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# Economic Liberty and the Constitution: An Introduction

*Edited by Paul J. Larkin, Jr.*

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# Table of Contents

# *Economic Liberty and the Constitution: An Introduction*

*Paul J. Larkin, Jr.*

Lawyers sometimes refer to bodies of law by mentioning the name of one or more parties to a decision of the Supreme Court of the United States that has become so well known that it serves as a shorthand reference to a particular legal rule, principle, or doctrine in American law. Only a few decisions have a sufficiently widespread reputation among the bench and the bar (and certain members of the public) that they can be identified by name. *Marbury v. Madison*,[1] the *Dred Scott* case,[2] the *Steel Seizure Case*,[3] *Brown v. Board of Education*,[4] *New York Times v. Sullivan*,[5] *Miranda*,[6] *Roe v. Wade*,[7] and a handful of others stand out as decisions that can be mentioned without mystifying the reader or listener.

Another decision belonging in that category is *Lochner v. New York*.[8] The Supreme Court decided *Lochner* just after the turn of the 20th century. The Court held unconstitutional a New York state law capping the number of hours that a baker could work on the ground that the statute unconstitutionally interfered with a baker's freedom to decide the terms of his employment. Today, however, there is a deeply critical connotation that attends to the Court's decision in *Lochner*, surrounding it like the black cloud following Joe Btfsplk of *Li'l Abner* fame.

By itself, Justice Rufus Peckham's opinion in *Lochner* hardly deserves the recognition—or the condemnation—that it has acquired in the century-plus since it was decided. *Lochner* did not arouse much public interest at the time it was decided,[9] and it does not bear the same stain as some other, more notorious Supreme Court decisions such as *Plessy v. Ferguson*[10] or *Korematsu v. United States*.[11] But to some it comes close.

After all, *Lochner* did not stand alone. The Supreme Court held numerous statutes unconstitutional in the early decades of the 20th century on grounds like those given in *Lochner*. *Lochner*, therefore, has become a symbol to some of a rabidly conservative Supreme Court. As Professor David Strauss has noted, *Lochner* symbolizes the era in which the Supreme Court invalidated numerous regulatory and social welfare statutes such as wage, unionization, and pension laws.[12]

The true importance of and controversy surrounding *Lochner* is not the decision itself, but its status as an iconic representation of a Court that sought to implant several tenets into the Constitution that now are often deemed anathemas. Specifically:

- A free-market system is far superior to central planning as a vehicle for economic growth.
- With a few exceptions, principally concerned with preventing force and fraud, the contracting parties are far better judges of their own economic interests than anyone else can be.
- Private parties should be left alone to negotiate whatever terms they believe advance their own self-interests without being hedged in or second-guessed by third parties, be they labor unions, legislatures, courts, or "do-gooders."

- Courts should intervene aggressively to protect the enforceability of contracts against arbitrary interference by a legislature.

- The courts should treat the Commerce Clause as a limited grant of authority to Congress rather than as a general police power that Congress may use like a philosopher's stone to solve every problem under the sun.

The policy—some would say politics—of *Lochner* has greatly eclipsed the limited ruling in that case.

## The Supreme Court's Decision in *Lochner v. New York*

At issue in *Lochner* was the constitutionality of the New York Bakeshop Act of 1895. Passed late in the 19th century and motivated by the Progressive Era interest in advancing the secular welfare of mankind through government intervention, the statute ostensibly sought to improve the health and welfare of members of the baking industry by limiting to 60 per week and 10 per day the number of hours that a baker could ply his trade. Bakery unions and large industrial bakers supported the act because it benefitted them,[13] but the state defended the act on the ground that it sought to redress the often squalid conditions found in New York City's highly decentralized baking industry, which often operated out of tenement basements by new classes of immigrants.[14]

The *Lochner* case, however, did not arise out of the application of the statute to a New York City bakery. Joseph Lochner ran a small bakery in Utica, New York. Arrested for violating the statute by allowing an employee to work during one week more than the 60 hours permitted by the New York Bakeshop Act, Lochner was convicted at trial. He argued on appeal that the statute unconstitutionally interfered with his right to enter into contracts as he saw fit, a freedom that the Supreme Court had described in glowing terms less than a decade earlier.[15] The New York courts rejected Lochner's argument, but he prevailed in the Supreme Court of the United States.[16]

Writing for a five-to-four majority, Justice Rufus Peckham started with the proposition that "the right to purchase or to sell labor" is a form of "liberty" protected by the Fourteenth Amendment's Due Process Clause.[17] Because it cannot arbitrarily deprive someone of liberty, he noted, the government had to justify the restriction that it imposed on Lochner as a proper exercise of the "police power"—that is, a state's inherent power to regulate as necessary to protect the lives, health, and welfare of the community.

Justice Peckham then examined the health and safety rationale offered for the statute. In so doing, he declined to accept uncritically the state legislature's proffered defense of the statute: namely, that tighter regulation of working conditions was necessary for the public's benefit. Instead, he undertook a *de novo* review of the relationship between a limitation on the hours that bakers can work and the benefits to their health from that cap.[18] Finding none, he concluded that the real purpose of the law was to grant labor unions economic rents by limiting competition rather than to protect individual bakers. That was an impermissible application of the police power, Justice Peckham reasoned, and therefore unconstitutionally deprived Lochner of the liberty to enter into a contract as he and his workers saw fit.[19]

## The Backlash Against *Lochner*

The orthodox trope is that *Lochner* is an example of the Supreme Court's willfully usurping the role of the political branches in our government. Justice Oliver Wendell Holmes was right in his dissent, the argument goes, to criticize the majority for choosing one disputed theory of economics over another.[20] In rejecting the maximum-hours component of the New York Bakeshop Act, the Court decided to impose its own view of the public welfare, rather than the one endorsed by the elected members of the political branches, upon the people of New York State. That view glorified Social Darwinism and denigrated legislative efforts to protect the less fortunate from the harsh workings of *laissez-faire* free-market capitalism. The Constitution does not impose any particular economic doctrine on the legislature, and it certainly does not empower the courts to make that decision for the nation. In sum, *Lochner* is an unjustifiable abuse of judicial review, a pathological ruling better fit for a morgue than the U.S. Reports.[21]

Critics of *Lochner* have levied at least three powerful, specific challenges to that decision. The first one is the argument that the Constitution itself does not give individuals a right to own property or to engage in commerce free from whatever regulations a validly elected legislature may adopt for the benefit of the public.[22] The premise of that argument is that the Constitution guarantees only those rights

that it expressly mentions. The purpose of the Constitution, the theory goes, was to charter a national government of separated and limited powers, and the set of limitations placed on that government by the Constitution itself or in later amendments is by design express, definite, and not subject to enlargement by the courts.

The second argument is willing to assume that the Constitution leaves room for an individual's liberty to pursue an occupation or to engage in trade.[23] That, however, is not the end of the matter. By definition, a popularly elected government may legislate in the public interest, and at least some of those regulations would be indisputably sufficient to justify a restraint on *laissez-faire* economics. The courts are not in a position to pick and choose which laws are sufficiently weighty, however; only a popularly elected legislature can make that judgment. Courts therefore must defer to the political branches.[24]

Well-known scholars such as Robert H. Bork have endorsed those positions.[25] They also draw strength from the terms of Article V, which defines the procedure by which the Constitution can be amended and does not include the judiciary in that process.[26]

The third argument, advanced by Yale Law School Professor Bruce Ackerman, comes at this issue from a different direction.[27] Professor Ackerman argues that, like Reconstruction, the New Deal Era was an epochal period in American history. The nation rejected the 19th century *laissez-faire* economic model that had sent the country into the Depression and embraced the national regulatory state and Keynesian macroeconomic policy that Franklin Roosevelt employed to right the ship of state. In so doing, the nation effectively amended the Constitution to grant the federal government the authority to do whatever was necessary to regulate the economy, even if that meant repudiation of the protection for private property that the Framers sought to implement in the charter of 1787. It follows that if the Constitution offers no special protection for private property or economic liberty, the states also may regulate either subject as they see fit.

Those theories have prevailed since the Supreme Court's 1937 decision in *West Coast Hotel Co. v. Parrish*,[28] which marked a turnabout in the Court's approach to economic and social legislation. *Parrish* upheld the constitutionality of a state statute setting a minimum wage for women and minors even though the Court previously had invalidated other such laws. Since then—pejoratively labeled "the switch in time that saved nine"—the academy and, even more important, the Court have consistently upheld state welfare legislation even when the Court had to manufacture its own, facially legitimate rationale for the law.[29] In fact, the Court has gone so far as to uphold the constitutionality of a statute even if the legislature did not have a clue as to what it was doing.[30]

## The Backlash Against the Backlash Against *Lochner*

Recently, there has been a renewed interest in the question whether the Constitution protects individual economic activity without undue—some might say any—government regulation or interference. Various scholars have bemoaned the Supreme Court's disdainful treatment of economic freedoms and its single-minded focus on one or another variation of the concept of "privacy" as a predicate of special judicial protection.[31] They have identified several different bases for the proposition that the Framers sought to safeguard the institution of property and the ability of every individual to pursue his economic fortune through the market-oriented economy that had taken hold in the colonies in lieu of the mercantile system that England sought to impose on the New World.

A major problem for critics of constitutional protection for economic liberty is the fact that leading figures in the founding of this nation believed that property rights held a cherished place in any hierarchy of social and legal values. John Locke, who had a pervasive influence on the founding generation,[32] believed that every person had an "inalienable" right to "life, liberty, and property" and that civil societies come into existence in order to protect those rights.[33] The colonists chafed at the restrictions placed on trade by the English mercantile system, as well as the monopolies—then known as "patents"—that the Crown granted to favored parties,[34] and "gravitated toward a free market economy based on private contracting" by the mid-17th century.[35] Montesquieu believed that "[t]he natural effect of commerce is to lead to peace."[36]

In the 1776 classic work *The Wealth of Nations*, Adam Smith criticized monopolies and extolled the virtues of free trade and a free-market economy.[37] The Virginia Declaration of Rights, enacted in 1776, the same year that Adam Smith's *The Wealth of Nations* was published, incorporated that principle into Virginian law, stating that "[a]ll men ... have

certain inherent rights ... namely, the enjoyment of life and liberty, with means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[38] Founders such as James Madison, Alexander Hamilton, James Wilson, and John Marshall were familiar with Smith's theories, and they believed that the protection of private property was necessary for economic growth.[39]

It should therefore hardly be surprising that the text of the Constitution itself contains several provisions that safeguard the workings of a free market.

- Congress has the power to regulate interstate and foreign commerce[40] in order to prevent the states from gumming up free trade with protectionist legislation.[41]

- Congress cannot take private property—which, in theory, may be taken only "for public use"[42]—without affording the owner "due process of law" and without paying him "just compensation" for his loss.[43]

- The states cannot coin money, cannot require that debts be paid in any currency other than silver or gold, and cannot impair the obligation of contracts.[44]

In sum, one need not agree with historian Charles Beard that the principal reason why the Framers adopted the Constitution was to safeguard property rights against the government[45] to conclude that the Constitution does seek to protect economic liberty in several distinct and important ways.

There also are several provisions of the Constitution that protect the right to acquire and own property, to engage in commerce, and to pursue a livelihood. Start with the ones that expressly refer to those liberties.

- The Contract Clause prohibits a state from nullifying existing contracts.

- The Privileges and Immunities Clause provides that "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[46] Given the Framers' belief in the value of economic liberty, they might readily have seen the freedom to pursue any lawful occupation as a "privilege" that the clause protects.

- The Fifth and Fourteenth Amendment Due Process Clauses bar the federal and state governments from seizing someone's assets without following whatever procedures the law requires.[47]

- The Fifth Amendment Takings Clause limits expropriation of property to "public uses" and guarantees "just compensation" for such seizures.

- The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,"[48] and several scholars have relied on that text to defend a right to economic freedom.[49]

The terms of those provisions themselves—without any need to resort to "penumbras" and "emanations" for additional support[50]—make it clear that the Framers thought property rights worthy of constitutional protection. There is far greater textual support for the principle that the Constitution protects economic freedom, the scholars would argue, than there is for the claim that there is an unenumerated constitutional right to abortion.[51]

Now move on to the implicit protections for economic liberty. The enumeration of powers in Article I ensured that Congress would not have the same general police power as the states.[52] The law in the states during the early period of the nation's history also is instructive in this regard, because it represented a contemporary understanding of how far governmental power could legitimately reach.

Three features are particularly relevant: Eighteenth century state constitutions protected property rights;[53] the states could establish the qualifications to hold state office;[54] and they also could define the qualifications to vote in state (or federal[55]) elections, which often included owning property.[56] If that were not an adequate protection, several 19th century state courts invoked due process to protect economic interests.[57] Accordingly, the structure of the Constitution buttresses the evident meaning of its text: The right to property and to seek economic success is entitled to constitutional protection.

Finally, advocates for the protection of economic rights would argue that it is a mistake to distinguish between "personal rights" and "economic rights." They would find themselves in good company in that

regard. The Supreme Court has found it difficult to draw that distinction.[58] In fact, the average person likely would trade personal freedoms for economic opportunity.[59] Accordingly, a strong argument can be made that only elitist snobbery would elevate the right to speak freely to the apex of constitutional protection while denying the right to work any such protection at all.[60]

## The Situation Today and Going Forward

The renewed interest in constitutional protection for economic liberty by certain members of the academy and conservative public interest organizations will ensure that there will be continued scholarship and litigation in this field.[61] The result is that there will continue to be disputes over the constitutionality of such regulatory régimes for the near future.

What the Supreme Court will do in such a case is far from certain. The Court could finally kick to the curb any hope of respecting the intent of the Framers, or it could enhance the constitutional protection afforded to economic liberty while still leaving the state ample room to regulate in the public interest.[62]

There is one subject that looks promising in this regard. A question just over the horizon is whether a state may use its licensing statutes in order to limit entry into certain lines of work for the purpose of granting incumbents economic rents. There currently is a split in the federal courts of appeal over such an issue—in particular, whether a state may prohibit any in-state resident other than a licensed funeral home director from selling caskets. The Tenth Circuit upheld a state prohibition, while the Fifth and Sixth Circuits have ruled that such laws are unconstitutional because there is no rational relationship between a limitation on sales and the public health interest that those laws purportedly seek to protect.[63]

Eventually, the Supreme Court will find itself obliged to settle that disagreement. It may well be that one such case will offer the Court an opportunity to reconsider some of its overbroad statements that the only protection for economic liberty is through the political process.[64] When that occurs, private parties, locked out of certain businesses by state licensing provisions, have a strong case that restrictions like those are unconstitutional.

States license entry into certain professions in order to raise income through fees and prevent charlatans and other unqualified parties from offering services that they are not capable of providing. For example, every state regulates the practice of medicine, and it is eminently reasonable to keep an unqualified party from diagnosing disease, prescribing medication, or performing surgery.[65] But not every licensing requirement is designed to, or in fact does, protect the public health and welfare.

States have adopted numerous licensing requirements for the simple purpose of creating a cartel or oligopoly.[66] Those laws ostensibly exist for the legitimate purpose of protecting the public welfare against snake oil salesmen and quacks, but the true reason why those laws are on the books is cronyism. Statutes prohibiting someone from working as a barber without first having undergone thousands of hours of education and training cannot be defended on the ground that, like surgeons, barbers must prove that they can handle a sharp implement. Parents have cut their children's hair for centuries without needing any education or training at all. The only rationale for such a law is economic protectionism, pure and simple.

Barbering is not the only field in which states have used licensing schemes to frustrate competition and grant incumbents favored status in the market. There are scores of needless state licensing requirements. As one commentator has noted:

> In many states, prospective hair braiders, casket retailers, interior designers, shampoo specialists, music therapists, teeth whiteners, and massage therapists must meet arduous and expensive licensing requirements in order to go into business.
>
> These onerous regulations on professionals have multiplied over the past fifty years. According to one study, the percentage of U.S. workers required to obtain state licenses to practice a trade has increased from five percent in 1950 to at least twenty percent in 2000 and to twenty-nine percent in 2006. Many of these new regulations do not have a strong public health or safety rationale, but were passed at the behest of special interest groups seeking to keep competitors out of the market. For example, until 2010, prospective florists in Louisiana were required to pass a subjective floral exam administered by incumbent florists interested in keeping potential competitors out of the market. Similarly, prospective barbers in California are obligated to spend over

> $10,000 and achieve 1,500 hours of class credits to obtain a barber's license.[67]

The issue is one that is likely to arise with considerable frequency.

The parties excluded from these professions are precisely the type of individuals for whom seeking relief through the ballot box is a wasted endeavor. Public choice theory teaches that the primary concern of elected officials is getting re-elected. To achieve that end, they will effectively market their services to whoever will enhance their prospects for returning to office. That attitude favors small, tightly knit groups that are the beneficiaries of particular laws. They have a strong incentive to oppose the repeal of those laws, and their small size makes it relatively efficient for them to band together in that effort.

By contrast, individuals who are excluded by law from entering a trade often find the cost of identifying each other and cooperating in order to obtain the repeal of a statute to be prohibitive. They are powerless to prevent a small minority's interests from swaying the political process to work in its favor. The result is that the ordinary, predictable operation of the political process, which typically can be counted on to redress perceived injustices as different interest groups join and abandon alliances, cannot perform that chore in these circumstances. Public choice theory readily explains how and why a law favoring a select few individuals can make it onto the statute books and remain there for a considerable period of time even though it harms the public welfare.[68]

The refusal to examine the practical working of the political process therefore leads to the ironic result that the law shows the least protection for those individuals who are most harmed by anticompetitive conduct and least able to protect themselves against the operation of politics. That seems backwards.[69]

As Robert McCloskey once put it, "scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined."[70] Those people are not *Fortune* 100 CEOs, and they do not work for a company like Omni Megacorp. They are individuals seeking to pursue a career in a legitimate, small-scale, principally local line of work, one that the Framers would have found quite ordinary, but who find themselves shut out by a type of law that the Framers would have deemed quite extraordinary.

Typically, in fact, it is only the emergence of a scandal of some sort involving government officials and their cronies that creates the public outrage necessary to establish the critical mass required to repeal such special-interest legislation. That occurrence, however, is not one that a group of widely scattered individuals can create—either through the political process or outside of it. Relegating that category of people to the political process, therefore, is just a cruel joke.[71]

## Conclusion

For nearly 80 years, *Lochner* has been a punch line for academics who see constitutional protection for economic rights as an impediment to—take your choice—redistribution of wealth or protecting the working and underclasses. Throughout that period, the Supreme Court has endorsed that view of constitutional law.

Lying just beyond the horizon, however, is a category of cases—involving statutes imposing licensing restrictions on entry into sundry lines of work unconnected to public health and welfare—that could lead the Court to reconsider its precedents. Those cases challenge the orthodox view that economic regulations always operate only on large corporations and their well-off white-collar officers and always benefit the blue-collar workers whose toil makes possible the corporation's profits. In those cases, the burden falls upon people who could be even poorer than the working-class individuals whom modern-day social welfare legislation normally seeks to protect, as well as on the general public, which is denied the benefit of the lower prices that competition can produce.

If the Court is willing to examine the economic and political reality underlying exclusionary licensing cases, it might well be moved to take a second look at its precedents granting the political process the unfettered ability to make whatever economic and social decisions politically powerful groups can induce it to adopt as long as its action can be classified as the regulation of the overall economic and social order. It is time for the Supreme Court to be honest about the political realities of the legislative process and to offer some constitutional protection for its victims.

# Endnotes:
## *Economic Liberty and the Constitution: An Introduction*

1. 5 U.S. (1 Cranch) 137 (1803) (the case recognizing judicial review).
2. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (the case that helped trigger the Civil War by treating Dred Scott, a slave, as property).
3. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the case refusing to allow the President to operate steel mills during a wartime strike).
4. 347 U.S. 483 (1954) (the case rejecting the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).
5. 376 U.S. 254 (1964) (the case requiring proof of "actual malice" in defamation cases).
6. Miranda v. Arizona, 384 U.S. 436 (1966) (the case that gave us the *Miranda* warnings for police interrogation).
7. 410 U.S. 110 (1973) (the case creating a constitutional right to abortion).
8. 198 U.S. 45 (1905).
9. *See* James W. Ely, Jr., Book Review, *Economic Due Process Revisited*, 44 Vand. L. Rev. 213, 217 (1991) (reviewing Paul Kens, Judicial Power and Reform Politics: The Anatomy of *Lochner v. New York* (1990)).
10. 163 U.S. 537 (1896) (the "separate but equal" case).
11. 323 U.S. 214 (1944) (the Japanese internment case).
12. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. Chi. L. Rev. 373, 373 (2003) (footnotes omitted) (citing Morehead v. Tipaldo, 298 U.S. 587 (1936) (declaring unconstitutional a state minimum wage law); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (declaring unconstitutional a federal law creating a railroad retirement system); Coppage v. Kansas, 263 U.S. 1 (1915) (declaring unconstitutional a state law that forbade employers to require employees to agree not to join labor organizations); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (declaring unconstitutional a federal statute providing for minimum wages for women and children in the District of Columbia); and Adair v. United States, 208 U.S. 161 (1908) (declaring unconstitutional a federal statute that forbade employers to discharge employees because they were members of labor organizations)).
13. Union bakers worked in two shifts with each one ordinarily less than 10 hours, while the primarily immigrant, non-union bakers worked in a single shift often of 12 to 22 hours per day. Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 Harv. L. Rev. 1363, 1373 n.78 (1990).
14. *See* David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (2011); Thomas A. Bowden, *Repairing Lochner's Reputation: An Adventure in Historical Revisionism*, 19 Geo. Mason L. Rev. 197, 197 (2011) (reviewing Bernstein, *supra*); Ely, *supra* note 9, at 215-16.
15. In Allgeyer v. Louisiana, 165 U.S. 578 (1897), the Supreme Court (per Justice Rufus Peckham) characterized the term "liberty" in exceptionally broad terms: "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.... [T]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.'" *Id.* at 58990 (quoting Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 763 (1884)).
16. *See* Ely, *supra* note 9, at 215-16.
17. *Lochner*, 198 U.S. at 53. Justice Peckham relied on *Allgeyer* for that proposition.

18. "We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others are, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts." *Id*. at 59-60.
19. "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.... It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, 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 between the master and his employees (all being men, *Sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution." *Id*. at 64.
20. *See Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain.... The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.... [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*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.").
21. *See*, *e.g.*, James MacGregor Burns, Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court 99 (2009); Archibald Cox, The Court and the Constitution 135 (1987); Kens, *supra* note 9, at 126-27 ("For more than thirty years [*Lochner*] served reformers as evidence of the conservative nature of the judiciary and as a striking example of its usurpation of political power."); Robert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34. The facts of *Lochner* generally never surface in critical discussions of the decision, perhaps because they would make it difficult to maintain the prevailing view that the Court elevated the interests of business over those of the average working man. In fact, there is considerable evidence that the New York statute was animated by ethnic and religious animosity. *See* Bernstein, *supra* note 14. Nonetheless, the common wisdom is that *Lochner* has crossed the River Styx. *See*, *e.g.*, Frank Easterbrook, *The Constitution of Business*, 11 Geo. Mason L. Rev. 53, 53 (1988) ("Substantive due process is dead.").
22. *See*, *e.g.*, Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 Harv. J. L. & Pub. Pol'y 13 (2012).
23. *See*, *e.g.*, Strauss, *supra* note 12.
24. The strong version of that argument is that courts must always defer to the political branches. The weak version allows the courts to intervene if there is something extraordinary about a particular law. That difference does not matter for purposes of this discussion.
25. *See*, *e.g.*, Robert H. Bork, The Tempting of America (1997); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).
26. *See* U.S. Const. amend. V; John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution (2013).
27. *See* 2 Bruce Ackerman, We the People: Transformations (2000).

28. 300 U.S. 379 (1937).
29. *See, e.g.*, Day-Brite Lighting Co. v. Missouri, 342 U.S. 421 (1952); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973); New Orleans v. Dukes, 427 U.S. 297 (1976).
30. *See* U.S. R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("[W]e disagree with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted."). Perhaps the Court has historically assumed that Congress knows what it is doing because the Court is afraid of what the evidence might actually show.
31. *See, e.g.*, Randy E. Barnett, Restoring the Lost Constitution (2d ed. 2014); Bernstein, *supra* note 14; James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008); Richard A. Epstein, The Classical Liberal Constitution: The Uncertain Quest for Limited Government (2013); Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government (2013); Bernard H. Siegan, Economic Liberties and the Constitution (2d ed. 2005); Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 Harv. J. L. & Pub. Pol'y 5 (2012); Roger V. Abbott, Note, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 Cath. U. L. Rev. 475 (2013); David E. Bernstein, Lochner's *Legacy's Legacy,* 82 Tex. L. Rev. 1 (2003); Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U.L. Rev. 627 (1988); 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 (1999); Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 Hastings Const. L.Q. 91 (1983).
32. *See* James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 Harv. J. L. & Pub. Pol'y 27, 30 (2012).
33. *See* John Locke, Two Treatises on Government § 85 (1689); John Locke, Of Civil Government 82-85 (1924); *see also* 1 W. Blackstone, Commentaries *138-140.
34. *See* Renee Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 Harv. J. L. & Pub. Pol'y 37, 38 (2012).
35. Ely, *supra* note 32, at 31-32 (footnote omitted); William E. Nelson, *Authority and the Rule of Law in Early Virginia*, 29 Ohio N.U.L. Rev. 305, 360 (2003) ("[T]he hallmark doctrine of market capitalism, that individuals should be free to enter into contracts which courts would then enforce, was firmly in place.").
36. Charles de Secondat, Baron de Montesquieu, The Spirit of the Laws 338 (1989) (1748).
37. *See* Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 149 (Reissue 2008) (1776) (monopolies are "the great enemy of good management"); Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 761-62 (1884) (Bradley, J., concurring) (discussing disfavored status of monopolies in English history).
38. Virginia Declaration of Rights § 1 (1776).
39. *See* Ely, *supra* note 32, at 31-32, 34; *see also* John Adams, *A Defence of the Constitutions of Government of the United States of America*, in Francis Coker, Democracy, Liberty, and Property 121-32 (1942); Charles A. Beard, An Economic Interpretation of the Constitution of the United States 325 (1998) (1913) ("The major portion of the members of the Convention are on record as recognizing the claim of property to a special and defensive position in the Constitution.").
40. *See* U.S. Const. art. I, § 8, cl. 3 ("[The Congress shall have Power] ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]").
41. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 16 (2005).
42. The Supreme Court has made it clear that the "public use" requirement really means "public use *or benefit*," which has the practical effect of reading the public use requirement out of the Fifth Amendment. *See* Kelo v. City of New London, 545 U.S. 469 (2005); Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).
43. *See* U.S. Const. amend. V ("No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").
44. *See* U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").
45. *See* Beard, *supra* note 39, at 325 ("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.").
46. U.S. Const. art. IV, § 2, cl. 1.
47. Compliance with existing legal procedures is the minimum requirement of due process. *See, e.g.*, Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 Harv. J. L. & Pub. Pol'y 241, 265–71 (2014).
48. U.S. Const. amend. IX.
49. *See, e.g.*, The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Randy E. Barnett ed., 1991).
50. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
51. *See* Roe v. Wade, 410 U.S. 113 (1973).

52. *Compare*, *e.g.*, License Cases, 46 U.S. (5 How.) 504, 523–25 (1847) (the states possess a general police power), *with*, *e.g.*, NFIB v. Sebelius, 132 S.Ct. 2566, 2577–78 (2012) (the federal government does not).
53. *See* Barnett, *supra* note 31, at 6-7 (quoting property rights protections in late 18th century constitutions in Massachusetts, New Hampshire, Pennsylvania, and Vermont).
54. The Constitution defines the criteria to hold federal, not state, office. *See* Larkin, *supra* note 47, at 259; *compare* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (the Constitution establishes the exclusive requirements to hold office as a Representative, a Senator, or President).
55. *See* U.S. Const. art. I, § 2, cl. 1 (electors in each state for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); *id*. amend. XVII (adopting the same criterion for senatorial elections); Arizona v. Inter Tribal Council of Arizona, 133 S.Ct. 2247, 2257-59 (2013); *cf*. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors).
56. *See* Harper v. Virginia St. Bd. of Elections, 383 U.S. 663, 684 (1966) (Harlan, J., dissenting) ("Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one.... Most of the early Colonies had [property qualifications for voting]; many of the States have had them during much of their histories[.]") (footnotes omitted); 2 Records of the Federal Convention 203 (Farrand ed. 1911) (James Madison) ("Whether the Constitutional qualification ought to be a freehold, would with him depend much on the probable reception such a change would meet with in States where the right was now exercised by every description of people. In several of the States a freehold was now the qualification. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty.").
57. *See* Ely, *supra* note 9, at 219-20; Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408 (2010).
58. *See* Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) ("[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, whether the 'property' in question be a welfare check, a home, or a savings account. 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.").
59. *See* Barsky v. State Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting) ("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. The American ideal was stated by Emerson in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be reversed.' 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. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man."); McCloskey, *supra* note 21, at 46 ("[M]ost men would probably feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their minds."); Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 Wis. L. Rev. 265, 298-99 ("The right to purchase and use contraceptives, for example, is probably less central to many lives than the right to pursue a chosen business, profession, or occupation. Since the choice of occupation may affect personal capacities, values, style of life, social status, and general life prospects in innumerable ways, this freedom is arguably more central to the individual than the rights already classed as fundamental.").
60. Economic rights advocates also would offer a few miscellaneous small-scale responses to critics of *Lochner*. First, the Supreme Court did not act willy-nilly in striking down every form of economic legislation it reviewed during the first four decades of the 20th century. In fact, the Court upheld the majority of the economic and social welfare laws during that period. *See*, *e.g.*, Note, *supra* note 13, at 1366. Also, critics treat Justice Holmes's *Lochner* dissent as if Moses brought it down from Mount Sinai. Economic rights advocates would point out, however, that it was not uncommon for Justice Holmes to substitute pithy remarks for detailed reasoning—remarks or reasoning that *Lochner*'s critics would deem radioactive. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Jacobson v. Massachusetts, 197 U.S. 11. Three generations of imbeciles are enough."). What is more, Holmes wrote only for himself in *Lochner*. The other three dissenting justices agreed with the majority that the Constitution protected economic liberty; they just disagreed over the issue of whether the New York law was constitutional nonetheless.
61. The Institute for Justice, for instance, has represented several private parties challenging state laws restricting entry into certain lines of work. For a description of its litigation, *see* Neily, *supra* note 31.
62. The Court also could switch its focus from a "freedom of contract" theory invoked in *Lochner* and the Due Process Clause discussed in *Roe* to the Privileges and Immunities Clause or the Ninth Amendment.
63. *Compare* St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2012), and Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (holding unconstitutional state laws limiting casket sale to licensed funeral home directors), *with* Powers v. Harris, 329 F.3d 1028 (10th Cir. 2004) (upholding the constitutionality of such a law).
64. "It is one thing to argue that economic liberty must be subject to rational control in the 'public interest'; it is quite another to say in effect that it is not liberty at all and that the proponent of the 'open society' can therefore regard it as irrelevant to progress.... Meiklejohn's arguments for protecting liberty of expression are cogent, but they do not on their face explain why other, 'private' rights should be neglected. A decision to protect Peter does not necessarily involve the decision to abandon Paul." McCloskey, *supra* note 21, at 48.
65. *See*, *e.g.*, Va. Code Ann. §§ 54.1-2902 to 54.1-2903, 54.1-2929 to 54.1-2937 (2014).

66. *See, e.g.*, Dick M. Carpenter et al., Inst. for Justice, License to Work: A National Study of Burdens from Occupational Licensing (May 2012); Paul J. Larkin, Jr., *Co-opting the Criminal Justice System to Prevent Competition or to Serve Noncompetitive Interests*, The Heritage Found. Legal Memorandum No. 134 (Aug. 21, 2014) (collecting state laws imposing education, training, and licensing requirements on barbers, hair stylists, manicurists, and the like for the purpose of limiting entry into those lines of work).
67. Abbott, *supra* note 31, at 475-76 (footnotes omitted).
68. *See* Mancur Olson, The Logic of Collective Action (1971); Note, *supra* note 13, at 1371-72.
69. The Supreme Court once thought so. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that "a correspondingly more searching judicial inquiry" may be necessary in cases where "prejudice against discrete and insular minorities may be a special condition" because it "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").
70. McCloskey, *supra* note 21, at 50.
71. *See id.* at 59 ("[T]here may be special reasons for protecting the right to work: the primacy of the right to the affected individual, the difficulty of protecting it through the ordinary political process.").

# Reassessing *Lochner v. New York*

*David E. Bernstein*

Resistance in various legal circles to any sort of constitutional protection of economic liberties has arisen in part because judicial protection of economic rights is associated with the infamous 1905 Supreme Court case of *Lochner v. New York*.[1] In *Lochner*, the Court held that a law banning bakery owners from employing workers more than 10 hours a day or 60 hours per week was an unconstitutional violation of the right to liberty of contract. The Supreme Court withdrew constitutional protection for liberty of contract in the 1930s. Since then, a hostile perspective inherited from the Progressives has virtually monopolized scholarly discussion of the Court's liberty of contract decisions.

*Lochner* has come to symbolize all that was wrong with pre–New Deal constitutional jurisprudence. The traditional Progressive story of *Lochner* is of a lawless Supreme Court engaging in unrestrained judicial activism and politicized judicial decision-making and favoring the rich over the poor, corporations over workers, abstract legal concepts over the practical necessities of a developing industrial economy, and white men over the right of women and minorities.

In all of its particulars, this story is wrong. The Supreme Court did not, as is typically alleged, make up the liberty of contract doctrine out of whole cloth. Rather, the doctrine had a strong basis in precedent and the venerable natural rights tradition. Contrary to the traditional story, there is no evidence that the Supreme Court in *Lochner* was motivated by Social Darwinism. Rather, the Court was trying to enforce traditional limits on the police power.

## Progressives' Claims vs. Reality

Contrary to the claims of Progressive critics, the Court emphatically was not trying to impose laissez-faire on the country. In a wide range of cases decided during the so-called *Lochner* era, the Court gave rather broad scope to the state's "police power" to regulate the economy.[2] Indeed, of the dozen or so laws that came before the Court that regulated working hours, all were upheld except for the law at issue in *Lochner*.

The Court, on the relatively unusual occasions that it did invalidate economic regulations, did not side with powerful corporations at the expense of helpless workers. As the history of *Lochner* itself shows, big corporations often teamed up with unionized workers to pass legislation that benefitted them at the expense of small-scale entrepreneurs.[3]

Nor was *Lochner* the product of judicial formalism that ignored social science data and other evidence in favor of abstract notions of rights. That much can be easily discerned from the text of Justice Rufus Peckham's majority opinion in *Lochner*. Peckham wrote that "in looking through statistics regarding all trades and occupations," he had discovered that "it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others."[4] One can criticize Peckham's opinion on various grounds, but the notion that he ignored hard evidence of the health effects of working as a baker in favor of abstractions is refuted by *Lochner* itself.

Finally, the Court did not neglect the rights of women and minorities in favor of liberty of contract. In cases like *Buchanan v. Warley*[5] and *Adkins v. Children's Hospital*,[6] the Court used liberty of contract to protect the rights of these groups against discriminatory legislation. In *Buchanan*, the Court invalidated a residential segregation law as a violation of the rights of contract and property without a valid police power rationale. In *Adkins*, the Court invalidated a minimum wage law that applied only to women. In doing so, the Court expressed strong support for equal rights for women—the strongest support that it would muster for decades.

Meanwhile, the story we have inherited about liberty of contract's contemporary Progressive opponents is as false as the story about its proponents. These Progressives were not, as often assumed, enlightened liberals who bequeathed to us a shift in the constitutional landscape from a protection of contract and property rights to a primary focus on the protection of civil rights and civil liberties.

In fact, Progressive opponents of liberty of contract evinced little interest in civil rights and civil liberties and even less interest in judicial protection of these rights. As a rule, they strongly supported the constitutionality of segregation laws, laws banning all private schools, laws requiring the sterilization of supposed mental defectives, and laws that restricted or excluded women from the workplace, among other laws violating civil rights and civil liberties.[7]

## Adopting the Rhetoric of Progressivism

Nevertheless, while conservatives nowadays tend to define themselves in part in opposition to a Progressivism stretching back to the early 20th century, an earlier generation of conservative jurists adopted the Progressives' distortion of *Lochner* as their own. The diminishing group of old-school Progressives in the 1950s and '60s who opposed Warren Court innovations as improper "judicial activism" found allies among conservatives like Robert Bork and William Rehnquist.

Influential conservative commentators on constitutional law were few and far between, and they chose to abandon traditional conservative limited-government and natural rights constitutionalism. Instead, they focused on containing the Warren Court's emerging judicial liberalism, hoping that adopting traditional Progressive rhetoric might coax liberals into supporting judicial restraint. Conservatives placed Progressives like Hugo Black, Felix Frankfurter, and Learned Hand in the pantheon of conservative judicial heroes and joined their liberal colleagues in expressing contempt for the anti-Progressive Justices of the early 20th century, such as *Lochner*'s author Rufus Peckham and *Adkins*'s author George Sutherland.

In adopting the old Progressive narrative as their own, the conservatives adopted the Progressives' majoritarian and anti–free market critique of the Supreme Court's pre–New Deal liberty of contract jurisprudence. Conservatives' anti-*Lochner* tendency was further accentuated when the Supreme Court held that a broad right to abortion was protected by the Fourteenth Amendment's Due Process Clause. Conservatives, joined by the final remnants of old Progressivism like Gerald Gunther and Raoul Berger, thought it rhetorically effective to analogize *Roe v. Wade* to *Lochner* as two great examples of horrific misuse of the Due Process Clause in the cause of judicial activism.

In demonizing *Lochner* and otherwise adopting what were once considered Progressive views of the Constitution and the role of the judiciary, conservatives ceded a great deal of intellectual ground to the other side. Many debates about constitutional law over the past few decades have amounted to a debate between the Old Progressivism of such jurists as Frankfurter, Hand, and Holmes, ironically favored by many modern "conservatives," against the New Progressivism of the Warren Court, Justice Brennan, Justice Marshall, and so on, favored by modern liberals and progressives.[8]

It is perhaps understandable that conservatives took this tack in the 1960s and '70s when conservatives were a small minority in elite legal circles and their only seemingly achievable goal was to limit judicial activism on behalf of liberal causes. But trying to create a *conservative* governing constitutional ideology out of myths inherited from Progressive propagandists who were anything but constitutional conservatives was and is a futile, even perverse, task.

## Rebuilding Limited-Government Constitutionalism

More recently, modern conservative and libertarian thinkers, especially the originalists among them, have taken great strides toward rebuilding traditional limited-government conservative constitutionalism.[9] Part of that progress has involved

recapturing some of the wisdom of pre–New Deal constitutional doctrine.

The implications of their work have already been felt in the Supreme Court. For example, the Court has held that the Commerce Clause, even as modified by the Necessary and Proper Clause, does and must have definable limits.[10] Moreover, the Tenth Amendment is not a "mere truism," as the Progressive Justices concluded, but a further substantive protection of federalism.[11] Future steps on the originalist road would include reviving the non-delegation doctrine to rein in the unconstitutional fourth branch of government.[12]

Continued acceptance of Progressive myths about *Lochner* in conservative circles, however, jeopardizes this project. Liberals claim that the pre–New Deal Court was consistently motivated by Social Darwinist, pro-corporate and anti-worker ideology, not tied to the text of the Constitution.[13] This critique of the Court applies not just in liberty of contract cases, but across the board. Conservatives, if they accept the *Lochner* myths, have to retort that the Court acted that way in due process cases but that the same Justices acted entirely properly in Commerce Clause, Tenth Amendment, and non-delegation cases. The argument for a Court that was a federalism and separation of powers Jekyll but a Due Process Clause Hyde is a difficult one to make.

This is not to say that conservatives must think that *Lochner* was correct. The originalist case for *Lochner* is ambiguous, and many think that liberty of contract in any event finds a more logical home in the Privileges or Immunities Clause. But conservatives should acknowledge that contrary to Progressive myth, *Lochner* was not willful pro-corporate, anti-worker activism, was not motivated by Social Darwinism, was not crazy doctrinally, and had precedential support.

## Strict Scrutiny and Rational Basis Scrutiny

Reassessing *Lochner* would also help to clarify several important constitutional issues. First, from the New Deal period until recently, the Supreme Court divided rights into fundamental rights that deserved "strict scrutiny" when infringed upon and other rights, infringements on which got only rational basis scrutiny. Rational basis scrutiny was applied in an especially cursory and forgiving way when the rights involved were deemed to be "merely" economic.[14] This structure has been breaking down of late as the Court has been applying a more forgiving version of strict scrutiny in some cases[15] and a stricter version of rational basis in others.[16]

There is no sound textual or historical case for blanket exemption of economic regulation from serious scrutiny; rather, it is an artifact of hostility to *Lochner* and like-minded cases. Now that the modern due process superstructure is collapsing, whatever replaces it should give parity to long-standing Anglo–American economic rights. This probably does not mean a broad presumption in favor of liberty of contract, which was the exception even during the so-called *Lochner* era, but could mean something narrower, such as substantial protection for the right to earn a living free from government-sponsored monopoly.

## Applying the Bill of Rights Against the States

Second, for decades, the Supreme Court has been applying the Bill of Rights against the states via the Due Process Clause in exactly the same way and to the same extent as they are applied against the federal government.[17] This is a product of non-originalist methodology and was made up by Progressive Justice Hugo Black to limit what he perceived as illegitimate judicial activism under the Due Process Clause. Black opposed not only *Lochner*, but also any use of the Due Process Clause to protect rights not explicitly mentioned in the Constitution, including such relatively uncontroversial non-economic rights as the right to raise one's children without unreasonable interference by the government. This includes the right to send one's child to private school when a state wants to ban private schooling. Binding "incorporation" under the Due Process Clause to the scope of the federal rights protected by the first eight amendments was Black's way of trying to limit judicial discretion.

From an originalist perspective, however, when a right protected by the Bill of Rights is applied to the states via the Fourteenth Amendment, it has to be the 1868 understanding of that right, not the 1791 understanding, that governs. After all, it was the *rights* in question that are protected by the amendment, not the specific language or 1791 meaning of the original provisions.[18] This must be so because, for example, one cannot literally apply the First Amendment's ban on *Congress* interfering with

freedom of speech and religion to the states. And the 1868 understandings of the right to freedom of expression, the right to bear arms, and the right to confront witnesses against you all point more clearly to a broad individual right than do the 1791 understandings of those rights.[19]

## Due Process and the Takings Clause

Third, revisiting *Lochner* helps us to better understand the history of the Fourteenth Amendment's public use clause. In the infamous *Kelo* case[20] allowing takings for private use, Justice John Paul Stevens cited cases around 1900 stating that due process protections against non–public use takings are fairly weak.[21] What Justice Stevens did not seem to recognize, however, is that these cases were not decided under the explicit language of the Takings Clause, which was decades away from being "incorporated" into the Fourteenth Amendment. Rather, those cases involved the Court's view of the bare minimum of protection that the Due Process Clause provided against government takings for private use.[22]

In other words, these were pure due process cases, *not* Takings Clause cases. Once the Supreme Court decided to incorporate against the states the protections of the Fifth Amendment Takings Clause, these cases were no longer directly on point in public use cases. They never should have been relied upon as precedents in *Kelo*, which involved incorporation of the Takings Clause.

## Reviving the Contracts Clause

Finally, once we accept the notion that the concept of constitutional protection for the right to contract is neither crazy nor evil, constitutional conservatives should think about how to revive the Contracts Clause, which prohibits state governments from "impairing the obligations of Contract." Although the clause was eviscerated in the Warren Court era, the Court has never disclaimed its landmark 1934 ruling in the *Blaisdell* case, in which the Court upheld a Minnesota law temporarily suspending creditors' remedies, including foreclosure, against delinquent homeowners.[23]

Contrary to the common perception that *Blaisdell* rendered the clause a nullity, from today's perspective, it actually left room for a fairly broad interpretation of the Contracts Clause that would disallow retroactive infringements on contracts not justified by emergency circumstances. The Supreme Court, meanwhile, has not issued a major Contracts Clause ruling since 1978.[24] Given that almost all constitutional conservatives, including Justice Antonin Scalia, agree that the Contracts Clause has not been interpreted properly, it is long overdue for a revival.

# Endnotes: *Reassessing* Lochner v. New York

1. 198 U.S. 45 (1905).
2. *See* David E. Bernstein, Lochner's *Legacy's Legacy*, 82 Tex. L. Rev. 1 (2003); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 82 Geo. L.J. 1 (2003). To put matters succinctly, the leading due process case of the early 20th century was not *Lochner*, with its relatively narrow vision of the police power, but Holden v. Hardy, 169 U.S. 366 (1898), which announced broad deference to legislation justified by reference to state police power.
3. *See* David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform ch. 3 (2011).
4. *Lochner*, 198 U.S. at 59.
5. 45 U.S. 60 (1917). *See* David E. Bernstein, *Philip Sober Restraining Philip Drunk*: Buchanan v. Warley *in Historical Perspective*, 51 Vand. L. Rev. 799 (1998).
6. 261 U.S. 525 (1923). *See* David E. Bernstein, Lochner's *Feminist Legacy*, 101 Mich. L. Rev. 2140 (2003).
7. *See* Bernstein, Rehabilitating *Lochner*, *supra* note 3, chs. 2, 4, 5 & 6.
8. *See* Randy E. Barnett, Restoring the Lost Constitution 385 (2d ed. 2014).
9. *See*, *e.g.*, Barnett, *supra* note 8; Richard A. Epstein, The Classical Liberal Constitution: The Uncertain Quest for Limited Government (2013); John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution (2013); Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government (2013).
10. *See*, *e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 U.S. 2566 (2012) (holding that the government cannot use the Commerce Clause to require individuals to engage in commerce by buying a health insurance policy); United States v. Morrison, 529 U.S. 598, 601–02 (2000) (holding unconstitutional a statute making rape a federal crime); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding unconstitutional a statute that made it a federal offense knowingly to possess a firearm in the vicinity of a school).
11. *See*, *e.g.*, Printz v. United States, 521 U.S. 898, 919–22 (1997); New York v. United States, 505 U.S. 144, 160–66 (1992).
12. *See*, *e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002).
13. *See* James MacGregor Burns, Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court 99 (2009); Archibald Cox, The Court and the Constitution 135 (1987); Gerald Gunther, Constitutional Law 432 (12th ed. 1991); Philip A. Klinkner & Rogers M. Smith, The Unsteady March: The Rise and Decline of Racial Equality in America 331 (2002); Ted Nace, Gangs of America: The Rise of Corporate Power and the Disabling of Democracy 126 (1995); David L. Faigman, Laboratory of Justice 86–90 (2004); William H. Rehnquist, The Supreme Court 109–110 (2001); Milton Ridvas Konvitz, Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly xi (2001); Paul Kens, Lochner v. New York, in The Oxford Guide to United States Supreme Court Decisions 161 (Kermit L. Hall ed., 2001).
14. *See*, *e.g.*, Williamson v. Lee Optical Co. (348 U.S. 483 (1955).
15. *See*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).
16. *See* United States v. Windsor, 133 S.Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2013).
17. *E.g.*, McDonald v. City of Chicago, 130 S.Ct. 3020 (2010); Mapp v. Ohio, 367 U.S. 643, 655–56 (1961); Ker v. California, 374 U.S. 23, 33–34 (1963); Aguilar v. Texas, 378 U.S. 108 (1964); Wallace v. Jaffree, 472 U.S. 38, 48–49 (1985).
18. *See* Josh Blackmun, *Originalism at the Right Time*, 90 Tex. L. Rev. 269 (2012). Relatedly, some scholars have argued that the Fourteenth Amendment's Due Process Clause should not be interpreted the same as the Fifth Amendment's Due Process Clause because the meaning of Due Process of Law had changed between 1791 and 1868. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408 (2010) (arguing that the Fifth and Fourteenth Amendment Due Process Clauses need not be given the same interpretation); Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 Harv. J.L. & Pub. Pol'y 241, 275–78 (2014) (same in the context of legislative inaction).
19. *See* Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 Geo. J.L. & Pub. Pol'y 1, 51–53 (2010); David Bernstein, *"Incorporation," Originalism, and the Confrontation Clause*, Volokh Conspiracy (July 6, 2009, 10:14 PM), http://volokh.com/posts/1246932856.shtml.
20. Kelo v. City of New London, 545 U.S. 469 (2005).
21. 545 U.S. at 479–80.
22. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 Sup. Ct. Econ. Rev. 183, 240–44 (2007). Stevens later acknowledged his error in describing the 19th and early 20th century Due Process Clause decisions as Takings Clause cases. Justice John Paul Stevens (Ret.), Fall 2011 Albritton Lecture, The University of Alabama School of Law, Tuscaloosa, Alabama, Nov. 16, 2011, *available at* http://www.supremecourt.gov/publicinfo/speeches/1.pdf.
23. Home Bldg. & Home Ass'n v. Blaisdell, 290 U.S. 398 (1934).
24. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

# *Does the Constitution Protect Economic Liberty?*

*Randy E. Barnett*

In this essay, I will consider whether the Constitution of the United States protects economic liberty. To clarify the issue, let me begin by defining that term. I define economic liberty as the right to acquire, use, and possess private property, as well as the right to enter into private contracts of one's choosing. If the Constitution protects those rights, then the Constitution does protect economic liberty. In my opinion, the evidence that the Constitution protects rights of private property and contract is overwhelming.

Let us begin with the constitutional protection afforded economic liberty at the national level. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[1] But what were these "other" rights "retained" by the people? The evidence shows that this was a reference to natural rights.

Consider an amendment drafted by Roger Sherman, who served with James Madison on the House Select Committee to draft the Bill of Rights.[2] Sherman's second amendment begins as follows: "*The people* have certain *natural rights* which are *retained* by them when they enter into Society...."[3] In this passage, Sherman uses all the terminology the committee eventually employed in the Ninth Amendment—"the people," "rights," and "retained"—and the "rights" "retained" by "the people" are then explicitly characterized as "natural rights."

But what was meant by the term "natural rights"? Sherman's draft provides some examples:

> Such are the rights of Conscience in matters of religion; *of acquiring property* and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances.[4]

The protection of property is at the heart of this list.

## Natural Rights and the Protection of Property

Sherman's rendition of natural rights was entirely commonplace. Consider some other examples. Another amendment proposed in the Senate reads: "That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are *the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety*."[5] Similar provisions were proposed by state ratification conventions. Virginia offered an identical amendment as its first proposed amendment.[6]

Many state constitutions contained similar language.

- **Massachusetts:** "All people are born free and equal, and have certain natural, essential and unalienable rights; among which may be reck-

oned 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."[7]

- **New Hampshire:** "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."[8]

- **Pennsylvania:** "All men are born equally free and independent, and have certain natural, inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of *acquiring, possessing and protecting property*, and of pursuing and obtaining happiness and safety."[9]

- **Vermont:** "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."[10]

All of these provisions share the affirmation that the natural, inherent, and inalienable rights retained by the people include the rights to acquire, possess, and protect property and the right to pursue happiness and safety. Today, we would characterize the right to acquire, use, and possess property as "economic" while characterizing the right to pursue happiness and safety as "personal," but these provisions show that the distinction between economic and personal liberty is anachronistic as applied to the Founding when these unenumerated natural rights were considered inextricably intertwined.

## Congress and the States: The Civil Rights Act of 1866

Of course, like the rest of the Bill of Rights, the Ninth Amendment restricts only the power of the federal government. What of the states? After the Civil War, the Republicans in Congress struggled to protect the newly freed slaves in the South from the Black Codes that Southern states adopted to reestablish white domination.[11] In 1866, Congress enacted the first Civil Rights Act.[12] This Act mandated that:

> [All citizens of the United States] of every race and color, without regard to any previous condition of slavery or involuntary servitude ... shall have the same *right ... to make and enforce contracts*, to sue, be parties, and give evidence, *to inherit, purchase, lease, sell, hold, and convey real and personal property*, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens....[13]

Congress identified the civil rights of *all* persons, whether white or black, as the rights "to make and enforce contracts ... to inherit, purchase, lease, sell, hold, and convey real and personal property." At the very core of civil rights in 1866, therefore, were the economic rights of contract and property, although, as with the Founding, it is anachronistic to impose the modern distinction between economic and personal rights on that period.

So where in the Constitution did Congress find the power to enact the Civil Rights Act protecting the economic rights of contract and property against infringements by the states? For many readers, the answer may be surprising: It is the Thirteenth Amendment, the first section of which prohibits "slavery [or] involuntary servitude, except as a punishment for crime,"[14] and the second section of which gives Congress the "power to enforce this article by appropriate legislation."[15]

## Basis for Action: The Thirteenth Amendment

If the argument that the Thirteenth Amendment empowered Congress to protect the economic rights of contract and property seems strained, it is only because we today forget that slavery was, first and foremost, an economic system that was designed to deprive slaves of their economic liberty. The key to slavery was labor. The fundamental divide between the Slave Power and abolitionists concerned the ownership of this labor.[16] Could a person be owned as property and be denied the right to refrain from laboring except on contractually agreed-upon terms? Or did every person own himself or herself, with the inherent right to enter into contracts by which he or she could acquire property in return?

Republican adherents of "free labor" held the second of these views.[17] Therefore, by abolishing slavery, Republicans in Congress maintained that the Thir-

teenth Amendment ipso facto empowered them to protect the economic liberties that slavery for so long had denied, in particular the "right ... to make and enforce contracts ... to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property...."[18]

This defense of the constitutionality of the Civil Rights Act under the Thirteenth Amendment can be simplified as follows: The Thirteenth Amendment prohibited slavery, and *the opposite of slavery is liberty*. Any unwarranted restrictions on liberty—whether personal or economic—are simply partial "incidents" of slavery.[19] Therefore, Section 2 of the Thirteenth Amendment empowered Congress to protect any citizen from unjust restrictions on liberty.

Defending the Civil Rights Act in Congress, Michigan Senator Jacob Howard noted about a slave that:

> He owned no property, because the law prohibited him. He could not take real or personal estate either by sale, by grant, or by descent or inheritance. He did not own the bread he earned and ate....
>
> Now, sir, it is not denied that this relation of servitude between the former negro slave and his master was actually severed by this amendment. But the absurd construction now enforced upon it leaves him without family, without property, without the implements of husbandry, and even without the right to acquire or use any instrumentalities of carrying on the industry of which he may be capable....[20]

In sum, by abolishing the economic system of slavery, the Thirteenth Amendment empowered Congress to protect the economic system of free labor and the underlying rights of property and contract that defined this system.

To the dismay of congressional Republicans, President Andrew Johnson vetoed the Civil Rights Act.[21] In his lengthy veto message, Johnson, a Tennessee Democrat, conceded that the civil rights identified in the act "are, by Federal as well as State laws, secured to all domiciled aliens and foreigners, even before the completion of the process of naturalization...."[22] But he nevertheless protested that this claim of congressional power "must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States."[23]

In response to Johnson's states' rights argument, super-majorities in both the House and Senate overrode his veto.[24] Congress then proposed the Fourteenth Amendment to constitutionalize the rights protected by the Civil Rights Act—and more.[25]

## Privileges or Immunities: The Fourteenth Amendment

The privileges or immunities of citizens protected by the Fourteenth Amendment were not limited to the natural rights enumerated in the Civil Rights Act; they also included the personal rights of American citizens enumerated in the original Bill of Rights.[26] Further, the Fourteenth Amendment did not adopt the Civil Rights Act's anti-discrimination language.[27] Instead, it protected the privileges or immunities of *any* citizen, whether white or black, male or female, from any abridgment whatsoever, not merely from discrimination; and because Democrats in southern states, who viciously attacked the Civil Rights Act, were eventually going to resume their seats in Congress, Republicans sought to place these guarantees beyond the power of any future Congress to repeal.[28]

What the Republicans in Congress giveth, however, the Supreme Court taketh away. Just five years after the Fourteenth Amendment's enactment, the Court in *The Slaughter-House Cases*[29]—by a vote of five to four—effectively gutted the Privileges or Immunities Clause by limiting its scope to purely national rights, such as the right of a citizen to be protected while traveling on the high seas. The Court also adopted Andrew Johnson's narrow reading of the Thirteenth Amendment.[30] Ever since then, the economic liberties protected by the Constitution have been questioned by those who would put the economic powers of the slaveholder into the hands of Congress and state legislatures.

Of course, these constitutionally protected economic liberties can still be reasonably regulated. After all, even the First Amendment's rights of freedom of speech and assembly are subject to reasonable "time, place, and manner" regulations.[31] As Justice Joseph Bradley explained in his dissenting opinion in *Slaughter-House*:

> The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But

> there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe *the manner of their exercise*, but it cannot subvert the rights themselves.[32]

By eliminating the Privileges or Immunities Clause while distorting the meaning of the Due Process and Equal Protection Clauses—along with ignoring the original meaning of the Ninth Amendment—the Supreme Court has deprived Americans of these express protections of *all* of their natural rights, including their rights "to make and enforce contracts" and "to inherit, purchase, lease, sell, hold, and convey real and personal property."[33] But thanks to the foresight of men like Virginia's James Madison, who conceived the Ninth Amendment,[34] and Ohio's John Bingham, who drafted the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment,[35] these protections of our natural rights—both personal *and* economic—remain a part of the written Constitution of the United States. They can be denied, they can be disparaged, and they can be abridged, but they have not been repealed.

# Endnotes:
## *Does the Constitution Protect Economic Liberty?*

1. U.S. Const. amend. IX.
2. *See Roger Sherman's Draft of the Bill of Rights* in The Rights Retained by the People: The History and Meaning of the Ninth Amendment app. A (Randy E. Barnett ed., 1989).
3. *Id.*
4. *Id.*
5. 6 Debates in Congress 320 (Gales and Seaton 1838) (emphasis added).
6. *See On the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 657 (Jonathan Elliot ed., 1830), *available at* http://memory.loc.gov/ammem/amlaw/lwed.html.
7. MASS. Const. art. I, *amended by* MASS. Const. art. CVI (emphasis added).
8. N.H. Const. art. II (emphasis added).
9. PA. Const. of 1776, art. I, § 1 (emphasis added).
10. VT. Const. of 1777, ch. I, art. I (emphasis added).
11. *See generally* Garrett Epps, Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America (2006).
12. Civil Rights Act of 1866, 14 Stat. 27.
13. *Id.* (emphasis added).
14. U.S. Const. amend. XIII, § 1.
15. U.S. Const. amend. XIII, § 2.
16. *See generally* Stanley L. Engerman & Robert A. Margo, *Free Labor and Slave Labor*, *in* Founding Choices: American Economic Policy in the 1790s, 291 (Douglas Irwin & Richard Sylla eds., 2010); Jonathan A. Glickstein, *Poverty Is Not Slavery: American Abolitionists and the Competitive Labor Market*, *in* Antislavery Reconsidered: New Perspectives on the Abolitionists 195 (Lewis Perry & Michael Fellman eds., 1979).
17. *See* Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper*, 66 Geo. Wash. L. Rev. 1269, 1285 (1998).
18. Civil Rights Act of 1866, 14 Stat. 27.
19. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968).
20. Cong. Globe, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Jacob Howard).
21. President Andrew Johnson, Veto of the Civil Rights Bill (Mar. 27, 1866), *available at* http://wps.prenhall.com/wps/media/objects/107/109768/chl6_ a2_d1.pdf.
22. *Id.*
23. *Id.*
24. *See* William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 233 (1988).
25. *See id.* at 70–71. *But cf.* Epps, *supra* note 11, at 164–83 (explaining how the legislative origin and movement of a constitutional amendment paralleled rather than succeeded the origin and movement for the Civil Rights Act). According to this chronology, each initiative employed a different means to accomplish the same end of protecting the fundamental rights of freedman and Republicans in the South. Still, Epps does not deny that the passage of the Fourteenth Amendment was motivated, at least in part, by the need to respond to Johnson's veto.
26. *See* McDonald v. Chicago, 130 S.Ct. 3020, 3058–88 (2010) (Thomas, J., concurring in the judgment). *See generally* Michael Kent Curtis: No State Shall Abridge: the Fourteenth Amendment and the Bill of Rights (1987).
27. *Compare* U.S. Const. amend. XIV *with* the Civil Rights Act of 1866, 14 Stat. 27.
28. *See* Epps, *supra* note 11, at 164–83.
29. 83 U.S. 36 (1872).
30. *Id.* at 69–70, 79.
31. *See* Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941).
32. *Slaughter-House*, 83 U.S. at 114 (Bradley, J., dissenting) (emphasis added).
33. Civil Rights Act of 1866, 14 Stat. 27.
34. *See generally* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 235–42 (2005).
35. *See* Epps, *supra* note 11, at 164–83.

# *Coaxing the Courts Back to Their Truth-Seeking Role in Economic Liberty Cases*

*Clark M. Neily III*

The Model Rules of Professional Conduct provide that a lawyer "shall not knowingly make a false statement of fact or law to a tribunal."[1] Similarly, by filing any paper in court, an attorney certifies that the factual contentions in that filing "have evidentiary support."[2] In short, making false or factually baseless representations in court is a big no-no—that is, unless you happen to be a government lawyer defending an economic regulation under rational basis review, in which case you are not only invited to misrepresent the government's true ends, but often rewarded for doing so by a judiciary that has come to view its role in economic liberty cases as more collaborative than adjudicative.

This essay explains how courts routinely turn a blind eye to government malfeasance in the economic sphere and suggests how they might be coaxed back to their duty through strategic litigation in doctrinal areas in which courts have not yet abandoned their truth-seeking role.

I begin with three points that are self-evident but often elided by those seeking to rationalize the judiciary's failure to meaningfully protect economic liberty:

1. Governments do things for a reason;

2. Sometimes those reasons are illegitimate; and

3. Like any other litigant, the government will sometimes seek to conceal the reasons for its actions, especially when they are improper.

The question—and it is one of the most important questions in all of constitutional law, though it is rarely framed in such stark terms—is whether the government's willingness to misrepresent its true ends in court should entitle it to a free pass from the judiciary to violate the Constitution. Current economic liberty doctrine says "Yes"; this essay argues "No" and describes three strategies for inducing courts to decide economic liberty cases based on the true state of the adjudicative and legislative record rather than on the government's speculation, conjecture, and dissembling.

## Discerning the Government's True Ends in Litigation

On the evening of April 19, 2013, Boston police went from house to house ordering residents of certain neighborhoods to stay indoors until further notice. Police had a reason for issuing those orders, and it was a good one: Two bombs had been set off near the finish line of the Boston Marathon four days earlier, killing three people and injuring hundreds more. The police were in hot pursuit of the perpetrators, one of whom was later found hiding in a tarpaulin-covered boat in the backyard of a home in Watertown, Massachusetts.

Though it appears that no one challenged the order to stay indoors, imagine if someone had done so. Could a court assess the constitutionality of that order without asking why it was issued? Of course not. After all, it is one thing to order people inside when chasing armed terrorist suspects who have

just murdered four people, including a police officer, and present a serious danger to anyone they encounter. But it is another thing entirely for police to confine people to their homes on a peaceful election day, particularly if the order applies only to neighborhoods with a history of voting for the party out of power. Simply put, it matters whether police are trying to save lives or rig an election.

This example illustrates a simple but vital point: It is nonsense to say that the end the government is pursuing in any given case is undiscoverable and unknowable. We do it all the time, and that may well explain why no one challenged the stay-inside orders. Admittedly, it may be difficult to discern the government's true ends in particular cases, especially when it tries to conceal them, but it is certainly not impossible either in all cases or in whole categories of cases, such as those involving economic liberty or property rights. The Boston Marathon vs. rigging-an-election illustration also shows that it is impossible to evaluate the constitutionality of the government's conduct unless you determine *why* the government is doing whatever it is doing.

For those who insist that the government's true ends are necessarily inscrutable because laws are written by committees, voted on by numerous legislators with different goals and perspectives, and enforced by faceless armies of bureaucrats,[3] consider this question: What about corporations? Do we let corporations off the hook simply because their policies are determined by boards of directors at the behest of hundreds, even thousands, of shareholders and executed by employees with varying levels of autonomy and responsibility? We do not.

On the contrary, when the shoe is on the other foot, the government has no qualms whatsoever about attributing motives and ascribing ends to corporate bodies. For example, the Equal Employment Opportunity Commission routinely accuses corporations of acting from improper motives in employment discrimination cases; the Securities and Exchange Commission (SEC) accuses corporations of defrauding stockholders; and the Department of Justice has even charged corporations with criminal conspiracy, which requires, as an element of proof, a "meeting of the minds" among co-conspirators regarding the object of the conspiracy—that is, a shared understanding of the end they are jointly pursuing.[4]

So we can dispense with the idea that it is categorically impossible to determine what ends corporate bodies are actually pursuing—whether they be private companies, partnerships, legislatures, or government agencies. This squares with Supreme Court precedent, at least in those areas of constitutional law that still receive real judging, or what we at the Institute for Justice call "judicial engagement."[5] Simply put, when courts care about the constitutional value at stake—such as religion, free speech, or invidious discrimination—they ask what end the government is actually pursuing, and they require an honest answer.

Thus, for example, when the City of Hialeah, Florida, claimed that it had banned ritual sacrifice on grounds of animal cruelty, the Supreme Court did not take that representation at face value. Instead, it sought to determine the true "object" of the law, which it concluded was "suppression of the central element of the Santeria worship service."[6] Likewise, when courts decide equal protection cases involving "suspect classifications," they require the government to provide a "genuine" explanation for its actions, not one that has been "hypothesized or invented post hoc in response to litigation."[7] In short, when the Supreme Court cares enough to exercise real judgment, it insists that government provide an explanation for its actions that is "sincere and not a sham."[8]

Rational basis litigation, however, is much different. As explained below, the government is not only permitted to offer sham explanations for its conduct, but encouraged to do so; and if its lawyers prove insufficiently creative, judges will even help them by hypothesizing justifications for government action. As suggested above, this is collaboration, not adjudication.

## Judicial Engagement

The Supreme Court divides constitutional rights into two distinct categories: fundamental and nonfundamental. Fundamental rights receive meaningful judicial protection, or judicial engagement; nonfundamental rights do not.

As routinely applied in fundamental-rights cases, the hallmarks of judicial engagement are a genuine search for the truth regarding the government's ends and means by a neutral adjudicator on the basis of actual evidence. The opposite of judicial engagement is judicial abdication, which is epitomized by the rational basis test and features none of those things: no genuine search for truth, no truly neutral

adjudicator, and no requirement that the government support its factual assertions with evidence.

Under the standard formulation of the rational basis test, courts must uphold a law if there is "any reasonably conceivable state of facts that could provide a rational basis" for it.[9] Judges applying rational basis review apply a strong—indeed, well-nigh irrebuttable[10]—presumption of constitutionality, which a challenger can overcome only by negating every conceivable justification for the government's actions, including purely hypothetical ones invented *post hoc* for purposes of litigation.

The Supreme Court has stated repeatedly that judges applying rational basis review must "never require a legislature to articulate its reasons for enacting a statute."[11] Moreover, "the existence of facts supporting the legislative judgment is to be presumed," which means the government "'has no obligation to produce 'evidence' or 'empirical data' to 'sustain the rationality'" of a challenged law and "can base its statutes on 'rational speculation.'"[12]

Thus, it is "entirely irrelevant" whether the asserted justification for a law "actually motivated the legislature," because rational basis review involves no genuine effort to determine the government's true ends.[13] Instead, the rational basis test is a charade designed to provide the appearance of judicial review with none of the substance.

The takeaway from all of this is that in some cases, courts will *ensure* that the government is pursuing a constitutionally permissible end, while in other cases, they will simply *presume* that it is doing so. Some courts have even taken the position that they must abandon judicial neutrality altogether and help the government invent justifications for its own conduct. As the Tenth Circuit Court of Appeals observed in a case challenging Oklahoma's requirement that people who sell caskets be state-licensed funeral directors, "we are not bound by the parties' arguments as to what legitimate state interests the statute seeks to further. In fact, 'this Court is obligated to seek out other conceivable reasons for validating'" the law.[14] Or, as the Second Circuit put it even more bluntly, "*we resort to our own talents* and those of counsel to discern the rationality" of the challenged law.[15]

To appreciate how dismaying this is from the standpoint of a rational-basis plaintiff, just imagine the judge in a breach-of-contract or employment-discrimination lawsuit against the government advising counsel on the eve of trial that he had been retained by the government for the "limited purpose" of suggesting defenses that the government's lawyers might have overlooked. It would be malpractice for a lawyer to proceed to trial under those circumstances, because litigants have a right to a decision-maker who is free from actual bias and from the appearance of bias—except, of course, in rational-basis litigation.

So what sorts of constitutionally illegitimate ends do governments pursue when regulating in the economic sphere? Currying favor with rent-seeking special interests by saddling their competitors with anticompetitive business regulations is a perennial favorite.[16] As the Tenth Circuit observed in rubber-stamping Oklahoma's nakedly protectionist casket sales restriction, "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments"[17]—not to mention Congress.

The Tenth Circuit panel was certainly correct in its description of the public-choice dynamic, but it was out to lunch with its conclusion that rank economic protectionism presents no constitutional concerns.[18] Thus, every court that has considered the Tenth Circuit's holding—that is, that "economic protectionism ... is a legitimate state interest"—has dismissed it out of hand.[19] And properly so: That holding is anathema to the rule of law, flatly inconsistent with equal protection, and—notwithstanding another jurisprudential blunder in the *Slaughter-House Cases*[20]—impossible to reconcile with an originalist reading of the Fourteenth Amendment's Privileges or Immunities Clause.[21]

Consider the following example of legislative pandering to a politically connected interest group called the American Society of Interior Designers (ASID). For decades, ASID has been trying to cartelize the industry by lobbying for laws that require a license to practice interior design. To get that license, applicants must have a college degree from an accredited institution; pass a two-day, thousand-dollar exam administered by a private testing company affiliated with ASID; and complete a two-year apprenticeship with a state-licensed interior designer. (Not surprisingly, these are the same qualifications required to be a professional member of ASID.)

Only four states have enacted occupational licensing requirements for interior designers: Alabama,

Florida, Louisiana, and Nevada. Alabama's law was struck down by the Alabama Supreme Court in 2007 after the head of the state board admitted that the law was so broad that it would actually be a crime for non-licensees to offer advice regarding paint colors and throw pillows.[22] Of the three remaining states, Florida was the nation's most zealous enforcer of interior-design licensing, and the Institute for Justice (IJ) challenged that scheme in 2009.

Notably, Florida's interior design law was unlike Alabama's in one key respect: It did not cover residential interior design services. Accordingly, anyone in Florida could practice interior design in private dwellings, but a license was required to provide those same services in any commercial setting. But even though they lawfully could perform interior design services in private residences, Florida law still forbade non-licensees from accurately referring to themselves as "interior designers" or their work as "interior design." Why would Florida prohibit people from accurately describing work they lawfully perform? Simple: to make it harder for non-licensees to advertise their services, connect with customers, and compete with members of the state-sanctioned cartel.

IJ's challenge to Florida's interior design law involved both real judging and fake judging: real judging for the restriction on non-licensees' use of the terms "interior design" and "interior designer" and fake judging (rational basis review) for requiring a license to practice interior design in nonresidential settings. Perhaps recognizing that the former would be judged under heightened scrutiny (the *Central Hudson* test for commercial speech[23]) in a proceeding where truth would matter and the government would have to support its factual assertions with evidence rather than "speculation or conjecture," the state did not even try to defend the titling restriction and instead agreed to an injunction forbidding it from enforcing that provision.

By contrast, the state vigorously defended the licensing requirement for nonresidential settings, arguing—without a shred of supporting evidence—that the law was meant to protect public health and safety. So confident was the state in the toothlessness of rational basis review and the irrelevance of evidence to the outcome of the case that it even stipulated that it had no evidence that "the unregulated practice of interior design presents any bona fide public welfare concerns" and no evidence that interior-design licensing "has benefited the public in any demonstrable way."[24] Also in the record were more than a dozen state studies, each of which concluded that the practice of interior design has no bearing whatsoever on public health, safety, or welfare.[25]

Nevertheless, the district court and the Eleventh Circuit upheld Florida's practice act anyway on the basis of the state's asserted—but entirely spurious—public safety concerns. Notably, both courts studiously avoided any citation to the record. Instead, they based their rulings on a committee report extracted from legislative archives by the district court and boilerplate from Florida's Architecture and Interior Design law asserting that "[t]he primary legislative purpose for enacting this [statute] is to ensure that every *architect* practicing in this state meets minimum requirements for safe practice" (note here, as the Eleventh Circuit panel did not, the legislature's conspicuous omission of the term "interior designer") and that "it is in the interest of the public to limit the practice of interior design to interior designers or architects who have a [*sic*] design education and training...."[26]

Regrettably, there is nothing unusual about the Eleventh Circuit's complete disregard for the evidentiary record and its utter lack of interest in the government's true end, which rather obviously was to protect state-licensed interior designers from competition.

Given the judiciary's history of allowing the government a free pass in the economic sphere, the question naturally arises whether anything can be done to restore judges' customary truth-seeking role in litigation. Happily, the answer is "Yes." In fact, there are many ways to get courts back in the business of actually judging the constitutionality of the government's actions in economic liberty cases instead of rationalizing it. The remainder of this essay describes three especially innovative ones: occupational speech claims, the doctrine of changed circumstances, and antitrust law.

## How to Restore Truth-Seeking in Litigation

**Occupational Speech.** "Occupational speech" refers to vocations in which the only service provided consists entirely of expression. Interior designers are one example in that all they do is provide suggestions and prepare drawings showing how a room might look with new furnishings or a different layout. Interior designers do not build anything, nor do

they physically move furniture or install new items. Instead, they are creators and visionaries: They are in the ideas business. The same is true of countless other vocations, from business consultants and lifestyle coaches to therapists and lawyers. Their services consist entirely of talking and writing.

But dictating who may speak about a particular subject, as states do when they license interior designers, tour guides, psychologists, and even lawyers, is a form of censorship. For example, it is actually a crime in Florida to create any drawing "relating to nonstructural elements of a building or structure"[27]—which is to say everything within the four walls of a given room, including furniture. Similarly, in New Orleans, Manhattan, Washington, D.C., and a handful of other cities, it is illegal to work as a tour guide without a government license. To be clear, it is perfectly fine for non-licensees simply to take people around the city; but if one wishes to describe points of interest or explain the relevant history—both of which are purely expressive—then a license is required.[28]

Sometimes government even censors licensed professionals. For example, Texas prohibits veterinarians from providing advice to pet owners unless they have examined the animal personally, which means it is illegal for Institute for Justice client Dr. Ron Hines to consult, via the Internet, with Scottish missionaries regarding the health of their cat at their posting in Nigeria. That it would be ridiculous for a Texas veterinarian to travel to Nigeria in order to physically examine a cat before providing advice to its owners is utterly irrelevant to the Texas Board of Veterinary Medical Examiners, as apparently is the impossibility of finding a local veterinarian to care for the animal in Nigeria.

Fortunately, it mattered to a federal district court judge, who denied the state's motion to dismiss the veterinarian's First Amendment claim and certified the key question—whether occupational licensing completely trumps free speech rights in the vocational context—to the Fifth Circuit, where it is now pending, for interlocutory review.

Remarkably, the Supreme Court has never considered whether government may restrict speech simply by slapping an occupational licensing requirement on it. As a result, lower courts are at sea, and some have grasped at the slender jurisprudential reed provided by Justice Byron White's concurring opinion in *Lowe v. SEC*.[29]

*Lowe* involved an attempt to stop the publication of a newsletter featuring general financial commentary by non-brokers. The majority found that the SEC lacked statutory authority to do so and thus avoided the free speech issue. Justice White wrote a concurrence in which he argued that it was necessary to reach the publisher's First Amendment claim and explained that he would have held that the newsletters were protected speech because they contained only general statements directed at the public and not individualized advice.[30] Citing no supporting authority, White went on to speculate that the First Amendment would *not* apply when professionals take the affairs of a client personally in hand and act in a fiduciary capacity.[31]

Though it has never been cited, let alone endorsed by the Supreme Court, some lower courts have given Justice White's surmise nearly talismanic significance, acting as though it neatly resolves the thorny issues that arise when two distinct lines of Supreme Court doctrine intersect: free speech rights, which the Court typically cares about very much, and economic liberty, which it cares about very little.[32]

Other courts, however, have been much more careful, including most recently the D.C. Circuit, which correctly analyzed Washington, D.C.'s tour guide licensing requirement as an imposition on speech and required the government to justify that burden with something more than speculation or conjecture.[33] While that may seem like a modest burden, it is one that government lawyers will frequently be unable to meet because, as explained above, their client frequently pursues constitutionally impermissible ends when regulating in the economic sphere. Deprived of the rationalize-a-basis standard of review that normally applies to occupational licensing challenges, Washington, D.C.'s defense of its tour guide licensing crumbled to dust in the face of a properly engaged judiciary.[34]

**Changed Circumstances.** Another avenue for getting courts to decide economic liberty cases on the basis of facts instead of a free-floating commitment to judicial deference is the doctrine of changed circumstances. The idea here is that even judges who are uncomfortable with the idea of candidly evaluating the government's true ends in economic liberty cases, as they routinely do in "fundamental" rights cases, might feel more comfortable holding that the legislature has simply failed to keep up with the times by amending the relevant statute to account for new realities.

The famous case of *United States v. Carolene Products Co.*[35] provides an excellent example. *Caroline Products* involved the constitutionality of a federal law banning the shipment of "filled milk" from which the butterfat had been removed and replaced with vegetable oil. Despite its textually baseless decision to bifurcate constitutional rights into fundamental and non-fundamental categories, the majority correctly observed that "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."[36] Indeed, that is precisely what happened 34 years later in a case called *Milnot Co. v. Richardson*, where a federal district court struck down the Filled Milk Act on the premise that the original justifications for the law had disappeared due to the advent of imitation dairy products that were indistinguishable from filled milk.[37]

The Supreme Court has shown a willingness to overturn laws in other settings based on changed circumstances, including major portions of the Voting Rights Act in *Shelby County, Alabama v. Holder*.[38] As documented in a petition for certiorari filed by the Institute for Justice this summer in a case called *Heffner v. Murphy*, there is a split of authority among both federal circuit courts and state supreme courts about whether changed circumstances provide an appropriate basis for overturning economic regulations.

The Third Circuit, in rejecting Heffner's challenge to various provisions of Pennsylvania's archaic funeral licensing scheme, held that obsolescence is not an appropriate basis for invalidating a statute under rational basis review.[39] Assuming the Supreme Court meant what it said in *Carolene Products* about the ability to challenge economic regulations based on changed circumstances—language that the Court has never expressly disavowed or limited—then this should provide an avenue for judges to strike down legislation without explicitly holding, as many seem uncomfortable doing, that the legislature was pursuing a constitutionally impermissible end all along.

**Antitrust Law.** While the legitimacy of antitrust laws is hotly debated among libertarians and other proponents of limited government, antitrust *litigation* possesses the virtue of being a genuine search for truth regarding a defendant's behavior—including government defendants. As a result, it provides yet another vehicle for recalling the courts to their truth-seeking role in the economic sphere.

Licensing occupations and saddling businesses with burdensome regulations obviously can have a negative effect on competition, but courts must give state and local governments room to regulate for legitimate policy reasons—protecting the public from incompetent bus drivers and surgeons, for example—without giving them carte blanche to violate the letter and spirit of federal antitrust laws. The line between legitimate policymaking and illegitimate suppression of competition is demarcated by so-called state-action immunity, a doctrine announced by the Supreme Court in a case called *Parker v. Brown*,[40] involving California's regulation of raisin sales. State action is a limited exemption from federal antitrust law, designed to allow the states to regulate their economies and protect consumers without undue interference.

The problem, of course, is that states will attempt to portray their regulatory policies as public-spirited even when they are not. As we have seen, courts will generally (though not inevitably[41]) turn a blind eye to the government's true ends in constitutional cases involving economic liberty and simply hypothesize a legitimate government end even where none is apparent. But it appears that antitrust law may be different and that government actors may not be entitled to the same sort of free pass to enforce nakedly anticompetitive economic regulations that they typically receive in rational basis cases.

That very question has been presented to the Supreme Court this term in a case involving the North Carolina State Board of Dental Examiners' regulation of teeth-whitening services provided by people who are not state-licensed dentists. North Carolina law contains a characteristically broad definition of dental practice that does not specifically include teeth-whitening, but the dental board, which consists of six dentists, one dental hygienist, and one "consumer member," issued a regulation prohibiting anyone but state-licensed dentists from providing that service. As the Fourth Circuit found in refusing to grant the board immunity for that anti-competitive act, "[i]n sum, the Board successfully expelled non-dentist providers from the North Carolina teeth-whitening market."[42]

Dental boards in other states have done likewise, and whether they will get away with it comes down to a simple question: Should courts determine the applicability of state-action immunity based on an honest assessment of an agency's true ends, or should

they instead adopt an essentially insurmountable presumption of legitimacy as they do in constitutional cases involving anticompetitive economic regulations? That question will be answered this term, and it may help to move courts in the direction of embracing the truth-seeking role consistently instead of sporadically in the economic realm.[43]

## Conclusion

Though some aspects of constitutional law are complicated, some are quite simple. Whether courts should embrace the truth-seeking role in some cases and abandon it in others is a simple question. So is the question whether government should receive a free pass from the judiciary to pursue constitutionally illegitimate ends in cases involving economic liberty, property rights, and other (currently) disfavored constitutional rights. Pretending to believe what no serious person would believe—for example, that Louisiana licenses florists in order to protect the public from the physical dangers of unlicensed floristry—makes judges look silly and undermines public confidence in the integrity and efficacy of judicial review.

Judicial engagement provides the way out of this morass by calling on judges to treat *every* constitutional case as a genuine search for the truth regarding the government's ends and means. Though Supreme Court precedent appears to preclude that approach in many settings, including particularly occupational freedom and other economic liberties, it is still possible to position cases in such a way that judges are able and inclined to do what they have a proud tradition of doing in other areas: Enforce constitutional limits on government power with an even hand and an unwavering commitment to the rule of law.

# Endnotes:
## *Coaxing the Courts Back to Their Truth-Seeking Role in Economic Liberty Cases*

1. Model Rules of Prof'l Conduct R. 3.2(a)(1) (1983).
2. Fed. R. Civ. P. 11(b)(3).
3. *See, e.g.*, O'Brien v. United States, 391 U.S. 367, 383–84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter.... What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it[.]").
4. Laura Stevens, *FedEx Faces Additional Charges in Prescription-Drug Delivery Case*, Wall St. J., Aug. 15, 2014 (describing Justice Department's prosecution of Federal Express for conspiracy to launder money, conspiracy to distribute controlled substances, and conspiracy to distribute misbranded drugs), http://online.wsj.com/articles/fedex-faces-additional-charges-in-prescription-drug-delivery-case-1408145975.
5. *See* Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government (2013).
6. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534–35 (1993).
7. United States v. Virginia, 518 U.S. 515, 533 (1996).
8. Edwards v. Aguillard, 482 U.S. 578, 587 (1987).
9. FCC v. Beach Comm'cns, Inc., 508 U.S. 307, 313 (1993).
10. *See, e.g.*, Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 Geo. Mason L. Rev. 845, 857 (2012) (describing evolution of Supreme Court's rational basis jurisprudence and arguing that with the advent of *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955), "[f]or all practical purposes, what had once been a true presumption [of constitutionality] that was rebuttable by evidence and reasoning would henceforth be an irrebuttable presumption, which is not truly a presumption at all").
11. *Beach Comm'cns*, 508 U.S. at 315.
12. Lewis v. Thompson, 252 F.3d 567, 582 (2d Cir. 2001) (quoting *Beach Comm'cns*, 508 U.S. at 315, and Heller v. Doe, 509 U.S. 312, 320 (1993)).
13. *Beach Comm'cns*, 508 U.S. at 315.
14. Powers v. Harris, 379 F.3d 1208, 1217 (10th Cir. 2004) (quoting Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001)).
15. Burke Mountain Acad., Inc. v. United States, 715 F.2d 779, 783 (2d Cir. 1983) (emphasis added).
16. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding dairy lobby's filled-milk ban on the basis of demonstrably bogus factual assertions); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (inventing hypothetical justifications for Oklahoma law making it illegal for opticians to duplicate eyeglass lenses or put old lenses into new frames without a prescription from an eye doctor); Hettinga v. United States, 677 F.3d 471 (D.C. Cir. 2012) (dismissing challenge to statute designed to force particular milk producer into federal government's communal milk-marketing system); *but see id*. at 481 (Judges Brown and Sentelle specially concurring and explaining that the "effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process.").
17. Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).
18. *See, e.g.*, Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984) (seminal work on the constitutional illegitimacy of "naked preference" in the "distribution of resources and opportunities to one group rather than another").
19. *E.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013); Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008).
20. 83 U.S. 36 (1873).
21. *See, e.g.*, Clark M. Neily III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate Over Privileges or Immunities*, 14 Tex. Rev. L. & Pol. 15 (2009). The Institute for Justice prepared a short documentary video explaining the history of the Fourteenth Amendment and the meaning of the Privileges or Immunities Clause. Institute for Justice, *The 14th Amendment of the U.S. Constitution: A History*, YouTube, https://www.youtube.com/watch?v=KWG8AcCty_I (last visited Sept. 1, 2014).
22. State v. Lupo, 984 So.2d 395, 402 (Ala. 2007).
23. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980) (establishing test for commercial speech under which government must (1) identify a "substantial" or "important" government interest, (2) demonstrate that the challenged law directly advances that interest, and (3) show that the law is no more extensive than necessary to serve the government's interest).
24. Joint Pretrial Stipulation at 8 ¶¶15–16, *Locke v. Shore*, No. 409cv193 (N.D. Fla. Jan. 8, 2010), *available at* http://www.ij.org/images/pdf_folder/first_amendment/interior_design/pretrialstipulation.pdf.
25. Institute for Justice, *State Interior Design Studies*, http://www.ij.org/state-interior-design-studies (last visited Sept. 1, 2014).
26. Locke v. Shore, 634 F.3d 1185, 1194 (11th Cir. 2011) (quoting Fla. Stat. § 481.201) (emphasis added).

27. *See* Fla. Stat. § 481.203 (8) (defining "interior design"). In defending the statute in court, the state's lawyers disavowed the plain meaning of the statute and argued that, contrary to the State Board's enforcement history and the testimony of every witness in the case, the definition of "interior design" was much narrower in scope. The district court accepted this argument but failed to provide a new definition; as a result, it is now impossible to say what constitutes the practice of interior design in Florida. *See* Locke v. Shore, 682 F. Supp. 2d 1283, 1287–91 (N.D. Fla. 2010) (providing incomprehensible gloss on the statutory term "interior design").
28. *See* 30 New Orleans Code, Ch. XXI, § 30-1486; N.Y. Admin. § 20-242; D.C. Code § 47-2836.
29. 472 U.S. 181 (1985).
30. *Id*. at 236 (White, J., concurring).
31. *Id*. at 228–29.
32. *See, e.g.*, Locke v. Shore, 634 F.3d 1185, 1191 (11th Cir. 2011) (dispensing with occupational-speech claim in less than one page by citing to *Lowe* and characterizing interior-design-related speech and drawings as "occupational conduct"); Accountant's Soc'y of Va. v. Bowman, 860 F.2d 602, 604–06 (4th Cir. 1988) (upholding Virginia law prohibiting use of various terms, including "assurance," "audit," "examine," and "report," by non-CPAs in connection with their work).
33. Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).
34. *See id*. at *10 (noting that "[t]he District failed to present any evidence the problems it sought to thwart actually exist").
35. 304 U.S. 144 (1938).
36. *Id*. at 153.
37. 350 F. Supp. 221, 223 (N.D. Ill. 1972).
38. 133 S.Ct. 2612, 2627 (2013).
39. *See* Heffner v. Murphy, 745 F.3d 56, 62 (3d Cir. 2014) ("As a threshold matter, we surmise that much of the District Court's conclusions regarding the constitutionality of the [Funeral Law], enacted in 1952, stem from a view that certain provisions of the [Funeral Law] are antiquated in light of how funeral homes now operate. That is not, however, a constitutional flaw.").
40. 317 U.S. 341 (1943).
41. *See*, *e.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215 (2013); Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (striking down casket-sales laws in Louisiana and Tennessee, respectively, under rational basis review).
42. North Carolina Dental Bd. v. FTC, 717 F.3d 359, 365 (4th Cir. 2013).
43. *See*, *e.g.*, Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093 (2014) (providing detailed discussion of state-action immunity in the context of the North Carolina teeth-whitening litigation and arguing that state agencies consisting of market participants should not receive immunity for anticompetitive conduct).

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