id.* The Forest Service claimed that "normal maintenance" of the ditches includes "minor trimming and clearing of vegetation around the ditches." *Id.* All other maintenance exceeding "normal maintenance" requires a special use permit. *Id. See also* 43 C.F.R. § 2801.1-1 (2002).

274 Elko County Bd. of Supervisors v. Glickman, 909 F. Supp. 759, 764 (D. Nev. 1995).

275 Hage v. United States, 35 Fed. Cl. 147, 178 (1996).

276 *Id.* at 176.

Management have the authority to "control the occupancy and use of public land and to protect that land from trespass and injury."[277] Accordingly, the Hages' failure to remove their cattle from the public domain within a reasonable time may have resulted in a trespass, thus permitting the federal government to rightfully confiscate the cattle under the permit and Forest Service regulations.[278] Such was the case in *Bradshaw*, where the court held that the plaintiffs' failure to remove their cattle from the public domain after the revocation of their grazing permit did not constitute a compensable taking.[279]

The facts in *Hage*, however, are distinguishable from *Bradshaw* in many respects. In *Bradshaw*, the plaintiffs admitted that their cattle were at times located on the public domain without the federal government's consent.[280] The plaintiffs also neglected to redeem their cattle after the confiscation when given the opportunity to do so.[281] The Hages, however, allege that the Forest Service was "able to impound and sell their cattle only because it made demands under the permit which [the Forest Service] knew [the Hages] could never satisfy as well as physically opened gates, causing the cattle to wander to the suspended allotment."[282] Specifically, the Hages argue that the Forest Service intentionally enacted regulatory schemes that "created a situation where it was physically and economically impossible to prevent their cattle from wandering and to redeem their cattle after impoundment."[283] Thus, while at first glance this claim appears to imply a physical taking, it more appropriately constitutes a potential regulatory taking. Under *Lucas*, it is plausible that the Forest Service's regulations were so unreasonable and restrictive that the Hages were ultimately denied all economic beneficial use of their cattle. If that turns out to be the case, the *Hage* court has determined that the total value of the confiscated cattle will be the Hages' remedy.[284]

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277 Klump v. United States, 38 Fed. Cl. 243, 248 (1997).

278 Specifically, 36 C.F.R. § 262.10 (2002) provides that "[u]nauthorized livestock or livestock in excess of those authorized by a grazing permit on the National Forest System, which are not removed therefrom within the periods prescribed by this regulation, may be impounded and disposed of by a forest officer as provided herein." The Secretary of Agriculture has the "authority to make such rules as are necessary to regulate the occupancy and use of the national forests for their protection." *Hage*, 35 Fed. Cl. at 176 n.15.

279 Bradshaw v. United States, 47 Fed. Cl. 549, 555 (2000).

280 *Id.* at 554.

281 *Id.* at 555.

282 *Hage*, 35 Fed. Cl. at 176.

283 *Id.* at 178.

284 *Id.* (finding that "[t]he seizure of the cattle was the effect of the taking and its measure of damages").

ii. Regulation that Results in Diminution of Economically Viable Use of Property *May* be a Taking under the Fifth Amendment

While *Lucas* is used to analyze governmental regulation that effectively denies a private landowner *all* economic use of his or her property, *Penn Central Transportation Co. v. New York City* is used to analyze governmental regulation that significantly *minimizes* a landowner's use of property.[285] Thus, although a mere "diminution in property value"[286] is not a *per se* taking, some diminutions are so severe that a taking results despite some remaining economically viable use in the property.[287] In *Penn Central*, the United States Supreme Court fashioned a three-prong test for determining when a regulatory taking has occurred.[288] In determining whether a governmental regulation constitutes a taking, an *ad hoc* inquiry is conducted through an examination of three factors: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the governmental action.[289] Like *Lucas*, *Penn Central*'s balancing test gives weight to the property rights holder's expectation in his or her property right.

Even if the *Hage* Court is unwilling to go so far as to find a categorical *per se* taking under *Lucas*, it may still find a taking under *Penn Central*. As stated, the extensive regulation of the ditch rights-of-way in *Hage* not only prevented access to the water, but also prevented the Hages from performing maintenance on the 1866 Act ditches.[290] The outcome of applying the

285 438 U.S. 104 (1978). In *Lucas*, Justice Scalia pointed out that there are two distinct categories of government activity that will give rise to a *per se* taking without inquiry into the public interest furthered by the regulation: (1) physical occupations of property; and (2) regulations that deny all economically beneficial or productive uses of land. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). Clearly, the *Lucas* holding means that "courts are not to apply the *Penn Central* balancing test if a land-use regulation is a taking per se. When a per se taking does not occur, the *Penn Central* balancing test applies." Mandelker, *supra* note 17, at 224. *See* also David L. Callies, *Takings: An Introduction and Overview*, 24 U. HAW. L. REV. 441, 448 (2002) (A partial taking under *Penn Central* "occurs whenever a land use regulation deprives a landowner of sufficient use and value that goes beyond necessary exercise of the police power for the health, safety, and welfare of the people, but stops short of depriving the landowner of all economically beneficial use.").

286 *Penn Cent.*, 438 U.S. at 131.

287 *See, e.g.*, Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 160 (1990) (holding that ninety-nine percent diminution in value qualifies as a taking); Florida Rock Indus. v. United States, 21 Cl. Ct. 161, 175–76 (1990) (holding that ninety-five percent diminution in value may be construed as a taking).

288 *Penn Cent.*, 438 U.S. at 124.

289 *Id.* In the years after *Pennsylvania Coal v. Mahon* was decided, the Court was "unable to develop any 'set formula' for determining when 'justice and fairness' require[d] that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* The Court in *Penn Central* remedied this dilemma by articulating a three-prong test.

290 Hage v. United States, 51 Fed. Cl. 570, 584 (2002).

first prong of the *Penn Central* test to the *Hage* case is unambiguous. The economic impact of the governmental regulations was clearly devastating to the Hages, who lost all economically viable use of their water rights. It should be reiterated, however, that it would be useless for the Hages to resurrect any argument involving the revocation of their grazing permit. As indicated by the court, there is no property interest in the permit or adjacent surface-estate,[291] and the result of that economic loss will not be used by the court as a factor to determine the economic impact of the regulations. What is a factor to be considered, however, is the succession of aggressive regulatory measures utilized by the government to ensure that the Hages could not continue to use their property rights in the water and ditches.

The second prong of the *Penn Central* test turns on the extent to which government regulation interferes with a property owner's investment-backed expectations.[292] For a court to consider such investment-backed expectations, those expectations must be both distinct and "reasonable."[293] In some instances, courts have employed a "notice" rule that qualifies the validity of reasonable expectations.[294] In those cases, "courts reject[ed] takings claims involving land that was acquired with actual or constructive knowledge of existing or pending regulatory limitations."[295] The rule from those cases is that a property owner's expectations are reasonably limited by pre-existing knowledge that his or her property rights may be subject to regulatory restrictions.

When applying the second prong of the *Penn Central* test to the *Hage* case, it would even be difficult for proponents of the Pub-

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291 *Id.* at 592.

292 *Penn Cent.*, 438 U.S. at 124.

293 Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 482 (1987). "[E]xpectations can only be of consequence where they are 'reasonable' ones." *Id. See also* Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 25 (1997) ("Expectations are reasonable when a person, passably acquainted with the state of the law and the legal process (which includes the currently accepted morals, mores, customs and usages, and . . . the general social milieu), foresees that the occurrence of a particular contingency is likely to receive proper legal protection.").

294 *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1009–10 (1984) (holding that reasonable investment-backed expectations in trade secrets do not exist when disclosed after the adoption of a statute requiring disclosure); Grant, *supra* note 124, at 438–39 (discussing how *Monsanto* gives insight to how the owner-expectations factor might operate in water right suits). *Monsanto*, although involving property interests in trade secrets as opposed to interests in real property, is applicable in takings cases. The court held that notice of a government regulation can limit landowner investment-backed expectations in takings cases. *Monsanto*, 467 U.S. at 1006–07. *See also* Furey v. City of Sacramento, 592 F. Supp. 463 (E.D. Cal. 1984), *aff'd on other grounds*, 780 F.2d 1448 (9th Cir. 1986); Sucesion Suarez v. Gelabert, 541 F. Supp. 1253 (D.P.R. 1982), *aff'd*, 701 F.2d 231 (1st Cir. 1983).

295 Glenn P. Sugameli, Lucas v. South Carolina Coastal Council: *The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 ENVTL. L. 939, 979 (1999).

lic Trust Doctrine to deny the existence of reasonable investment-backed expectations. The Hages' predecessors in interest acquired property rights in the water and ditches at issue in 1865, when the Ranch was established,[296] long before the federal government began to assert dominion over the public domain,[297] and well before Nevada's creation of the contemporary regulatory permit system.[298] It would, therefore, be reasonable to characterize those interests as quite "old." "The distinction between 'old' and 'new' property is . . . relevant . . . . The common law's longstanding protection of 'old property' may seem to render more reasonable the expectations connected with it in comparison to the expectations of a holder of 'new property.'"[299] For example, if the Hages' situation were compared to an appropriator possessing water rights under the current permit system, the outcome of this analysis might be significantly different. The modern permit system was created to anticipate controversies between the state and appropriators over beneficial use, quantities of diversion, and so on.[300] This regulatory scheme is generally efficient, as it creates standards for the use of water and provides each appropriator with notice about the limitations of water rights so that distinct and clear expectations are formed. But, "keep in mind that however attractive a modern [permit] administrative system may be, it does not settle the very old, pre-permit system claims which are often the most important and valuable water rights."[301] That, of course, is the precise situation that exists in *Hage*.

In addition to the fact that "old" appropriative rights like the Hages' were not acquired with notice of current regulatory schemes, the value of those "old" rights plays an important role in the analysis of investment-backed expectations. Admittedly, limited property rights give way to limited expectations, just as property rights with little chance of economic prosperity would lead to decreased expectations regarding their economic potential. However, "[t]he oldest rights are the most valuable,"[302] and concrete expectations are sure to develop over the course of many years.

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296 Hage v. United States, 35 Fed. Cl. 147, 153 (1996).

297 *Id.* Congress created the Toiyabe National Forest in 1907, approximately forty years after the Ranch was established. *Id.*

298 *See* Prosole v. Steamboat Canal Co., 140 P. 720, 721 (Nev. 1914). In 1907, the Nevada legislature passed an act "to provide for the appropriation and distribution and use of the water." *Id.* Any appropriation prior to 1907 is considered to have been acquired prior to the current permit system. *Id.*

299 Massey, *supra* note 175, at 556.

300 SAX ET AL., WATER RESOURCES, *supra* note 115, at 109. Specifically, "permit administration gives the state an opportunity to consider such issues as beneficial use before the fact, to provide public records of actual use and to assure that there is unappropriated water available before anyone begins work on a diversion." *Id.*

301 *Id.*

302 *Id.* at 104.

While the Hages cannot predicate their takings phase argument on reliance interests in the grazing permits, *other* expectations regarding their right to put the water and ditches to beneficial use will become clear. As senior appropriators of vested water rights not subject to restrictions imposed by the current permit system, the Hages reasonably expected to be able to use the water in an economically beneficial manner.[303] Such an expectation developed as a result of the very nature of the water allocation scheme under the Prior Appropriation Doctrine—a framework that the federal government formally assented to and continues to recognize in the western United States today. The federal government's imposition of regulations restricting access to the ditches and water clearly interferes with these expectations in a manner detrimental to the Hages.

The third and final prong of the *Penn Central* test requires inquiry into the character of the governmental action.[304] The Court in *Penn Central* stated that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[305] The disputed regulations in *Hage* can be characterized as amounting to a physical invasion. As stated, the ultimate effect of the regulations was a virtual denial of access to the ditches, and consequently access to the water as well. Although the federal government's intent may have been to preserve the public domain for the public good, an invasion of this sort cannot be deemed necessary to satisfy that objective.

If the court in *Hage* applies *Penn Central*'s balancing test, it seems likely that the court will find that the federal government's extensive regulation of the Hages' 1866 ditches constitutes a taking under the Fifth Amendment. If the court examines the Hages' claims under *Lucas* and *Penn Central*'s regulatory takings framework, the Hages' expectations associated with their vested water rights will be thoroughly and properly considered. In addition, the Hages' vested water rights would be afforded the significant protection prescribed by the Takings Clause.

VI. CONCLUSION

"The oldest rights are the most valuable, and much controversy still turns on the validity and status of rights acquired many

303 *See* discussion *supra* Part V.B.1. This section of the comment outlines how the Hages could have put their water to a beneficial use if the federal government had not rerouted or denied access to the ditches and water.

304 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

305 *Id.*

years ago, often in the nineteenth century. In western water law, age is not coextensive with obsolescence."[306] These ideas capture the essence of vested water rights acquired long ago; they are extremely coveted, virtually priceless to those who have rightfully appropriated them, and the subject of an ongoing and passionate dispute in the western United States. Per the discussion in this comment, the government's activity in *Hage* simply went "too far" in many respects. The remaining question is how the *Hage* case should be resolved, and, more generally, how water rights should be treated by courts in the West.

The regulatory takings standards articulated in *Lucas* and *Penn Central*, as well as the physical takings standards set forth in *Loretto*, *Causby*, and *Kaiser Aetna*, are not only readily applicable to the *Hage* dispute and other takings disputes involving water, but are also well suited for this purpose. Accordingly, those standards should be applied by the *Hage* court in the takings phase of the trial and by other courts in similar controversies involving water rights. The application of those standards will ensure that vested water rights are afforded the significant protection they deserve.

The inherent differences between water and land as natural resources do not support the conclusion that water should be afforded less protection under the Takings Clause. In fact, Nevada case law and expectations founded on the Prior Appropriation Doctrine suggest that vested water rights should be vigorously protected and preserved. The *Hage* court recognized "that water rights are not 'lesser' or 'diminished' property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution."[307] Although water and land are different in nature, the recognition of water rights as a protected property right does not require the creation of new legal theories, or even new justifications of old theories. Indeed, the most appropriate way of affording water rights full protection under the Takings Clause is to examine takings disputes involving water under the same framework currently applied to land disputes. Most importantly, recognition of water rights as protected property under the Takings Clause is not a dramatic departure from well established constitutional precedent, but merely the logical extension of it.

306 SAX ET AL., WATER RESOURCES, *supra* note 115, at 104.
307 Hage v. United States, 35 Fed. Cl. 147, 172 (1996).