

# The Right to Earn a Living

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*"The monopolizer engrosseth to himself what should be free for all men."*

-Edward Coke<sup>1</sup>

## I. INTRODUCTION

"At common law," wrote William Blackstone, "every man might use what trade he pleased."<sup>2</sup> This seemingly innocuous phrase, dropped offhandedly into a chapter on the obligations of master and servant, hints at a rich common law tradition which has largely been ignored—or even denied outright—by more modern scholarship.

One representative sample of the modern view of economic liberty is the following:

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\* College of Public Interest Law Fellow, Pacific Legal Foundation. J.D., Chapman University School of Law, 2002; B.A., Hillsdale College, 1998. A much-abridged version of this article appeared in 7 *INDEPENDENT REV.* 69 (2002). In the following paper, many quotations from antique sources reproduce obsolete or incorrect spellings which appear in the original. Using "sic" after all of these unique spellings would quickly become tedious. Thus, these quotations are reproduced without the customary "sic" designation, except for a few instances where the editors felt its inclusion was necessary to avoid the appearance of typographical error. In addition, many of the cases discussed in this paper were written in Law French, an odd mixture of Latin, Norman French, and English, which constituted a unique legal language until the seventeenth century. These have been translated and summarized. I wish to thank Harvard law student Alexander Volokh and Chapman University School of Law Professor John C. Eastman for their help.

I wish to dedicate this article to my father, Mark M. Sandefur, who, like his father before him (a World War II veteran), has secured the blessings of liberty to himself and to me, first by helping to win the Cold War, and now by working to win the war in which we are engaged today.

Your fathers . . . were peace men; but they preferred revolution to peaceful submission to bondage. They were quiet men; but they did not shrink from agitating against oppression. They showed forbearance; but that they knew its limits. They believed in order; but not in the order of tyranny. With them, nothing was "settled" that was not right. With them, justice, liberty and humanity were "final," not slavery and oppression. You may well cherish the memory of such men. . . . They seized upon eternal principles, and set a glorious example in their defense. Mark them!

Frederick Douglass, *What to the Slave is the Fourth of July?*, reprinted in FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 192 (P. Foner & Y. Taylor eds., 1999).

<sup>1</sup> Quoted in CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* 420 (1957).

<sup>2</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*427.

I do not count the Supreme Court decisions defending contract or property rights from state regulation as Bill of Rights decisions. None of these cases represents a defense of civil liberties. The Court merely used libertarian philosophy to protect the wealthy from progressive legislation. The Court eventually rejected these economic liberty decisions because they were not connected to the text of the Constitution or any philosophy with roots in the history and traditions of our nation and its democratic process.<sup>3</sup>

In Part I of this paper I will examine the history of the common law right to pursue a lawful occupation, to demonstrate just how thoroughly wrong this view is. Part II will address the history of this right from the Magna Carta to the era of Sir Edward Coke, who might rightly be regarded as the founding father of what is now called "economic substantive due process."<sup>4</sup> Part III discusses the effect of Coke's works on the American Revolution, and Part IV discusses his influence on the early period of American Constitutional history. Part V discusses the *Slaughter-House Cases*,<sup>5</sup> and the treatment of the right to earn a living between those cases and the New Deal era. Part VI discusses academic criticism of these cases, and the triumph of legal positivism in 1937. Part VII will review the treatment of this right from 1937 to the present day. It is my desire that this paper will at least illustrate that the economic substantive due process cases did not announce principles unknown to legal history—were not legal interlopers gone beyond reasonable readings of precedent—and that it was instead the 1937 repudiation of protections for economic liberties that was the new, ahistorical reading of the law,<sup>6</sup> and one which has proven itself to be fallacious and dangerous.

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3 John E. Nowak, *The 'Sixty Something' Anniversary of the Bill of Rights*, 1992 U. ILL. L. REV. 445, 452 (1992).

4 This term is generally used to refer to the theory, much reviled in the legal academy, that the Due Process Clauses of the Fifth and Fourteenth Amendments prevent government from infringing on certain rights which are generally associated with "economic" behaviors—e.g., property rights, or the right to earn a living. Today, the Due Process Clauses are seen as protecting rights such as the right to privacy, but not economic freedoms. That the term "economic substantive due process" dissolves on closer inspection, particularly because there is no principled distinction between "economic" and "personal" rights, is one of the major themes of this article. Another theme, that the Due Process Clause was interpreted as including a substantive component long before the nineteenth century, has been thoroughly explored by Bernard Siegan, particularly in his recent book. See BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM THE MAGNA CARTA TO THE FOURTEENTH AMENDMENT* (2001).

5 83 U.S. (16 Wall.) 36 (1873).

6 See *infra* note 230.

## II. BEFORE THE AMERICAN REVOLUTION

## A. Magna Carta to Lord Coke

By Magna Carta, “[a]ll merchants are to be safe and secure in leaving and entering England, and in staying and traveling [sic] in England . . . to buy and sell free from all maletotes by the ancient and rightful customs . . . .”<sup>7</sup> Although Magna Carta’s importance has been greatly exaggerated, the “myth of Magna Carta” was built by men who were simultaneously building the background tradition of English and American liberty.<sup>8</sup> Before (and after) Magna Carta, the king exercised a vaguely defined sweep of power called the “prerogative,”<sup>9</sup> by which he could grant certain exclusive rights, or “franchises” to his subjects. But from early on, the English suspicion of the prerogative power manifested itself in resistance to these royal grants of exclusive rights to trade.

Thus Fortescue, whose *De Laudibus Legum Anglie*<sup>10</sup> was written in 1471, wrote that:

In the realm of England, no one . . . [is] hindered from providing himself with salt or any goods whatever, at his own pleasure and of any vendor. . . . Nor can the king there, by himself or by his ministers, impose tallages, subsidies, or any other burdens whatever on his subjects, nor change their laws, nor make new ones, without the concession or assent of his whole realm . . . in . . . parliament.<sup>11</sup>

Fortescue believed that this relative economic freedom was responsible for England’s prosperity and he was largely right.<sup>12</sup> Of course, the monarchy was hardly a free-market institution, but as far back as the reign of Edward III, common law courts had been concerned with protecting the subject’s right to economic freedom. In 1377, the court struck down a royal monopoly which had been granted to a man named John Peachie, on the sale of wine in London.<sup>13</sup> The court held this to be a violation of the right of free

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7 J.C. HOLT, *MAGNA CARTA* 461–63 (2d ed. 1992). By the Confirmatio Cartarum, King Edward I acknowledged that the Magna Carta had become common law. CONFIRMATIO CARTARUM (Nov. 5, 1297), available at [http://www.constitution.org/eng/confir\\_cartarum.htm](http://www.constitution.org/eng/confir_cartarum.htm).

8 See WINSTON S. CHURCHILL, *THE BIRTH OF BRITAIN* 254–57 (Barnes & Noble Books 1993) (1956); HOLT, *supra* note 7, at 2–22, 378–405 (describing the rise of the “myth of Magna Carta”).

9 See generally 1 BLACKSTONE, *supra* note 2, at \*271–73. Blackstone also discusses the effects of prerogative in corporate law. 1 *id.* at \*467–85.

10 “In Praise of the Laws of England” (per author’s own translation).

11 SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* 87 (S.B. Chrimes ed. and trans., Wm. W. Gaunt & Sons, Inc. 1986) (1545).

12 *Id.* at 87–89.

13 EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* \*181 (William S. Hein Co. 1986) (1797) [hereinafter COKE, *THE THIRD PART OF THE INSTITUTES*]; 4 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 344 (3d ed. 1945).

trade.<sup>14</sup> Similarly, in *John Dier's Case*,<sup>15</sup> Chief Justice Holt ruled against a monopoly charter, holding that he would have imprisoned anyone who had claimed such a monopoly on his own authority.<sup>16</sup>

Thus, the right of the king to control the economy *was* limited at common law, by a right, the importance of which must have been very obvious in an era where starvation and pestilence were daily experiences. The right to support oneself by a lawful calling<sup>17</sup> was not only central to the health of the state, but to the lives of citizens. Such economic liberties were protected in, for example, *Prior of Christchurch Canterbury v. Bendyshe*, in which the court held that merely selling products adjacent to an existing seller does not constitute a cause of action, even though it might injure an existing seller.<sup>18</sup> As Holdsworth said, "the mediæval [sic] judges favoured the principle [of free trade], just as they favoured the principle of freedom of alienation, because they were hostile to all arbitrary restrictions on personal liberty, or rights of property, for which no legal justification could be shown."<sup>19</sup>

## B. Lord Coke

By far the most outspoken defender of the right to earn a living was Sir Edward Coke.<sup>20</sup> speaker of the House of Commons, then attorney general for Queen Elizabeth, Coke was appointed Chief Justice of King's Bench by King James I.<sup>21</sup> Coke is best remembered today for his decision in *Dr. Bonham's Case*,<sup>22</sup> in which he asserted the supremacy of the law over the king.<sup>23</sup> But Coke was also the leading opponent of royal monopolies.<sup>24</sup> This is rather ironic, since, as Elizabeth's Attorney General, Coke was re-

14 4 HOLDSWORTH, *supra* note 13, at 344 n.6.

15 2 Y.B. Henry V \*26 (per author's own translation).

16 See also *The Case of the Tailors*, 77 Eng. Rep. 1218, 1219 (K.B. 1615) (citing *Dier's Case*, and noting that "there Hull held, that the bond was against the common law, and by G—d if the plaintiff was here, he should go to prison till he paid a fine to the King").

17 Throughout this paper, I will use interchangeably such terms as "the right to a lawful calling," "the right to pursue a lawful occupation," "the right to earn an honest living," and so forth. I find the term "right of livelihood" to have been tainted by frequent misuse. See *infra* text accompanying note 274.

18 93 SELDEN SOCIETY 8, 9 (1503).

[D]amage alone is not a cause of action. Thus, [where] an innkeeper or other victualler comes and dwells next to another [innkeeper] and thereby more of the customers resort to him than to the other, it is a damage to the other but no wrong, for he cannot compel men to buy victuals from him rather than from the other.

93 *id.* (second and third alteration in original). See also *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 1128 (K.B. 1707).

19 11 HOLDSWORTH, *supra* note 13, at 477–78 (footnotes omitted).

20 See BOWEN, *supra* note 1.

21 *Id.* at 340–41.

22 77 Eng. Rep. 646 (K.B. 1610).

23 See BOWEN, *supra* note 1, at 314–17.

24 *Id.* at 420.

quired to argue on behalf of the plaintiff in the famous *Case of Monopolies*, or *Darcy v. Allen*, in 1602.<sup>25</sup> Edward Darcy had received a monopoly to sell playing cards from the monarchy. Allen then made and sold playing cards, and Darcy sued.<sup>26</sup> Chief Justice Popham ruled for the defendant. As Coke wrote:

All . . . trades, as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liberty of the subject . . . .<sup>27</sup>

Today, those who criticize the concept of “economic due process” essentially argue that protection of freedom of contract is merely a guise for the wealthy to oppress the poor or to prevent regulations which aim to protect the safety and health of the people.<sup>28</sup> Some critics have even contended that economic due process is an attempt to “enact Mr. Herbert Spencer’s Social Statics,”<sup>29</sup>

<sup>25</sup> 77 Eng. Rep. 1260 (K.B. 1602).

<sup>26</sup> For an enlightening history of this case, see Jacob I. Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 EMORY L.J. 1261 (1996).

<sup>27</sup> 77 Eng. Rep. at 1262–63. Note that this was the argument of one of the attorneys in the case, not an opinion by Popham. *Id.* at 1262. Popham and the court did not explain their decision in print. Corré, *supra* note 26, at 1269–70.

<sup>28</sup> Although I quote many such critics throughout this article, this view is so prevalent that it would be impossible to cite all but a fraction of them here. See, e.g., Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 431–32 (1999) (arguing that *Lochner* was an example of “misuse of the Fourteenth Amendment to invalidate humane state legislation”); Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 51 (2002) (“The U.S. Supreme Court’s use of rights doctrines to invalidate progressive legislation during the *Lochner* era attests to the fact that the protection of rights can advance causes on the political right as well as that of the left.”). See also Jane Rutherford, *The Myth of Due Process*, 72 B.U.L. REV. 1, 12 (1992) (arguing that “[t]he *Lochner* era decisions . . . protected private enterprise from the incursions of an impoverished majority, echo[ing] the original Framers’ fear of the poor masses”). Rutherford recognizes that the Founders probably would have “approved of a baker’s ‘right’ to work sixteen hours per day. Born without property, a person could only hope to acquire such property by dint of extraordinary effort. Indeed, limiting the baker’s ‘right’ to work sixteen hours a day may have relegated him to a life of poverty.” *Id.* Yet she proceeds to argue that “[t]he anti-regulatory decisions err (are substantively arbitrary) because they fail to balance power in favor of the oppressed,” which of course begs the question. *Id.* Mr. *Lochner*, after all, *won* his case.

<sup>29</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Holmes’ remark, and his further explanation that a constitution is “made for people of fundamentally differing views” and is “not intended to embody a particular economic theory” can be questioned. *Id.* at 75–76. A constitution is exactly where a particular political and economic theory is embodied. The United States Constitution explicitly protects private property, contracts, and even a gold standard. See U.S. CONST. amend. V. *Id.* art I, § 10, cl. 1. Indeed, what *is* a constitution, if it is not an enactment of a particular economic and political system? Classical philosophers such as Aristotle and Augustine theorized that political society is (in Augustine’s words) “an assemblage associated by a common acknowledgement of right, and by a community of interests.” See AUGUSTINE, *THE CITY OF GOD* 19:23–24,

and consequently a threat of rampant *laissez-faire*, leaving the consumer no protection against faulty or dangerous products. Yet the common law courts, which had always defended freedom of contract, had also always upheld the right of the government to regulate or license dangerous occupations to protect the consumer.

Indeed, evidence of judicial consumer protection dates back to the twelfth century.<sup>30</sup> Glanville wrote that "if the seller has sold the thing to the buyer as sound and without fault and the buyer can afterwards satisfactorily prove that at the time of the contract the thing was not sound and had a fault, then the seller will be bound to take back his thing."<sup>31</sup> Ancient court reports are also full of cases which protect the consumer from fraud or from shoddy merchandise. For instance, in the Leet Rolls of Edward I, "Robert Suffield [was found liable] for making fraud etc., by selling oil of one kind for oil of another kind," and was fined four shillings.<sup>32</sup> In another case, "all those Sprowston men . . . knowingly buy measly pigs, and they sell the said sausages and puddings, unfit for human bodies, in Norwich market."<sup>33</sup> The Fair Court of St. Ives routinely dealt with similar cases in which, for instance, a loaf of

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reprinted in *THE ESSENTIAL AUGUSTINE* 211 (Vernon J. Bourke ed., 2d ed. 1974). See also ARISTOTLE, *POLITICS* 1:2, reprinted in *INTRODUCTION TO ARISTOTLE* 555 (Richard McKeon ed., 1947) ("[T]he state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life."). Thus, classical political theory lends support to the idea that at least one of the purposes of a constitution is to delineate common societal interests in order to affect the public's common political and economic goals. While such modernists as Holmes may have rejected this view, even their view, that society is only a means of organizing and bargaining for political power, would beg the question: On what premises does a society create the rules for that bargaining? Further, even if the Constitution is only a procedural document, the decisions that lead to those procedural arrangements are certainly based on at least an implicit judgment of good and bad. It is harder for the Congress, for example, to overrule the President's veto than for the Congress to pass a law with the President's consent. Ostensibly, this is because a law which the President does not approve is more likely to be a "bad" law than a law which both the President and the Congress agree upon. To have made the procedure (i.e., the power-sharing) more difficult in one case than in the other embodies a judgment of good and bad which can only be called a "particular political theory." Likewise, the Constitution prohibits any state from "mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts." U.S. CONST. art I, § 10, cl. 1. This rule can *only* be explained by reference to "a particular economic theory." See also CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 324 (1946) ("The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.").

<sup>30</sup> See Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 *YALE L.J.* 1133, 1157-59 (1931).

<sup>31</sup> RANULF DE GLANVILL, *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* 129 (G.D.G. Hall trans. & ed., Thomas Nelson & Sons 1965) (1189).

<sup>32</sup> Leet Roll of 24 Edward I. 129 5/6, in 5 *THE PUBLICATIONS OF THE SELDEN SOCIETY* 47 (1891).

<sup>33</sup> Leet Roll of 24 Edward I. 128 7/8, in 5 *THE PUBLICATIONS OF THE SELDEN SOCIETY* 8 (1891).

bread was found “deficient in weight,” and the seller fined,<sup>34</sup> or where “Adam Cabel sells whelks with good and bad mixed together.”<sup>35</sup>

The courts have acknowledged the legitimacy of government regulations to protect consumers, though they have not held that the right to pursue a given occupation necessarily meant being free from basic safety and other similar regulations. For example, the courts never held that the state could not prohibit the exercise of a lawful trade on Sabbath days.<sup>36</sup> Rather, the common law held that such regulations were invalid when used for the purpose of keeping an honest person out of the market.<sup>37</sup> In the *Case of the City of London*,<sup>38</sup> the court ruled that “the King may erect *guildam mercatoriam*, i.e., a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, and not for the hindrance or diminution of it.”<sup>39</sup> In other words, government could regulate trade impartially, but not in order to prevent the free exercise of a lawful calling. The cases agreed with the principle explained by Friedrich Hayek: “[A] free system does not exclude on principle all those general regulations of economic activity which can be laid down in the form of general rules specifying conditions which everybody who engages in a certain activity must satisfy”—for example, a ban on the production and sale of phosphorus matches for reasons of health.<sup>40</sup> Truly benign regulations of trade may result in greater economic efficiency by reducing production costs.<sup>41</sup> Thus, while Hayek acknowledged that such regulations might sometimes be worthwhile,<sup>42</sup> he warned that “[t]he economist will remain suspicious and hold that there is a strong presumption against such measures because their over-all cost is almost always underestimated and because one disadvantage in particular—namely, the prevention of new

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34 Pleas of the Fair on Wednesday Before the Feast of St. Dunstan the Bishop in the Aforesaid Year (A.D. 1302), in 23 THE PUBLICATIONS OF THE SELDEN SOCIETY 83 (1908).

35 Leet Roll of 24 Edward I. 128 7/8, *supra* note 33, at 10.

36 See *Crepps v. Durden*, 98 Eng. Rep. 1283, 1284 (K.B. 1777).

37 This point was put succinctly in an 1833 New York case, where the court said that “a by-law that no meat should be sold in the village would be bad, being a general restraint; but that meat shall not be sold except in a particular place is good, not being a restraint of the *right to sell* meat, but a *regulation* of that right.” *Village of Buffalo v. Webster*, 10 Wend. 99, 101 (N.Y. Sup. Ct. 1833) (emphasis added).

38 77 Eng. Rep. 658 (K.B. 1610).

39 *Id.* at 663. *Accord* *Walter v. Hanger*, 72 Eng. Rep. 935 (K.B. 1602) (per author’s own translation).

40 FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 224–25 (1960).

41 *Id.* Note here the similarity to what Richard Epstein has called “Implicit In-Kind Compensation.” RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 195 (1985).

42 HAYEK, *supra* note 40, at 224–25.

developments—can never be fully taken into account.<sup>43</sup> As a 1727 case indicated, a restraint on trade is acceptable so long as the party exercises the trade somewhere, but is undesirable if it tends to prevent the exercise of the trade anywhere.<sup>44</sup> A South Carolina court put it more simply. A city may regulate a trade, “[b]ut the suppression of a trade is not a regulation. To be regulated, the trade must subsist.”<sup>45</sup>

In *Davenant v. Hurdis*,<sup>46</sup> Coke argued the same point—that although a “by-law” which regulated the practice of a trade was legitimate, a law which restrained trade was unjust. He reasserted this stance some twenty-eight years later in *Monopolies*: “[O]rdinances for the better rule and government of the company . . . are consonant to law and reason,” but an ordinance which required a person to have clothing only made by a particular guild of tailors “was against the common law, because it was against the liberty of the subject . . . .”<sup>47</sup>

Another example is *Allen v. Tooley*,<sup>48</sup> in which an upholsterer was sued for failure to serve an apprenticeship before taking up his trade. Coke, who by this time had become Chief Justice of King’s Bench, ruled that “no skill there is in this, for he may well learn this in seven hours.”<sup>49</sup> As unskilled labor, it was not subject to the sort of licensing restrictions appropriate to more technical trades. The court in *Tooley* lucidly explained the common law’s view of regulations for the protection of consumers:

<sup>43</sup> *Id.*

<sup>44</sup> *Chesman ex Ux’ v. Nainby*, 93 Eng. Rep. 819, 821 (K.B. 1727).

The reason why particular restraints [on trade] are allowed is, because the publick is not concerned, so long as the party exercises the trade somewhere. But if it tends to prevent the exercise of [the trade] any where, it is not to be endured; because the publick loses the benefit of the party’s labour, and the party himself is rendered an [sic] useless member the community.

*Id.* Or to put it in the words of a 1787 text on English legal history:

Many other statutes were made [in the reign of Henry VIII] for the conducting of different manufactures, of which, as well as of the other acts of this and the following reigns, it may be observed in general, that they had a tendency to give preferences to corporations and fraternities, and to encourage a spirit of monopoly.

4 JOHN REEVES, HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS TO THE END OF THE REIGN OF PHILIP AND MARY 230 (2d ed. 1787). See also *Wannel v. Camerar’ Civit’* London, 93 Eng. Rep. 775, 775–76 (K.B. 1726).

We are all of opinion, that this is a good by-law, being made in regulation of trade, and to prevent fraud and unskilfulness [sic], of which none but a company that exercise the same trade can be judges. This does not take away his right to his freedom, but only his election of what company he shall be free . . . .

*Id.* *Accord* *Player v. Vere*, 83 Eng. Rep. 149 (K.B. 1691), also reported at 83 Eng. Rep. 168.

<sup>45</sup> *State v. Town Council of Columbia*, 40 S.C.L. (6 Rich.) 404, 415 (1853). *Accord* *Sweet v. City of Wabash*, 41 Ind. 7 (1872); *Town of Cantril v. Sainer*, 12 N.W. 753, 753–54 (Iowa 1882); *City of Emporia v. Volmer*, 12 Kan. 622, 626 (1874).

<sup>46</sup> 72 Eng. Rep. 769 (K.B. 1574) (per author’s own translation).

<sup>47</sup> *Darcy v. Allen*, 77 Eng. Rep. 1260, 1263 (K.B. 1602).

<sup>48</sup> 80 Eng. Rep. 1055 (K.B. 1614).

<sup>49</sup> *Id.* at 1057.



[B]y the very common law, it was lawful for any man to use any trade thereby to maintain himself and his family; this was both lawful, and also very commendable, but yet by the common law, if a man will take upon him to use any trade, in the which he hath no skill; the law provides a punishment for such offenders, and such persons were to be punished in the court leet, and by actions brought, as by the cases before . . . .<sup>50</sup>

The court cited the example of a blacksmith who injured a horse because he was not skilled in his trade—proper legal redress, the court explained, was already available in the form of a suit for damages. “Unskilfulness [sic] is a sufficient punishment for him,” Chief Justice Coke said,<sup>51</sup> but the case settled out of court before a final decision.<sup>52</sup> In short, the common law view was that skilled trades were subject to regulation only in order to increase or advance trade, but not to hinder it.<sup>53</sup> In the *Case of the Tailors* (1615), Coke again wrote that “at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness,”<sup>54</sup> and thus “the common law abhors all monopolies, which prohibit any from working in any lawful trade . . . .”<sup>55</sup>

Coke’s defense of the free market in these cases was not intended to protect the rich, but exactly the opposite: to defend the poor from legal restrictions on the freedom which gave them a chance to work their way out of poverty. It was the wealthy who benefited from monopoly practices. When, furious over *Dr. Bonham’s Case*, James finally fired him, Coke entered the House of Commons and continued his attack on the monopolies: “The monopolizer engrosseth to himself what should be free for all men,” he said.<sup>56</sup> Finally, he managed to get an act passed, the Statute of Monopolies, which declared that all monopolies—save temporary patents, used to encourage innovation—“are altogether contrary to the laws of the realm, and so are and shall be utterly void and of none effect and in no wise to be put in use or execution.”<sup>57</sup> In his *Commentaries on American Law*, Chancellor Kent referred to the Statute of Monopolies as “magna charta for British industry,” and quoted the view that it “contained a noble principle, and secured to every subject unlimited freedom of action, provided he did no injury to others, nor violated statute law.”<sup>58</sup>

<sup>50</sup> *Id.* at 1055.

<sup>51</sup> *Id.* at 1059.

<sup>52</sup> *Id.*

<sup>53</sup> See also *Chamberlain of London’s Case*, 77 Eng. Rep. 150, 151 (K.B. 1592) (upholding regulation of trade where it is “made . . . to prevent all frauds and falsities”).

<sup>54</sup> 77 Eng. Rep. 1218, 1219 (K.B. 1615).

<sup>55</sup> *Id.*

<sup>56</sup> BOWEN, *supra* note 1, at 420.

<sup>57</sup> 21 Jac. 1 c. 3.

<sup>58</sup> 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*272 n.(c) (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 12th ed. 1999) (1873).

Coke was not the only judge who argued that monopolies violated the common law.<sup>59</sup> In *Colgate v. Bacher*,<sup>60</sup> the court held that:

[T]his condition is against law, to prohibit or restrain any to use a lawful trade at any time . . . for as well as he may restrain him for one time . . . he may restrain him for longer times . . . being freemen, it is free for them to exercise their trade in any place. . . . [A party] ought not to be abridged of his trade and living.<sup>61</sup>

In the 1632 case of *Mounson v. Lyster*, the court struck down a monopoly under the Statute of Monopolies.<sup>62</sup> Only a few years earlier, the court struck down an ordinance of the Company of Bricklayers which prohibited the plastering of chimney bricks with lime, and permitting only the Company of Plasterers to do the job.<sup>63</sup>

But it was Coke who fought monopolies so intensely that his name became permanently associated with freedom of trade. After he retired from Parliament, he wrote a series of books, the *Institutes of the Common Law of England*, which were to be the training books for generations of lawyers, including Thomas Jefferson, John Adams, and John Marshall.<sup>64</sup> In a chapter on monopolies, Coke wrote that "all grants of monopolies are against the ancient and fundamentall [sic] laws of this kingdome," because "a mans trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a mans trade, taketh away his life . . . ."<sup>65</sup> In short, "[n]o man ought to be put from his livelihood without answer."<sup>66</sup>

So likewise, and for the same reason, if a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that graunt is against the liberty and freedome of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter.

Generally all monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against the law of the land.<sup>67</sup>

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<sup>59</sup> See also *Weaver of Newbery's Case*, 72 Eng. Rep. 962, 962 (K.B. 1616) (per author's own translation).

<sup>60</sup> 78 Eng. Rep. 1097 (K.B. 1602).

<sup>61</sup> *Id.* at 1097.

<sup>62</sup> 82 Eng. Rep. 122, 122 (K.B. 1632) (per author's own translation).

<sup>63</sup> *Les Brick-Layers & Tilers v. Les Plaisterers*, 81 Eng. Rep. 871, 872 (1624) (per author's own translation).

<sup>64</sup> BOWEN, *supra* note 1, at 513-14.

<sup>65</sup> COKE, *THE THIRD PART OF THE INSTITUTES*, *supra* note 13, at \*181.

<sup>66</sup> EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* \*47 (William S. Hein Co. 1986) (1797) [hereinafter COKE, *THE SECOND PART OF THE INSTITUTES*].

<sup>67</sup> *Id.*

The "Myth of Magna Carta," largely Coke's invention, had come down to earth. Monopolies were anathema to the generation that grew up reading the *Institutes*. In 1678, the Court of King's Bench found a Mr. Ripton not guilty of "exercising the trade of a grocer, not having served an apprenticeship," because "any man at common-law might use what trade he pleaseth."<sup>68</sup> In 1685, in *Thomas v. Sorrel*,<sup>69</sup> the Court of Exchequer Chamber noted that "any free-man of London . . . may trade in any part of England."<sup>70</sup> In 1687, King's Bench struck down a monopoly which had been granted for "the sole printing of *blank writs, bonds, and indentures*."<sup>71</sup> In 1695, the court struck down an ordinance requiring that "every person using the occupation of music and dancing" in London should be a member of the Company of Musicians, calling the law monopolistic.<sup>72</sup>

In the 1718 case of *Parry v. Berry*,<sup>73</sup> the court held that "without a custom such a bye-law, to restrain persons not being free of the borough from exercising a trade, cannot be maintained . . . ."<sup>74</sup> Probably the most famous of these cases is *Keeble v. Hickeringill*,<sup>75</sup> in which the plaintiff complained that the defendant was firing off a gun to frighten ducks away from his duck-pond, "intending to damnify the plaintiff in his vivary, and to fright and drive away the wildfowl . . . and deprive him of his profit . . . ."<sup>76</sup> Chief Justice Holt wrote that "when a man useth his art or his skill to take [ducks], to sell and dispose of for his profit; this is his trade; and he that hinder another in his trade or livelihood is liable to an action for so hindering him."<sup>77</sup> *Hickeringill's* protection of the right to earn a living continues through the English cases of the eighteenth century, providing the necessary legal protection for the beginning of the Industrial Revolution.<sup>78</sup>

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68 *Wade v. Ripton*, 84 Eng. Rep. 79, 79 (K.B. 1678).

69 84 Eng. Rep. 689 (K.B. 1685).

70 *Id.* at 689.

71 *Earl of Yarmouth v. Darrel*, 87 Eng. Rep. 48, 48 (K.B. 1687).

72 *Robinson v. Grosccourt*, 87 Eng. Rep. 547, 547 (K.B. 1695).

73 92 Eng. Rep. 1066 (K.B. 1718).

74 *Id.* at 1066. See also *The King v. Co. of Fishermen of Faversham*, 101 Eng. Rep. 1429, 1430 (K.B. 1799) (a private agreement not to compete is legal, but a law in restraint of trade is harmful); *Mitchell v. Reynold*, 92 Eng. Rep. 859, 859 (K.B. 1714) (Private contracts in restraint of trade, "where no particular consideration is to balance the restraint of trade . . . are void, in what form soever the contract appears."); *Broad v. Jollyfe*, 79 Eng. Rep. 509, 509 (K.B. 1616).

75 103 Eng. Rep. 1127 (K.B. 1707). See also A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW 45-75* (1996).

76 *Keeble*, 103 Eng. Rep. at 1128.

77 *Id.*

78 Law reports from this era and earlier frequently record only the attorney's arguments, or only the judge's words, and do not record other material. In *Robinson v. Watkins*, 90 Eng. Rep. 165 (K.B. 1702), the reporter has carefully preserved the long and eloquent argument of the defendant's counsel, and then reports of the outcome only that the matter "was settled in Parliament," without saying what the settlement was. *Id.* at 171. The re-

### III. COKE'S LEGACY IN AMERICA

The result of all this, in no small part, would be the American Revolution. After the repeal of the Townshend Duties in 1773, Jefferson wrote that "[n]othing of particular excitement occurring for a considerable time our countrymen seemed to fall into a state of insensibility to our situation."<sup>79</sup> The immediate crisis of the Townshend Acts being over, the tradesmen who made up Boston's Sons of Liberty had returned home, and the American Revolution teetered on the brink. It was *monopoly* that pushed it over.<sup>80</sup> When George III granted the East India Company the right not only to *ship* tea, but to *sell* it in America, workers who were now legally closed out of a livelihood reacted with the famous Boston Tea Party.<sup>81</sup>

The founding generation probably understood monopoly in a way we do not. To them, the term monopoly meant a company

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port, however, is strong evidence that by 1702, the English courts regarded it as a settled matter that "the common law . . . leaves it lawful for any man to exercise a lawful employment [sic] . . ." *Id.* at 169. See also *Harrison v. Godman*, 97 Eng. Rep. 161, 163-65 (K.B. 1756) (striking down licensing requirement for butchers); *Rex v. Combs*, 90 Eng. Rep. 454, 454 (K.B. 1702) ("[A]n indictment, which sets forth that there is an antient [sic] custom in Winchester, that no person should exercise any trade till free of the Guild of Merchants there . . . was quashed without difficulty."). Yet still the courts upheld regulations which were necessary to continue the trade or protect quality. See, e.g., *Clark v. Le Cren*, 109 Eng. Rep. 20, 22 (K.B. 1829) ("By common law, any person may carry on any trade in any place, unless there be a custom to the contrary . . . but if there be no such custom, a by-law in restraint of trade will be bad."); *Bricheno v. Thorp*, 37 Eng. Rep. 864, 865 (K.B. 1821) ("A gentleman going into business for himself must not carry into it the secrets of his master; but, on the other hand, I think it my duty to take care that he may not be prevented from engaging in any business that he may fairly and honourably take."); *King ex rel. Coates v. Coopers Co. of Newcastle-upon-Tyne*, 101 Eng. Rep. 1123, 1123 (K.B. 1798) (by-law oppressing trade is void); *Kirk v. Nowill*, 99 Eng. Rep. 1006, 1006 (K.B. 1786) (striking down regulation of manufacture of cutlery where penalty was forfeiture); *Hesketh v. Braddock*, 97 Eng. Rep. 1130 (K.B. 1766).

In the regulation of their own members, [guilds] may indeed make bye-laws . . .

But if corporations were to try their own suits against strangers upon a bye-law "for excluding all traders but themselves," there would be an end of the distinction which has long been established, "that a bye-law which lays this restraint upon trade is void, unless there be a custom to support it."

*Id.* at 1136; *Rex v. Harrison*, 97 Eng. Rep. 854, 857 (K.B. 1762) (upholding licensing requirement for butchers because it "is only regulating the trade to what is most right and reasonable."); *Rex v. Master of Co. of Surgeons*, 97 Eng. Rep. 621, 621 (K.B. 1759) (upholding requirement that surgeon's apprentice must understand Latin); *Bosworth v. Hearne*, 93 Eng. Rep. 1047, 1047-48 (K.B. 1738) (by-law permissible if reasonable and not in restraint of trade).

<sup>79</sup> *Autobiography of Thomas Jefferson*, in *THOMAS JEFFERSON: WRITINGS* 6 (Merrill D. Peterson ed., 1984).

<sup>80</sup> See, e.g., *THOMAS FLEMING, LIBERTY!: THE AMERICAN REVOLUTION* 75, 77 (1997) (British trade restrictions "virtually made the government the East India Company's permanent partner."); *JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION* 341 (1943) ("The menace of monopoly united virtually all businessmen—whether smugglers or honest traders—in opposition to the East India Company."); *SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 203 (1965) (noting colonial reaction to tea monopoly).

<sup>81</sup> *MORISON, supra* note 80, at 203-04. See also *A.J. LANGGUTH, PATRIOTS: THE MEN WHO STARTED THE AMERICAN REVOLUTION* 179-84 (1988).

insulated from competition by a special legal privilege which barred others from competing, and thereby earning a living. It was not what we mean by the term today—simply a large and successful company, often one which has succeeded in *spite* of the law. Microsoft, for instance, was not what Thomas Jefferson or Adam Smith meant when they denounced “monopoly.” The Post Office is.<sup>82</sup> It was precisely the fact that the government made illegal harmless competition—indeed, helpful competition—that upset the founding generation.<sup>83</sup> In their famous “Cato’s Letters,” published in 1721, John Trenchard and Thomas Gordon wrote that while free trade “will turn Deserts into fruitful Fields, Villages into great Cities, Cottages into Palaces,” the state’s exercise of arbitrary power would pervert trade into a weapon or a catastrophe.<sup>84</sup> Trenchard and Gordon believed that those who used “Bribes or Favour,” to establish “exclusive Companies” prospered only at the expense of honest merchants who simply lacked political connections.<sup>85</sup>

Some may remark that Thomas Jefferson’s ringing phraseology in the Declaration of Independence was meant to depart from John Locke’s earlier defense of the rights of “life, liberty, and estate,” or “life, liberty and property.” In light of Jefferson’s other

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82 See 4 WILLIAM BLACKSTONE, COMMENTARIES \*159 (defining monopoly as “a license or privilege allowed by the king for the sole buying and selling, making, working, or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.”). Adam Smith wrote:

The price of monopoly is upon every occasion the highest which can be got. The natural price, or the price of free competition, on the contrary, is the lowest which can be taken, not upon every occasion indeed, but for any considerable time together. The one is upon every occasion the highest which can be squeezed out of the buyers, or which, it is supposed, they will consent to give: The other is the lowest which the sellers can commonly afford to take, and at the same time continue their business.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 65 (Edwin Cannan ed., 1937) (1776). Note that software prices have consistently fallen while postage stamps have consistently risen. See also *Budd v. New York*, 143 U.S. 517, 550–51 (1892).

There are two kinds of monopoly; one of law, the other of fact. The one exists when exclusive privileges are granted. Such a monopoly, the law which creates alone can break; and being the creation of law, justifies legislative control. A monopoly of fact any one can break, and there is no necessity for legislative interference. It exists where anyone by his money and labor furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He has therefore a monopoly of that business; but it is a monopoly of fact, which anyone can break who, with like business courage puts his means into a similar building.

*Id.* (Brewer, J., dissenting); see also GEORGE REISMAN, CAPITALISM: A TREATISE ON ECONOMICS 375–440 (1996) (detailing two different meanings of the term “monopoly”).

83 See generally THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 37–70 (1997).

84 John Trenchard, *Trade and Naval Power the Offspring of Civil Liberty Only, and Cannot Subsist Without It* (Feb. 3, 1721), in THE ENGLISH LIBERTARIAN HERITAGE 146 (David L. Jacobson ed., 1965).

85 *Id.* at 147.

influences, it is evident that Jefferson's use of the phrase, "life, liberty, and the pursuit of happiness," was meant to assert this right of livelihood. Earlier in 1776, George Mason had begun the Virginia Declaration of Rights with the phrase, "That all men are by nature equally free and independent, and have certain inherent rights . . . namely, the enjoyment of life and liberty, with *the means of acquiring* and possessing property, and *pursuing and obtaining* happiness and safety."<sup>86</sup> Jefferson, who read Mason's declaration with interest while he labored away in Philadelphia, was very concerned with social mobility; he resented what he would later call the "artificial aristocracy," and wanted instead to foster the "natural aristocracy" of "virtue and talents."<sup>87</sup> That government was best which most efficiently enabled the natural aristocracy to rise, he said, and America presented a unique opportunity to create such a government. "Here every one may have land to labor for himself if he chuses; or, preferring the exercise of any other industry, may exact for it such compensation as not only to afford a comfortable subsistence, but wherewith to provide for a cessation from labor in old age."<sup>88</sup> In his first inaugural address, Jefferson defined "the sum of good government" as one which "shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned."<sup>89</sup> "[E]very one has a natural right to choose for his pursuit such one of them as he thinks most likely to furnish him subsistence," he wrote.<sup>90</sup> Surely this is "the pursuit of happiness." James Madison summed up these ideas keenly in his essay "Property"—

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his

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<sup>86</sup> ROBERT ALLEN RUTLAND, *GEORGE MASON: RELUCTANT STATESMAN* 111 (1961) (emphasis added).

<sup>87</sup> Letter of Thomas Jefferson to John Adams (Oct. 28, 1813), in *THE ADAMS-JEFFERSON LETTERS* 387, 388 (Lester J. Cappon ed., 1959).

<sup>88</sup> *Id.* at 391.

<sup>89</sup> First Inaugural Address of Thomas Jefferson (Mar. 4, 1801), in *THOMAS JEFFERSON: WRITINGS* 492, 494 (Merrill D. Peterson ed., 1984).

<sup>90</sup> Thomas Jefferson, *Thoughts on Lotteries* (Feb. 1826), in *17 THE WRITINGS OF THOMAS JEFFERSON* 448, 449 (A. Bergh ed., 1905). Jefferson drafted this memo while he was asking the Virginia legislature for permission to hold a lottery to raffle off Monticello and thereby pay off his crushing debts. Although he received permission, the lottery was a failure. See DUMAS MALONE, *THE SAGE OF MONTICELLO* 473-82, 495-96 (1981).

neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the oeconomic [sic] use of buttons of that material, in favor of the manufacturer of buttons of other materials!<sup>91</sup>

Bernard Siegan has said that “[t]he Framers might well be described as commercial republicans.”<sup>92</sup> The specter of legally forbidding an honest person from making an honest living haunted the founding generation so much that four states, when ratifying the Constitution, included a ban on monopolies among their proposed bills of rights.<sup>93</sup> To the Framers of the Constitution, the question of monopoly was not merely a matter of economic efficiency. Rather, it was primarily a matter of *natural right*: the right to engage in the very labor which Locke said was the foundation of property rights to begin with: “[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.”<sup>94</sup> It was a matter of the free exercise of one’s faculties, a right granted by nature, and protected by the common law. This is why Chancellor Kent referred to the Statute of Monopolies as protecting “freedom of *action*.”

We can see this concern expressed also in the founders’ attitude toward patents and copyrights. In *The Federalist Papers*, James Madison expressed his belief that “[t]he utility of the power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law.”<sup>95</sup> But in truth, Madison and Jefferson were quite suspicious of the idea. Jefferson wrote to him that he wished the new Constitution would prohibit monopolies. “With regard to Monopolies they are justly classed among the greatest nuisances [sic] in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly re-nounced?”<sup>96</sup> Jefferson agreed that the temporary monopolies called patents and copyrights were *useful*, even while he disagreed that they were *legitimate* from a natural rights point of view.<sup>97</sup> In

91 James Madison, *Property*, reprinted in JAMES MADISON: WRITINGS 515, 516 (Jack N. Rakove ed., 1999).

92 BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 104 (1980) [hereinafter SIEGAN, *ECONOMIC LIBERTIES*].

93 See *THE DEBATE ON THE CONSTITUTION* (Bernard Bailyn ed., 1993). The states were Massachusetts, *id.* at 1:944, North Carolina, *id.* at 2:571, New Hampshire, *id.* at 2:551, and New York, *id.* at 2:542.

94 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 328–29 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

95 *THE FEDERALIST* No. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961).

96 Letter from James Madison to Thomas Jefferson, (Oct. 17, 1788), in 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826*, at 562, 566 (James Morton Smith ed., 1995).

97 See also William Grampp, *A Reexamination of Jeffersonian Economics*, in 1 *THE RANDOM HOUSE READERS IN AMERICAN HISTORY* 393–404 (Joseph Ernst et al., eds., 1970).

a letter written in 1813, he expressed his deep concerns about the monopolistic power inherent in patents. "Every man should be protected in his lawful acts," he wrote. "But he is endamaged, if forbidden to use a machine lawfully erected, at considerable expense, unless he will pay a new and unexpected price for it. . . . Laws, moreover, abridging the natural right of the citizen, should be restrained by rigorous constructions within their narrowest limits."<sup>98</sup> Jefferson and his contemporaries therefore presumed strongly against laws which granted exclusive business privileges. As the Chief Justice Marshall wrote in *Charles River Bridge v. Warren Bridge*, "[t]he exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation."<sup>99</sup>

At the Constitutional Convention, the Framers debated a motion to establish "a [Congressional] power 'to grant charters of incorporation . . .'"<sup>100</sup> Some delegates objected because they believed such a power might permit Congress to create monopolies. George Mason, responding to these fears, stated that "[h]e was afraid of monopolies of every sort, which he did not think were by any means already implied" by the commerce clause.<sup>101</sup>

Historian Gordon S. Wood described the hostility with which the founding generation greeted the notion of monopolies.

[B]ecause of a republican aversion to chartered monopolies, the creation of corporations [in early America] did not take place without strenuous opposition and heated debate. As a consequence, these corporations were radically transformed. Within a few years most of them became very different from their monarchical predecessors: they were no longer exclusive monopolies and they were no longer public. They became private property and what Samuel Blodget in 1806 called "rivals for the common weal." And they were created in astonishing numbers unduplicated anywhere else in the world.<sup>102</sup>

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"What [Jefferson] wanted essentially was the increased incentive resulting from monopoly grants without the ill effects of monopoly." *Id.* at 401.

<sup>98</sup> Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in THOMAS JEFFERSON: WRITINGS 1286, 1287 (Merrill D. Peterson ed., 1984).

<sup>99</sup> 36 U.S. (11 Pet.) 420, 546 (1837) (quoting *Beatty v. Lessee of Knowler*, 29 U.S. (4 Pet.) 152, 168 (1830)).

<sup>100</sup> JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION 638 (Adrienne Koch ed., 1966).

<sup>101</sup> *Id.*

<sup>102</sup> GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 318 (1992). At the California Constitutional Convention of 1849, the subject of corporations was debated at length in an exchange that reveals the way in which, as Paul Kens has put it, the nineteenth century saw "people with the same Jacksonian and free-labor roots split over the meaning of liberty and the proper scope of government power." PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 8 (1997). Delegate Charles Botts warned the Convention that:

Corporations as they were originally known to the Roman law, had several beneficial properties. . . . The institution as it was known when adopted by the common



The revolution had been fought to prevent the arbitrary sway over economic liberty which the throne exercised through (*inter alia*) the monopoly power. Chancellor Kent explained: “[A]lthough corporations were found to be very beneficial in the earlier periods of modern European history . . . their exclusive privileges have too frequently served as monopolies, checking the free circulation of labor, and enhancing the price of the fruits of industry.”<sup>103</sup> These monopolies, writes Wood, “even when their public purpose seemed obvious . . . were repugnant to the spirit of American republicanism, ‘which does not admit of granting peculiar privileges to any body of men.’”<sup>104</sup> As Wood explained, this principle did not lead early American legislatures or courts to abolish the power to grant corporate charters, but led instead to the *widening of access to those charters*: “[T]he legislatures opened up the legal privileges to all who desired them.”<sup>105</sup> This meant that “the traditional exclusivity of corporate charters [was] destroyed.”<sup>106</sup>

Economic liberty was specifically protected in various parts of the Constitution. The contracts clause, for instance, prohibited any state from passing any law “impairing the Obligation of Contracts.”<sup>107</sup> The farmers who had made Shays’ Rebellion (which had served as a spur for holding a Constitutional Convention) had sought, among other things, to have their debts annulled.<sup>108</sup> But

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law, had engrafted upon it this doctrine: that to establish a corporation was the great prerogative of the crown; and it followed soon with the numerous other prerogatives of the crown . . . and certain great privileges and immunities were given to these corporations. . . . The Legislature should not be permitted to grant exclusive privileges to these corporations; they are then not only harmless, but they are useful.

J. ROSS BROWNE, REPORT OF THE DEBATES OF THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 124–25 (1850).

103 2 KENT, *supra* note 58, at \*271.

104 Wood, *supra* note 102, at 319.

105 *Id.* at 321.

106 *Id.*

107 U.S. CONST. art. I, § 10, cl. 1.

108 See generally DAVID P. SZATMARY, SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980); Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, And The Forgotten Role of The Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 19–21 (1997); 1 MORISON, *supra* note 80, at 390–94. One particularly revealing comment on Shays’ Rebellion is to be found in Arthur Miller’s *Pretense And Our Two Constitutions*: “Shays’ Rebellion in Massachusetts in 1786 . . . terrified the propertied elite (and . . . [was] quickly smashed by use of violence).” Arthur S. Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375, 384 (1986) [hereinafter Miller, *Pretense*]. Such a comment totally overlooks the real consequences of the principles advocated by the Shaysites: the drying up of credit that would have resulted from the abolition of debts, or the higher prices caused by inflationary paper currency—all of which harm the poor most of all. Here is how one contemporaneous observer of Shays’ Rebellion described it:

There was a black cloud that rose in the east last winter, and spread over the west . . . and burst upon us, and produced a dreadful effect. It brought on a state of anarchy, and that led to tyranny. . . . People that used to live peaceably, and were before good neighbors, got distracted, and took up arms against government. . . and then, if you went to speak to them, you had the musket of death presented to

protecting the right to make contracts was just as important for the poor farmer as for the landlord. As Madison wrote in *The Federalist Papers* No. 44: “[L]aws impairing the obligation of contracts . . . are contrary to the first principles of the social compact and to every principle of sound legislation,” and the prohibition of such laws was a “bulwark in favor of personal security and private rights.”<sup>109</sup> The founders understood that it is the poor who have the most to gain from economic freedom, and that laws restricting the freedom of contract are restrictions on the right to pursue happiness—the very purpose of freedom itself. Although the right to pursue a lawful occupation has been repeatedly cited in American case law, it has been mentioned more often in the breach than in the observance.

#### IV. AFTER 1787

##### A. Essential Rights

In the 1798 case of *Calder v. Bull*, Justice Chase described a class of laws which “cannot be considered a rightful exercise of legislative authority”:

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your breast. They would rob you of your property; threaten to burn your houses; oblige you to be on your guard night and day; alarms spread from town to town; families were broken up; the tender mother would cry, “O, my son is among them! What shall I do for my child!” Some were taken captive, children taken out of their schools, and carried away. Then we should hear of an action, and the poor prisoners were set in the front, to be killed by their own friends. How dreadful, how distressing was this! Our distress was so great that we should have been glad to snatch at any thing that looked like a government. Had any person, that was able to protect us, come and set up his standard, we should all have flocked to it, even if it had been . . . a tyrant . . . [W]hen I saw this Constitution, I found that it was a cure for these disorders. . . . I got a copy of it, and read it over and over. . . . I did not go to any lawyer, to ask his opinion; we have no lawyer in our town, and we do well enough without. I formed my own opinion, and was pleased with this Constitution.

Comments of Mr. Smith, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 102–03 (J. Elliott ed., 1836). Farmer Smith was hardly a member of the “propertied elite.” Smith described himself as “a plain man, and get my living by the plough.” *Id.* at 102. Unlike Miller, Smith and those he called “my brother ploughjoggers” did not have the luxury of ignoring the consequences of economic liberty—or the lack of it.

109 THE FEDERALIST No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961). Note also that the Constitution specifically preserved “[a]ll debts contracted and engagements entered into, before the adoption of this Constitution.” U.S. CONST. art. VI, §1. The Founding generation’s belief in the sanctity of debt and contract is reflected in *Ware v. Hylton*, in which the Court held that the state of Virginia had no right to cancel debts owed to British creditors before the Revolution. Justice Chase held that “the immutable principles of justice; the public faith of the states . . . the rights of the debtors . . . all combine to prove, that ample compensation ought to be made to all the debtors.” 3 U.S. (3 Dall.) 199, 245 (1796). Justice Paterson wrote “[c]onfiscation of debts is considered a disreputable thing among civilized nations of the present day . . .” *Id.* at 255. Also, Justice Wilson held that “[b]y every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable . . .” *Id.* at 281. *But see* Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 416 (1934) (upholding the constitutionality of a Minnesota act which extended the due dates on property rental and mortgage payments).

A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.<sup>110</sup>

The state and federal courts were in wide agreement on this point. In another famous case, *Corfield v. Coryell*,<sup>111</sup> Justice Bushrod Washington wrote that there are certain “privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments . . .”<sup>112</sup> These “fundamental principles” were viewed as protections of certain basic rights, such as the right of “enjoyment of life and liberty . . . the right to acquire and possess property . . . and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole,” and the right “to pass through, or to reside in any other state, for purposes of trade, agriculture, [or] professional pursuits.”<sup>113</sup>

Between *Corfield* and the 1873 *Slaughter-House Cases*, there are about sixty reported cases at both state and federal levels which discussed this common law right.<sup>114</sup> *Sewall v. Jones*<sup>115</sup> for instance, held that “[s]tatutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be construed strictly.”<sup>116</sup> The 1829 case of *Beall v. Beck* addressed whether a landlord or innkeeper had the right to take possession of property, which in this case involved a slave left behind by a boarder who had not paid his rent.<sup>117</sup> The court said that although the landlord had a privilege to retain a non-paying guest’s property, “[w]herever the privilege of the landlord would destroy a lawful trade or occupation which is useful to the public, it is restrained by law.”<sup>118</sup>

110 3 U.S. (3 Dall.) 386, 388 (1798).

111 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

112 *Id.* at 551.

113 *Id.* at 551–52.

114 See *infra* Appendix A for those cases not addressed in the text.

115 *Sewall v. Jones*, 26 Mass. (9 Pick.) 412 (Mass. 1830).

116 *Id.* at 414.

117 2 F. Cas. 1111, 1111 (C.C.D.C. 1829) (No. 1,161).

118 *Id.* at 1114. This legal preoccupation with protecting the individual’s ability to earn a living is also revealed by the decisions concerning public access to fishing or hunting areas. In *Peck v. Lockwood*, the Connecticut Supreme Court held that at common law anyone might take oysters from a stream, even if another person owned the soil surrounding the stream; the landowner must show some right to exclusive fishing. 5 Day 22 (Conn. 1811). “[T]he right of fishing in such place where there is a flux and reflux of the sea, is a right common to every citizen, although the soil be the estate of a particular person.” *Id.* at

Some of the cases are historically intriguing. In *City of Memphis v. Winfield*,<sup>119</sup> Justice Turley of the Tennessee Supreme Court struck down an ordinance which required the city watchmen to arrest, fine, or punish "all free negroes who might be found out after ten o'clock."<sup>120</sup> Given that this case arose in a southern court in the 1840s, it is remarkable enough that the court struck down the statute. The angry language which the court used to denounce it is even more surprising: "This new curfew law . . . is high handed and oppressive, and . . . an attempt to impair the liberty of a free person unnecessarily, to restrain him from the exercise of his lawful pursuits, and to make an innocent act a crime . . . without trial before any tribunal."<sup>121</sup> The court based its reasoning on the fact that "very often, the most profitable employment is to be found in the night," and therefore restraining free blacks from engaging in meaningful employment was "both cruel and useless."<sup>122</sup> Earning a living ought not to be punished as if it were a "crime against society" the court noted, since free people have a right to earn a living as they can.<sup>123</sup>

## B. The Moral Dimension

We therefore discover a moral dimension to the common law right to earn a living. A number of nineteenth century cases which discussed this right would trace it to the Bible, where, in Genesis, God tells Adam, "In the sweat of thy face shalt thou eat bread, till thou return unto the ground."<sup>124</sup> The Alabama Supreme Court held in 1838 "that a citizen has the right to aspire to office, or to pursue any lawful avocation," and no citizen should be "legally deprived of this right, as a punishment for an offence com-

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27. This reflects the general presumption against exclusivity in the pursuit of a lawful occupation. "[A] man may have an exclusive privilege of fishing in an arm of the sea; but such right is not to be presumed; it must be proved . . ." *Id.* See also *Warren v. Matthews*, 91 Eng. Rep. 312, 312 (K.B. 1704); *Carter v. Murcot*, 98 Eng. Rep. 127, 127, 129 (K.B. 1768).

119 27 Tenn. (8 Hum.) 707 (Tenn. 1848).

120 *Id.* at 707.

121 *Id.* at 709.

122 *Id.*

123 *Id.* at 710.

124 Genesis 3:19 (King James). In *Democracy in America*, Alexis de Tocqueville noted that "[e]very honest profession is honorable."

Among democratic peoples where there is no hereditary wealth, every man works for his living, or has worked, or comes from parents who have worked. Everything therefore prompts the assumption that to work is the necessary, natural, and honest condition of all men. . . . As the desire for prosperity is universal, fortunes are middling and ephemeral, and everyone needs to increase his resources or create fresh ones for his children, all see quite clearly that it is profit which, if not wholly then at least partially, prompts them to work. . . . In the United States professions are more or less unpleasant, more or less lucrative, but they are never high or low.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 550-51 (J.P. Mayer ed. & G. Lawrence trans., Anchor Books 1969) (1850).

mitted, without a trial by jury."<sup>125</sup> In 1850, the Georgia Supreme Court held, in *Mayor of Savannah v. Hartridge*,<sup>126</sup> that "Statutes which impose restrictions upon trade or common occupations, and which levy an excise or tax upon them, must be construed strictly."<sup>127</sup> And the Supreme Court of Illinois held, in the 1855 case of *Wade v. Halligan*,<sup>128</sup> that "[t]here are lawful trades, which are, nevertheless, treated as nuisances in particular places and localities."<sup>129</sup> The law should resist such restraints of trade, explained the court: judges should act with "an anxious view to protect all parties in their just rights, and the profitable . . . pursuit of their interests."<sup>130</sup> Similarly, in *Wynehamer v. People*, the New York Court of Appeals struck down an 1856 temperance law, noting that although liquor might have pernicious effects, it was still property, and selling it was therefore a legitimate occupation protected under the Constitution.<sup>131</sup> In short, as one author has noted, "long before the adoption of the Fourteenth Amendment, British and American courts protected many facets of the individual's right to pursue a gainful occupation against encroachment by the government."<sup>132</sup>

### C. The Fourteenth Amendment

After the Civil War, in response to the Black Codes and Jim Crow laws, the Federal Government sought new ways to protect the former slaves from oppression by their own states. The ingenuity with which the Southern legislatures devised ways of "keeping the black man in his social and legal place" is occasionally

<sup>125</sup> *In re Dorsey*, 7 Port. 293, 368 (Ala. 1838).

<sup>126</sup> 8 Ga. 23 (Ga. 1850).

<sup>127</sup> *Id.* at 30. See also *Hall v. Ohio*, 20 Ohio 8, 13 (1851) ("[S]tatutes which impose restrictions on trade or common occupations must be construed strictly.") (quoting *Sewall v. Jones*, 26 Mass. (9 Pick.) 412 (1830)).

<sup>128</sup> 16 Ill. 507 (Ill. 1855).

<sup>129</sup> *Id.* at 512.

<sup>130</sup> *Id.*

<sup>131</sup> 13 N.Y. 378, 385–86 (N.Y. 1856). A large number of the cases involving interference with the right of livelihood concern temperance or prohibition laws. As one court put it, however, such regulations are legitimate not *in spite of* the right of a liquor purveyor to make his living in this fashion, but because "[t]o sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling." *Sherlock v. Stuart*, 55 N.W. 845, 846 (Mich. 1893) (quoting BLACK, INTOX. LIQ. §§ 46, 48). But see *Baker v. Beckwith*, 29 Ohio St. 314, 319 (Ohio 1876) ("At common law, it was lawful to sell or give away intoxicating liquors, and still continues so, except to the extent that the sale, or giving away, has been prohibited by the statute."). In *Mugler v. Kansas*, 123 U.S. 623 (1887), the Supreme Court upheld restrictions on the sale of liquor against the challenge that it violated this common law right, noting that because liquor caused a variety of moral and physical ills, it was properly the subject of especially stringent controls. *Id.* at 660–63.

<sup>132</sup> Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 Ky. L.J. 397, 399–400 (1993–94) [hereinafter McCormack, *Economic*].

astonishing.<sup>133</sup> Among the laws which Congress passed to redress these problems was the Civil Rights Act of 1866<sup>134</sup> and the Fourteenth Amendment, the first section of which held in part that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>135</sup>

There is a good deal of dispute in the scholarly literature over the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, but as Bernard Siegan wrote, “commentators generally agree that [the Amendment] was intended to guarantee and constitutionalize the Civil Rights Act of 1866.”<sup>136</sup> That Act’s primary concern was the protection of economic rights for new black citizens. It mentioned *none* of what courts later would call “fundamental rights” (speech, travel, procreation, *etc.*), though it did state that all “citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”<sup>137</sup> It is noteworthy that the Congressional Framers of the Fourteenth Amendment, Senators Howard and Trumbull for instance, referred to Justice Bushrod Washington’s explanation of “privileges or immunities” in *Corfield v. Coryell* when explaining this clause.<sup>138</sup> Representative John Bingham,

133 LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 308 (1973). *See also* Poindexter v. La. Fin. Assistance Comm’n, 275 F. Supp. 833 (E.D. La. 1967) (detailing the history of Louisiana’s mechanisms for segregating public schools).

134 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1994)).

135 U.S. CONST. amend. XIV, §1.

136 SIEGAN, *ECONOMIC LIBERTIES*, *supra* note 92, at 50. *See also* Buchanan v. Warley, 245 U.S. 60, 78–79 (1917); Virginia v. Rives, 100 U.S. 313, 317–18 (1879) (explaining the Fourteenth Amendment was designed to constitutionalize the Civil Rights Act of 1866); Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause*, 10 SETON HALL CONST. L.J. 321, 332 (2000) (“Most students of the Privileges or Immunities Clause . . . agree on one point: the Privileges or Immunities Clause was meant to protect, in some fashion, the freedoms enumerated in the Civil Rights Act of 1866. Property and contract rights, access to the courts and personal security were the principal concerns of the Act.”); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389–90 (1992) (“Virtually everyone agrees that Section 1 of the Fourteenth Amendment was intended at least to empower Congress to pass the Civil Rights Act of 1866. Most students of history would go a bit further and say that the Amendment actually writes the substance of the 1866 Act into the Constitution.”).

137 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (1994)).

138 *See* CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). *See also* CONG. GLOBE, 42d Cong., 1st Sess. App. 69 (1871) (statement of Sen. Shellabarger); SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD AS A LEGISLATOR, STATE JUDGE, AND JUDGE OF THE SUPREME COURT OF THE UNITED STATES 124 (1881) (“[The Fourteenth Amendment] was intended to make every one within the jurisdiction of the United States a free man, and as such to

one of the authors of the Privileges or Immunities Clause, said that the clause included "the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."<sup>139</sup>

Senator John Sherman explained that courts interpreting the Fourteenth Amendment's Privileges or Immunities Clause will "look first at the Constitution of the United States as the primary fountain of authority,"<sup>140</sup> but also to the Declaration of Independence, American and English history, and English common law, where "they will find the fountain and reservoir of the rights of American as well as English citizens."<sup>141</sup> Representative Hamilton asked:

[H]as not every person a right, to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself, as long as it is a legitimate exercise of this right and not vicious in itself, or against public policy, or morally wrong, or against the natural rights of others?<sup>142</sup>

These statements are at least plausible support for the conclusion of one federal court, that "it seems quite impossible that any definition of these terms [privileges and immunities] could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence."<sup>143</sup>

The Fourteenth Amendment's protection of the right to earn a living was part of the sublimated conflict that made up the Reconstruction era. That conflict consisted largely of vengeful, pent-up frustration, cultural chauvinism, and attempts by Southerners to maintain to the last a firm hold on a social order which was "gone with the wind." A good example is the case of *Cummings v. Missouri*, which involved Missouri's constitutional requirement that citizens take an oath of loyalty to the United States before engaging in a profession.<sup>144</sup> Citizens were required to swear that they had never "been in armed hostility to the United States, or to the lawful authorities thereof," or had participated in the secessionist cause in any way.<sup>145</sup> A person who refused to take this oath was forbidden not just from holding "any office of honor, trust, or

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allow him to pursue his happiness by the ordinary avocations of life upon the same terms and conditions as others.")

139 CONG. GLOBE, 42d Cong., 1st Sess. App. 86 (1871).

140 CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872).

141 *Id.*

142 1 CONG. REC. 363 (1874).

143 *In re Parrott*, 1 F. 481, 506 (C.C.D. Cal. 1880). See generally Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995).

144 71 U.S. (4 Wall.) 277, 316-17 (1866).

145 *Id.* (quoting MO. CONST.).

profit" under state authority, but even from holding any position in *any* corporation, teaching in private schools, or "holding any real estate or other property in trust for the use of any church."<sup>146</sup>

In an opinion by Justice Field, the Supreme Court struck down the state constitutional requirement, holding that "[t]he oath could not . . . have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged."<sup>147</sup> The state had argued that the requirement did not deprive citizens of "life, liberty, or property," but merely restrained them from working. Field rejected this contention. "The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law," he wrote. "He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. . . . Disqualification from the pursuits of a lawful avocation . . . may also, and often has been, imposed as punishment."<sup>148</sup>

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.<sup>149</sup>

In an era in which such severe racial conflicts were leading to statutory schemes for keeping individuals from pursuing happiness, the importance of protecting the right to earn an honest living could hardly be overestimated. In *Ex parte Garland*, which like *Cummings* involved an oath that a person was required to take before engaging in a lawful occupation, attorney Reverdy Johnson put the point starkly:

[T]he legislature undertakes to say to [the defendant], "You shall no longer enjoy that right, unless you will swear that you have not done the things stated in the oath which we require you to take;" . . . . Certainly, he is not obliged to take it. No man

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<sup>146</sup> *Id.* at 317 (quoting Mo. CONST.).

<sup>147</sup> *Id.* at 320.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 321–22. Likewise, in *Munn v. Illinois*, Justice Field wrote:

By the term "liberty," as used in the [Fourteenth Amendment], something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.

94 U.S. 113, 142 (1876) (Field, J., dissenting).



is obliged to follow his occupation; but unless he takes it he must starve, except he have other means of living."<sup>150</sup>

Thus by 1870, when the cases which eventually became the *Slaughter-House Cases* were being heard in lower federal courts, Circuit Justice Bradley could write:

[I]t is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit—not injurious to the community—as he may see fit, without unreasonable regulation or molestation, and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments . . . . These privileges cannot be invaded without sapping the very foundations of republican government. . . . [A]ny government which deprives its citizens of the right to engage in any lawful pursuit, subject only to reasonable restrictions, or at least subject only to such restrictions as are reasonably within the power of government to impose,—is tyrannical and unrepresentative. And if to enforce arbitrary restrictions made for the benefit of a favored few, it takes away and destroys the citizen's property without trial or condemnation, it is guilty of violating all the fundamental privileges to which I have referred, and one of the fundamental principles of free government.<sup>151</sup>

## V. THE *Slaughter-House Cases*

### A. The Louisiana Monopoly

Federal determination to protect the right to earn a living was soon crippled, however, with the *Slaughter-House Cases*, which questioned the constitutionality of a Louisiana law granting a twenty-five year monopoly to a state butchery company.<sup>152</sup> Any cattle brought to New Orleans and several surrounding counties could only be slaughtered in the facilities run by this company—effectively outlawing private slaughterhouses.<sup>153</sup>

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<sup>150</sup> *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 370 (1866).

<sup>151</sup> *Live-stock Dealers' & Butchers' Ass'n v. Crescent City Live-stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 652 (D. La. 1870) (No. 8,408). Likewise, in *State ex rel. Belden v. Fagan*, another case arising out of the Louisiana butchery regulations, the Supreme Court of Louisiana held:

[W]hile for sanitary reasons, [the state legislature] had the right to compel the butchers to abandon the locality where their slaughterhouses are situated . . . imposing this limitation upon their natural rights for the public good, justifiable only by the necessity, it had not the right to create this monopoly in favor of the Slaughterhouse Company . . . . It had no right to place unnecessary restrictions upon labor, to compel the numerous persons pursuing the occupation of butchers to repair to the premises of the Slaughterhouse Company and there pay tribute to it for the privilege of pursuing their usual occupation or earning their living.

22 La. Ann. 545, 559 (La. 1870).

<sup>152</sup> 83 U.S. (16 Wall.) 36, 66 (1873).

<sup>153</sup> *Id.* at 59–60. The *Slaughter-House Cases* contrast sharply with an English case, *Pierce v. Bartrum*, which upheld a regulation prohibiting any slaughtering within the walls

The proponents of the law claimed it was enacted to protect public health and safety, just as the proponents of the regulation of upholsterers in *Allen v. Tooley*, or of tailors in *Davenport v. Hurdis*. The private butchers sued, on the grounds that the law violated their right to pursue a lawful occupation, a right protected by the privileges and immunities clause of the Fourteenth Amendment; however, in a five to four decision, the Supreme Court upheld the constitutionality of the Louisiana law.<sup>154</sup> Justice Miller, writing for the majority, declared that it was "difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation," because the law did not forbid butchers from slaughtering cattle *themselves* in the state corporation's slaughterhouses; a private butcher was free "to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place."<sup>155</sup> Miller thus considered the Louisiana statute as nothing more than a legitimate health regulation. Peter Irons wrote, however, that "[a]s they had in 1810, when they ignored evidence of corruption in the Yazoo land grants, the justices shut their noses to the stench of bribery in the *Slaughterhouse Cases*."<sup>156</sup>

Miller held that Coke's *Case of Monopolies* was inapposite. Monopolies in England, he held, had been outlawed because they were conveyed by the king, against the will of the people.<sup>157</sup> A legislature, however, represented the will of the people. "It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the Constitution of that state or in the amendments to the Constitution of the United States . . . ."<sup>158</sup> In other words, whatever the legislature passed was legitimate, unless the legislature was specifically prohibited from acting in that regard. Even if such a

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of the city of Exeter. *Pierce*, 98 Eng. Rep. 1080 (K.B. 1775). The regulation was challenged as being in restraint of trade, but the court, while scrutinizing the regulation to protect the right to earn a living, upheld it as a reasonable health and safety regulation. Unlike the law in the *Slaughter-House Cases*, *Pierce* did not establish a monopoly by requiring all butchers to do their work at a particular butcher-shop.

<sup>154</sup> *Slaughter-House Cases*, 83 U.S. at 66, 83.

<sup>155</sup> *Id.* at 61. In *Noe v. Morristown*, the Tennessee Supreme Court emphasized this fact:

We are referred to the *Slaughterhouse Case* as an authority in support of such a monopoly. That case does hold that it was within the power of the Legislature of the state of Louisiana to establish such a monopoly as to the place where the slaughter was to be done, but distinctly pointed out that at that place everybody was permitted to do their own slaughtering, and the company in charge of the place was bound under heavy penalties to permit them.

<sup>161</sup> S.W. 485, 486 (Tenn. 1913) (internal citations omitted).

<sup>156</sup> PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 199 (1999).

<sup>157</sup> *Slaughter-House Cases*, 83 U.S. at 66, 66.

<sup>158</sup> *Id.*

“blank-check view” of state power was appropriate at the state level, the question was equally whether the federal Constitution prohibited the state from establishing such a monopoly. Miller rejected the claim that the privileges or immunities clause was intended to protect citizens against the legislatures of their own states: The clause “speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states . . . . [T]he latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment.”<sup>159</sup>

Justice Stephen Field, in a famous dissent, reviewed the history of monopoly practices. At the time of the Revolution, Field wrote that the right of “every free subject . . . to pursue his happiness by following any of the known established trades” was among the most cherished principles in English law.<sup>160</sup>

This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex and condition. The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and unless adhered to in the legislation of the country our government will be a Republic only in name.<sup>161</sup>

It is neither necessary nor possible to fully discuss the aspects of the *Slaughter-House Cases* here; other commentators have written very extensively about the subject,<sup>162</sup> and as Justice Thomas recently said, they have agreed on little except that the *Slaughter-House Cases*’ interpretation of the Privileges and Immunities Clause was wrong.<sup>163</sup> But it is pertinent to note a few things about the case. First, the holding, which Robert Bork has praised as “a narrow victory for judicial moderation” because it allowed the cor-

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<sup>159</sup> *Id.* at 74.

<sup>160</sup> *Id.* at 105.

<sup>161</sup> *Id.* at 109–10.

<sup>162</sup> See, e.g., JOHN E. SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 325–26 (1998); BERNARD H. SIEGAN, THE SUPREME COURT’S CONSTITUTION 68–71 (1987); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 79 (1993); Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges Or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 27–48 (1998).

<sup>163</sup> See *Saenz v. Roe*, 526 U.S. 489, 522 n.1 (Thomas, J., dissenting).

ruption of the Louisiana legislature to proceed unchecked by judicial interference—did not escape controversy in its own time.<sup>164</sup> More importantly, the majority in the *Slaughter-House Cases* did not deny that the right to earn an honest living was, indeed, a common law right; rather, the majority implicitly agreed that it was, and merely held that the Privileges or Immunities Clause was not meant to protect that right, at a federal level, against state encroachments.<sup>165</sup> Third, the majority held that the Louisiana statute had not actually violated that right.<sup>166</sup>

Thus, the *Slaughter-House Cases* did not actually hold that state monopolies could never violate such a right, or that such a right did not exist. In fact, the Court increasingly began to observe the validity and importance of that right. The subsequent era of “economic substantive due process” has been charted well enough by Bernard Siegan,<sup>167</sup> but it is important to note that by 1888, the Court’s majority in *Powell v. Pennsylvania* would conclude as correct that one’s “enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property as guaranteed by the fourteenth amendment. . . .”<sup>168</sup> The *Slaughter-House Cases* were truly an example of the age-old tension between legitimate business regulation and the wrongful restraint of liberty. As economic regulation became more prevalent from the turn of the century to the present, the courts were increasingly called upon to resolve this tension.

## B. The Impact of the *Slaughter-House Cases*

Lawrence Friedman described the emergence of protectionist economic measures disguised as health and safety regulations during the post-Civil War era: “[O]ccupational licensing . . . absolutely burgeoned in this period,” and while some of these regulations were “solely designed to produce revenue,” others were

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164 ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 39 (1990). The *Slaughter-House Cases* was one of what became a string of cases undermining the Civil War Amendments in the post-Civil War decades. In *United States v. Cruikshank*, the Court, relying on the *Slaughter-House Cases*, held that the Fourteenth Amendment gave Congress no power to stop southern states from tacitly aiding in the mass murder of former slaves, because the right to life is a right incident to state, and not federal, citizenship. 92 U.S. 542, 549 (1875). See also Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2151–60 (1993). Such scandalously bad law prevailed, however, culminating in the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which the Court, by applying “judicial restraint,” refused to block southern majorities from obliterating the Reconstruction commitment to civil rights.

165 83 U.S. (16 Wall.) 36, 78–80 (1873).

166 *Id.* at 78, 83.

167 See generally SIEGAN, *ECONOMIC LIBERTIES*, *supra* note 92.

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

discriminatory defensive measures meant to exclude outside merchants from the local market.<sup>169</sup> Licensing was first required for the “learned” professions, especially those concerned with health issues, like dentistry or pharmacy, because it was easier to make the argument that these practices should be regulated for public safety purposes.<sup>170</sup> Licensing requirements were subsequently broadened to include architecture, midwifery, mining, and blacksmithing.<sup>171</sup> While the state justified such licensing laws as safeguards for the public’s health and safety, the true motivation was often to stifle competition within a given trade or occupation.<sup>172</sup> As Friedman believed, “[t]he [licensing] argument was quite obvious in the case of doctors . . . . For barbers, the argument was a trifle strained; and for horseshoers, fairly desperate.”<sup>173</sup>

In 1889 the Michigan Supreme Court summarized the negative effects of this phenomenon:

It is quite common in these later days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts . . . .<sup>174</sup>

In a well-known case, *Butchers’ Union Co. v. Crescent City Co.*, Justice Field wrote that monopolies violated the common law because:

[T]hey destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a lawful trade or employment.<sup>175</sup>

The court shunned the granting of monopoly power to a corporation or specific class of business, notwithstanding the state’s rec-

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169 FRIEDMAN, *supra* note 133, at 397 (emphasis deleted). See also Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 CAL. L. REV. 487 (1965).

170 *Id.* at 397–99.

171 *Id.*

172 *Id.* at 399.

173 *Id.* at 399–400.

174 *Chaddock v. Day*, 42 N.W. 977, 978 (Mich. 1889).

175 111 U.S. 746, 756 (1884) (Field, J., concurring).

ognized right to limit or prevent undesirable nuisances resulting from the operation of certain types of businesses.<sup>176</sup> In *Dent v. West Virginia*, the Supreme Court definitively described the “right of every citizen of the United States to follow any lawful calling, business, or profession he may choose,” for the right to earn a living, said the Court, was a property right, one which is “often of great value to the possessors, and cannot be arbitrarily taken from them.”<sup>177</sup>

State cases also enunciated this principle, holding that “[s]tatutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be strictly construed.”<sup>178</sup> In these cases, the question before the court was as follows: “Is the act in question an arbitrary interference with the right of contract, and is there no reasonable ground upon which the legislature, acting within its conceded powers, could pass such a law?”<sup>179</sup> In other words, is the challenged regulation of business a legitimate exercise of the state’s power to prevent public nuisances—or was that merely a guise for monopolistic practices, limiting the right of the individual to pursue a lawful calling? That analysis often required the Court to look beyond the facial explanation of the law. These cases, which today are referred to as the “economic substantive due process” cases, were substantive due process cases in the sense that they examined the substance of legislation to determine if the legislature, “under the pretext of executing its powers, [had] pass[ed] laws for the accomplishment of objects not entrusted to the government,” when it would then “become the painful duty of this tribunal . . . to say that such an act was not the law of the land.”<sup>180</sup> To discover such a pretext requires the court to examine the *substance* of legislation, and not merely the procedures by which it was promulgated.<sup>181</sup> One of the

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176 *Id.* at 749–53.

177 129 U.S. 114, 121–22 (1889). Note that the Court here, at the height of the *laissez-faire* era, which allegedly proscribed legislative attempts to protect consumers and society, nevertheless concluded “[b]ut there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society.” *Id.* at 122.

178 *Memphis v. Bing*, 30 S.W. 745, 746 (Tenn. 1895). See also *Merced County v. Helm & Nolan*, 36 P. 399, 400 (Cal. 1894) (holding that business license taxes must be strictly construed); *Washington Electric Vehicle Transp. Co. v. District of Columbia*, 19 App. D.C. 462, 470 (D.C. 1902); *Mace v. Buchanan*, 52 S.W. 505, 507 (Tenn. 1899); *Combined Saw and Planer Co. v. Flournoy*, 14 S.E. 976, 977 (Va. 1892); *State v. Pullman Palace Car Co.*, 23 N.W. 871, 875 (Wis. 1885). See also *infra* Appendix B.

179 *McLean v. Arkansas*, 211 U.S. 539, 548 (1909).

180 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

181 In *Cummings v. Missouri*, Justice Field penned perhaps the most succinct defense of substantive due process ever. 71 U.S. 277, 325 (1866). He wrote:

The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form,

most famous of these “economic substantive due process” cases—which is not often referred to as such—is *Yick Wo v. Hopkins*.<sup>182</sup>

*Hopkins* involved a statute which regulated Chinese laundries in San Francisco. Laundries were not permitted to be housed in wooden structures, and they were required to be licensed by a board of supervisors.<sup>183</sup> Although the legislature justified the statute as necessary to protect public health and safety, the Supreme Court found that the regulation was actually part of a statutory scheme of discrimination against Chinese immigrants, whose laundry cleaning businesses were generally made of wood. In fact, nearly all of the laundries in the city were made of wood, as were most residences.<sup>184</sup> Why then, did the regulation affect only laundries? And were wooden laundry facilities really more dangerous than those made of stone? “We are . . . constrained, at the outset,” the Supreme Court said, “to differ from the Supreme Court of California upon the real meaning of the ordinances in question.”<sup>185</sup> The statute was not a means of protecting society; instead it vested the board of supervisors with “a naked and arbitrary power to give or withhold” a business license.<sup>186</sup> The statute was a sort of “Jim Crow law,” a disguised attempt to infringe on the rights of Chinese immigrants to freely earn a living.

[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.<sup>187</sup>

Just as literacy tests for voting had been used in the South under the pretext of ensuring an educated electorate—though actually used to keep former slaves from voting—so this law, supposedly regulating businesses for safety’s sake, was in fact a pretextual attempt to exclude Chinese workers from the marketplace.

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however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

*Id.* See also *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877) (“[C]an a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail . . . .”); John C. Eastman & Timothy Sandefur, *Stephen Field: Frontier Justice or Justice on the Natural Rights Frontier?*, 6 NEXUS 121 (2001) (reviewing Field’s views on the right to earn a living).

<sup>182</sup> 118 U.S. 356 (1886). See also *In re Parrott*, 1 F. 481, 520 (D. Cal. 1880) (striking down law prohibiting the hiring of Chinese); *Lin Sing v. Washburn*, 20 Cal. 534, 535, 580 (Cal. 1862) (striking down tax on Chinese laborers as unconstitutional).

<sup>183</sup> *Yick Wo*, 118 U.S. at 366.

<sup>184</sup> *Id.* at 368.

<sup>185</sup> *Id.* at 366.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 370.

*Yick Wo* was one of a number of economic liberty cases which protected the right to earn a living on equal protection grounds. In an 1875 case, the Illinois Supreme Court stated that:

If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and, for that reason, void, but its direct tendency would be to create a monopoly, which the law will not tolerate.<sup>188</sup>

After quoting Justice Field's opinion in *Butcher's Union*, an 1891 Colorado appellate court similarly explained that any law which allows one individual to pursue a vocation while excluding another from the same business effectively nullifies the fundamental right of United States citizens to pursue any lawful calling.<sup>189</sup>

In *Allgeyer v. Louisiana*, the Court reiterated that the "the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States,"<sup>190</sup> and that this right was one of the "rights which are covered by the word 'liberty' as contained in the 14th Amendment."<sup>191</sup> Yet again the Court repeated that the pursuit of a lawful occupation could be subjected to legitimate licensing restrictions for the protection of the public—but such regulations should not be disguised restrictions on individual freedom. With this standard in mind, the Court left open the question of professional licensing, explaining it should be determined on a fact-specific basis.<sup>192</sup>

Given this background, the "notorious" case of *Lochner v. New York*<sup>193</sup> seems much less arbitrary and scandalous than it is usually described in the scholarly literature. *Lochner* involved a statute which regulated the number of hours that bakers could work.<sup>194</sup> This law was a protectionist measure, pushed through the legislature by larger bakery companies which primarily relied upon machinery.<sup>195</sup> The statute thus limited the smaller bakeries' ability to effectively compete, as they were more reliant on human labor.<sup>196</sup> As one author explained, "[w]ere such a result achieved by private contract, it would violate the antitrust laws."<sup>197</sup> It is ironic that such laws are often described as beneficial to the less

188 *Tugman v. Chicago*, 78 Ill. 405, 409 (Ill. 1875).

189 *May v. People*, 27 P. 1010, 1012 (Colo. Ct. App. 1891).

190 165 U.S. 578, 590 (1897) (quoting *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 764 (1884)).

191 *Id.*

192 *Id.*

193 *Lochner v. New York*, 198 U.S. 45 (1905).

194 *Id.* at 64.

195 Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 42–43 (1999).

196 See Meese, *supra* note 195, at 42–43.

197 *Id.*



powerful. To put the point simply, you cannot make people richer by making their jobs illegal.<sup>198</sup>

Although the legislature claimed that the statute was a health and safety regulation, the Court did not blithely accept this purported explanation. Rather, it looked into the real substance of the law and concluded that the statute unconstitutionally interfered with the freedom of contract between employer and employee, while bearing little relationship to employee health and safety.<sup>199</sup>

*Lochner* is generally cited as the ultimate point of hubris in the career of a Court run wild on newfangled *laissez-faire* economic theory. In reality, it was the continuation of a legal theory whose roots went back for centuries.<sup>200</sup> It was followed by a number of high profile cases striking down economic regulations. In *Adair v. United States*, the Supreme Court struck down a law which made it illegal to discriminate against employees who were not members of a labor union.<sup>201</sup> The liberty clause of the Fourteenth Amendment “embrace[s] the right to make contracts for the purchase of the labor of others . . . .”<sup>202</sup> In *Truax v. Raich*, the Court struck down an Arizona statute which prohibited companies from employing more than twenty percent non-citizens.<sup>203</sup> In this rerun of *Yick Wo*, the Court said that “[t]he right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law.”<sup>204</sup> Just as the statutes in *Yick Wo* and *Lochner* were defended as health-and-safety mea-

198 *Id.*

199 *Lochner v. New York*, 198 U.S. 45, 64 (1905).

200 *See, e.g., In re Jacobs*, 98 N.Y. 98, 115 (N.Y. 1885).

When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void.

*Id.* The myth that *Lochner* announced a “new” and “unprecedented” rule has long deserved debunking. The reader will find a list of cases predating *Lochner*, with holdings identical to those the Court reached—that the Court must look behind the scenes of a police power regulation which infringes on economic rights. *See infra* Appendix B.

201 208 U.S. 161, 180 (1908).

202 *Id.* at 172.

203 239 U.S. 33, 38 (1915). *See also Truax v. Corrigan*, 257 U.S. 312, 334–35 (1921).

The Fourteenth Amendment . . . intended . . . that all persons should be equally entitled to pursue their happiness and acquire and enjoy property . . . that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid on others in the same calling and condition . . . .

*Id.* at 334–35 (quoting *Barbier v. Connolly*, 113 U.S. 27, 31 (1885)).

204 239 U.S. at 38.

asures, so too was the law in *Truax*.<sup>205</sup> Nevertheless, while the legislature may act to protect health and safety, the Court held such measures unconstitutional when they go beyond that point and deny people the "ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."<sup>206</sup>

The rule that impositions on the common law right of livelihood should be strictly construed was also maintained at the state level during this period.<sup>207</sup> Economic substantive due process was a means by which the real effect of a regulation of private contracts could be analyzed to see whether it was *really* a legitimate exercise of police power, or a protectionistic or monopolistic scheme. As the Court explained in *Adams v. Tanner*,<sup>208</sup> the mere potential for abuse within a given profession does not justify complete removal of one's right to pursue that profession.<sup>209</sup> "Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."<sup>210</sup>

This was the backdrop for the famous pre-New Deal cases. In *United States v. Butler*, the Supreme Court struck down a New Deal statute called the Agriculture Adjustment Act, which required "processors" of crops—mill owners, for instance—to pay a tax, thus generating revenue to be turned over to farmers.<sup>211</sup> The plaintiffs sued, and the government responded that this was only a tax system, and therefore Constitutional under the provision for "lay[ing] and collect[ing] taxes" as well as protecting the "general

<sup>205</sup> *Id.* at 41. This, of course, began the notorious era of economic substantive due process and "rampant *laissez-faire*," and the cases are more prevalent during this period. See *infra* Appendix C.

<sup>206</sup> *Id.*

<sup>207</sup> See *infra* Appendix D.

<sup>208</sup> 244 U.S. 590 (1917).

<sup>209</sup> *Id.* at 594–95. See also *Commonwealth v. Fowler*, 28 S.W. 786, 787 (Ky. 1894).

Every one has the right to follow an innocent calling without permission from the government. He may do with his own whatsoever he pleases, so that he injure no one else. We agree with learned counsel that "the doctrine of legislative permission, as a condition precedent to the conduct of any useful or harmless business, is grossly repugnant to those obvious principles of human right which lie at the foundation of just government among men." So, then, without governmental interference or consent, the farmer may till his soil, the merchant may buy and sell, the lawyer and the doctor practice their professions, and the druggist and pharmacist compound their medicines. And if, by reason of shysters and quacks, an injured people demand protection, or if, because ill-behaved druggists or pretended pharmacists debauch the public morals by dealing out intoxicating liquors and nostrums as beverages, yet the pursuit of these callings cannot be prohibited.

*Id.*

<sup>210</sup> *Adams*, 244 U.S. at 594–95.

<sup>211</sup> 297 U.S. 1, 54–56, 78 (1936).

welfare."<sup>212</sup> The Supreme Court found the statute unconstitutional, determining that the government's justification of the statute as a tax measure was merely a disguise: "The tax can only be sustained by ignoring the avowed purpose and operation of the act."<sup>213</sup> Just as in *Yick Wo* and *Truax*, the Court refused to blindly accept the government's justification of the law. "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."<sup>214</sup>

## VI. ECONOMIC SUBSTANTIVE DUE PROCESS AND ITS ENEMIES

I have quoted these cases at such length because they demonstrate the fragility of the prevailing interpretation of the pre-New Deal courts. Under the prevailing interpretation, the court struck down government intervention in the economy because such laws ran contrary to the Supreme Court Justices' personal economic views, which they then wrongfully enforced from the bench. These "economic substantive due process" cases were thus a concoction of the bourgeoisie in its effort to suppress and exploit the proletariat. According to Arthur S. Miller, "a complaisant Supreme Court that was a de facto arm of the capital-owning class. . . . invented, through a flash of revelation known only to them, the notion that due process of law had a substantive dimension, and thereby protected corporations against social legislation."<sup>215</sup>

Upon closer inspection, however, it seems odd to call any of these decisions "economic substantive due process," since the Court did not address economic concerns or apply any law-and-economics methodology. Similarly, the Court did not rely on economics when striking down the New Deal statutes. For instance, in *Adkins v. Children's Hospital*, a minimum wage law that only applied to females had the potential to cause the replacement of female workers by males, since males were not covered by the

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<sup>212</sup> *Id.* at 64. Until the New Deal, there was broad consensus among American jurists that, as Justice Chase put it in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798) ("[A] law that takes property from A. and gives it to B. . . . is against all reason and justice."). See also *Wilkinson v. Leland*, 27 U.S. ( 2 Pet.) 627, 657-58 (1829) ("We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union."); *Goshen v. Stonington*, 4 Conn. 209, 221 (Conn. 1822) ("If, for example, the legislature should enact a law, without any assignable reason, taking from A. his estate, and giving it to B., the injustice would be flagrant, and the act would produce a sensation of universal insecurity."); *Taylor v. Porter & Ford*, 4 Hill 140, 143 (N.Y. 1843) ("The property of A. is taken, without his permission, and transferred to B. Can such a thing be rightfully done? Has the legislature any power to say it may be done?").

<sup>213</sup> *Butler*, 297 U.S. at 58.

<sup>214</sup> *Id.* at 68.

<sup>215</sup> Miller, *Pretense*, *supra* note 108, at 390.

statute and were therefore cheaper to employ.<sup>216</sup> Congress justified the law as an attempt to protect women's "health and morals."<sup>217</sup> In an opinion by Justice Sutherland, the Court struck down the law, not only for its unequal treatment, but also for its infringement on the right of a woman to be employed as she sees fit: "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court and is no longer open to question."<sup>218</sup>

Indeed, the law in *Adkins* fits precisely the description of sexist paternalism provided by none other than Justice Ruth Bader Ginsburg. Such laws were "apparently designed to benefit or protect women [but] could often, perversely, have the opposite effect."<sup>219</sup> Such legislation was "ostensibly to shield or favor the sex regarded as fairer but weaker, and dependent-prone," but was in fact "premised on the notion that women could not cope with the world beyond hearth and home without a father, husband, or big brother to guide them."<sup>220</sup> Some defenders of the legislation in *Adkins* explicitly embraced such paternalism. Roscoe Pound, for instance, explained that the individual should have no right "by contract [to] impose[ ] substantial restraints upon his liberty," because "[f]reedom to impose restraints, in the hands of the weak and necessitous, defeats the very end of liberty."<sup>221</sup> In other words, the poor could not be trusted with the right to decide for themselves the number of hours, or for how much pay, they wished to work.

In any case, just like the statute in *Lochner*, the minimum wage law in *Adkins* had nothing to do with health and safety; rather, both statutes were protectionist economic measures meant to benefit politically-favored classes by restricting the freedom of others to compete.

It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the

<sup>216</sup> 261 U.S. 525, 554-60 (1923).

<sup>217</sup> *Id.* at 555.

<sup>218</sup> *Id.* at 545.

<sup>219</sup> Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 269 (1997).

<sup>220</sup> *Id.* at 269-70.

<sup>221</sup> Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 484 (1909).

provisions relating to minors), who are legally as capable of contracting for themselves as men.<sup>222</sup>

As Hadley Arkes points out, Sutherland nowhere used any economic arguments in the opinion. "There were no ventures into the theories of monetarism or fiscal policy with the manipulation of aggregate demand and 'multipliers.' There was not even a feint toward theories of price and the supply of labor."<sup>223</sup> Instead, Sutherland was "offering nothing less than a moral instruction . . . [and] was settling the case in terms that were as purely *jural* as an opinion could be. . . . Sutherland and his colleagues would find, in the contrivances of the New Deal, arrangements that offended, deeply, the principles of lawfulness."<sup>224</sup> They offended the right of the individual to use her land, her property, or her talents as she saw fit.

Cases like *Adkins*, *Yick Wo*, and *Lochner* may have been "substantive due process" cases, but were not examples of "judicial activism." They were examples of the court restraining *legislative activism* which abridged the right to earn a living; a right with at least seven hundred years of traditional protection behind it. We may measure the political origins of the modern hostility toward these decisions by one bitter comment made in an attack on *Adkins* published shortly after it came down. "From somewhere or other Mr. Justice Sutherland derives the constitutional doctrine [that] . . . 'freedom of contract is, nevertheless, the general rule and restraint the exception,'" wrote the commentator.<sup>225</sup> But "[n]o such doctrine is stated in the Constitution. . . . [R]egulation has long since become the rule, and freedom the exception. Whence, then, comes the rule that Mr. Justice Sutherland reveals? Needless to say, it comes from Mr. Justice Sutherland."<sup>226</sup>

This is a backwards interpretation of the Constitution. In wording similar to the Fifth Amendment, the Fourteenth Amend-

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<sup>222</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525, 554 (1923). Yet again, the straw man accusation—that the *Adkins* Court was defending "unlimited freedom of contract"—is belied by Sutherland's own words: "There is, of course, no such thing as absolute freedom of contract." *Id.* at 546.

The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good . . . . But, nevertheless, there are limits to the power, and, when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

*Id.* at 561.

<sup>223</sup> HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* 78 (1994).

<sup>224</sup> *Id.* at 79, 82.

<sup>225</sup> Thomas Reed Powell, *The Judiciality of Minimum Wage Legislation*, 37 HARV. L. REV. 545, 555 (1924) (quoting *Adkins v. Children's Hosp.*, 261 U.S. 525, 546 (1923)).

<sup>226</sup> *Id.*

ment reads, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>227</sup> In logical sequence, this means that the individual possesses life, liberty, and property to begin with, and that he may be *deprived* of it subsequently, only when due process standards are met. In other words, freedom is the rule, and government action is the exception.<sup>228</sup> But reversing this order—and then denouncing the original order as the concoction of a capitalist cabal on the federal bench—was imperative to establishing the regulatory welfare state.

To ratify the extreme sorts of regulation which made up the New Deal, it was necessary to overcome the presumption of liberty, or to deny its existence. When the Court finally gave in to New Deal pressures in the famous “Switch in Time That Saved Nine,” and held that courts should defer almost entirely to legislative economic regulations, it was in fact reversing the old rule that the common law “is always jealous of its own importance; and requires every statute which invades its authority to be carefully watched and strictly construed.”<sup>229</sup> In *United States v. Carolene Products Co.*, most famous for its fourth footnote, the Court reversed this completely, holding:

Even in the absence of [evidentiary] aids, the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>230</sup>

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<sup>227</sup> U.S. CONST. amend. XIV, § 1.

<sup>228</sup> See also Randy E. Barnett, *Necessary and Proper*, in THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM 157, 186–94 (Bradford P. Wilson & Ken Masugi eds., 1998) (explaining the “presumption of liberty”); James Madison, *Charters*, reprinted in JAMES MADISON: WRITINGS 502, 502 (Jack N. Rakove ed., 1999) (“In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty.”).

<sup>229</sup> *Lessee of Brewer v. Blougher*, 39 U.S. (14 Pet.) 178, 185 (1840) (Argument of Mr. Pigman, for Plaintiff).

<sup>230</sup> 304 U.S. 144, 152 (1938). Although throughout this paper I refer to *Carolene Products* in particular, I do so only as shorthand, because the case was only one of a trio of cases which announced the new epoch in Constitutional law brought on by the New Deal. The other two were *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937), which expanded Congress’ Commerce Clause power, and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which upheld minimum wage legislation. Thus, I refer to this shift as occurring in 1937 even though *Carolene Products* was announced on April 25, 1938. Moreover, I do so while acknowledging that the expansion of economic regulation did not begin suddenly in 1937, but gradually over the course of the preceding half-century, with its Populist and Progressive movements. Nevertheless, as Samuel R. Olken puts it, while the “Switch In Time That Saved Nine” model of legal history is “overly simplistic,” it remains true that “a fairly complete transformation in constitutional thought occurred” in the 1920s and 30s, during which “an emerging majority of Supreme Court Justices adapted constitutional provisions to changing economic and social conditions.” Samuel R. Olken, *Historical Revisionism and Constitutional Change: Understanding the New Deal Court*, 88 VA. L. REV. 265, 278 (2002)

Saying that economic regulations would bear such a strong presumption of constitutionality, the Court split individual rights into “fundamental” rights and “economic” rights. Yet, as generations before had understood, the two cannot be separated. The “economic right” to run a business had never been based only on economic justifications; it was the right of a person to act and provide for himself or his family. The spurious nature of *Carolene Products*’ dichotomy has been sufficiently demonstrated elsewhere,<sup>231</sup> but it is remarkable how, after 1937, the Courts’ treatment of the right to earn an honest living has been confused.

Among the reasons for this confusion is the frequently articulated premise with which we began this article: that the economic liberty cases lacked historical foundation, and that there was no such thing as the right to earn a living. The rise of Progressivism,<sup>232</sup> and in particular, of legal positivism, led by Oliver Wendell Holmes, Louis Brandeis, and others, was the first time that the very *existence* of such a right was to be directly challenged. In *McAuliffe v. New Bedford*,<sup>233</sup> Holmes wrote, “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>234</sup> This is strictly correct, since the common law guarantees only the right to *work*, not the right to *be hired*, but Holmes’s dictum, as Justice William Douglas would later write, “ha[d] pernicious implications,”<sup>235</sup> and was generally taken to be a denigration of the common law right to *seek* employment. Holmes denied that the right to earn a living was protected by the Constitution ostensibly because he denied that the Constitution was based on an economic theory. But one contemporary admirer of Holmes got closer to the truth—that Holmes was re-writing the Constitution:

Justice Holmes came to the bench in 1882, when the transition from individualism to collectivism in England was in progress. . . . [He] was too learned in the history of the law to be

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(reviewing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000)). See also Barry Cushman, *Lost Fidelities*, 41 WM. AND MARY L. REV. 95 (1999) (providing a much more balanced assessment of the history of the “Switch In Time That Saved Nine”). Still, compared to the period from 1215 to 1937, the decades of the 1920s and 1930s still appear as a flash in legal history. What was new in 1937 was the ascendancy of rational basis scrutiny.

<sup>231</sup> See, e.g., ROGER PILON, *THE PURPOSE AND LIMITS OF GOVERNMENT* 31–33 (Cato’s Letters No. 13, Cato Institute, 1999); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 34–45; Bernard H. Siegan, *Separation of Powers and Economic Liberties*, 70 NOTRE DAME L. REV. 415, 469–82 (1995) [hereinafter Siegan, *Separation of Powers*].

<sup>232</sup> For more on Progressivism, see generally Thomas G. West, *The Constitutionalism of The Founders Versus Modern Liberalism*, 6 NEXUS 75 (2001); ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 163–93 (1998).

<sup>233</sup> 29 N.E. 517 (1892).

<sup>234</sup> *Id.* at 518.

<sup>235</sup> *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

blind to the fact that the socialistic trend in American political thought would finally demand extensive paternal legislation in no uncertain terms; and that when this demand became strong enough serious consequences might follow the failure of the courts to acquiesce . . . .

. . . [T]he necessity for the establishment of a benevolent attitude towards social reform was apparent . . . [yet] the Constitution was regarded as almost immutable. . . . [N]o further [Amendment] might be looked for short of a popular upheaval. Next to amendment of the Constitution, the most feasible means of giving validity to new principles was to change the interpretation of the provisions under which the inevitable social legislation would be held invalid. "Liberty of contract" and the broad powers of review assumed by the courts under the 5th and 14th Amendments were the elements which barred the way to reform,—and it is against these interpretations that Justice Holmes' most significant attacks have been directed.<sup>236</sup>

As an element of this process of Constitutional pseudo-amendment, it was necessary to ignore a few messy details, such as centuries of precedent supporting the right to earn a living, and to instead portray the economic liberty cases as the interlopers. This effort was fruitful. In 1936, an admirer of Justice Brandeis argued that the nineteenth century Court had adopted "[n]ew definitions of 'liberty' and 'property,'" including the right to earn a living, as a "means . . . of the Judiciary's becoming substantially 'a perpetual censor upon all legislation of the states.'"<sup>237</sup> Today's critics continue to deny the existence of this right. Peter Irons de-

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236 DORSEY RICHARDSON, CONSTITUTIONAL DOCTRINES OF JUSTICE OLIVER WENDELL HOLMES 41 (1924) (footnote omitted). Perhaps I should add that Richardson approved of this view. *Id.* at 43. ("[I]t is the duty of the courts to note the change in the very nature of society, and to do away with the theories of the past that are erroneously being applied to the present.")

237 ALPHEUS THOMAS MASON, BRANDEIS AND THE MODERN STATE 128-29 (1936) (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589-91 (1897)). Mason's hagiographic book is a remarkable window into the shift in legal philosophy that went on in 1936-1937, and the contradictory "pragmatism" that was written into Constitutional law in that era. In almost gushing terms, Mason described Brandeis as "an avowed partisan of the common man; his special concern is for those economically and financially dependent; he prefers human welfare to property rights." *Id.* at 226. Mason's book blows apart the prevailing notion that the New Deal Court did nothing more than awaken from the *Lochner* era legislating from the bench, and return to the dispassionate weighing of the objective constitutionality of laws. Brandeis "is at heart a crusader," convinced that "eighteenth century individualistic philosophy of rights and property is no longer a creed adequate for modern life . . ." *Id.* at 229, 232-33. Yet, while Mason confesses—indeed, applauds—that Brandeis "sustains social legislation . . . because he believes it desirable and expedient as well as constitutional . . ." *Id.* at 224. Nevertheless, he excoriates the *Lochner* Court for being "possessed by preconceived theory," and basing its opinions not "upon any statable rule, but rather upon what social-political philosophy is held by a majority of the justices." *Id.* at 146, 149-50. The solution to this contradiction, according to Mason, was for the Court to allow legislatures "to experiment in things social and economic . . . only when such enactments conform with certain standards of social justice." *Id.* at 223. But, of course, those standards depend on nothing more objective than a particular Justice's sensitivity "to present-day economic and social ills . . ." *Id.* at 227.



rides the *Lochner* Court for “[h]aving inserted ‘liberty of contract’ into the Constitution.”<sup>238</sup> Robert Bork denounces *Lochner* and similar cases stating, “[t]his was lawlessness. The Court made up an entire new set of freedoms . . . .”<sup>239</sup> John Semonche wrote that in his *Lochner* dissent, “Holmes was arguing against the use of the Fourteenth Amendment to protect *newly discovered* individual rights from control by state legislatures,”<sup>240</sup> and refers to the “*new* liberty of contract.”<sup>241</sup> Paul Kens claims that the right to pursue a lawful calling was solely the brainchild of Stephen Field’s dissent in the *Slaughter-House Cases*. He argues “[Field] invented a new right. Nowhere does the Constitution expressly guarantee a right to engage in a trade or profession.”<sup>242</sup> Erwin Chemerinsky writes that during “[t]he fifty years prior to 1937 . . . . The Supreme Court . . . struck down progressive legislation enacted by state and federal legislatures to protect workers and consumers. These decisions reflected the Justices imposing their political and economic philosophies.”<sup>243</sup> Such statements simply ignore the multiple protections for property and economic liberties in the Constitution—backed as they were by over a century and a half of common law protections for economic liberties.

Common criticisms during the Progressive Era that the economic liberty cases promoted unlimited or extreme freedom of contract, concepts supposedly central to *Lochner*, were merely straw men. The common law had always protected consumers, had always struck down contracts if contrary to public policy—contracts restraining trade, for instance—and had always permitted regulations for the protection of the public.<sup>244</sup> But neither the minority in the *Slaughter-House Cases* nor the majority in *Lochner*—nor,

238 IRONS, *supra* note 156, at 249 (emphasis added).

239 BORK, *supra* note 164, at 44. Bork’s hostility to judicial review is particularly extreme.

240 SEMONCHE, *supra* note 162, at 151 (emphasis added).

241 *Id.* at 150 (emphasis added).

242 KENS, *supra* note 102, at 117. Nowhere in his book does Kens mention Edward Coke, which is ironic, since elsewhere he notes that the Court’s holding in *Munn* that the state could regulate businesses which are “affected with a public interest”—was based on the “age-old legal authority” of Lord Hale, another seventeenth century English Chief Justice. *Id.* at 161. See also Eastman & Sandefur, *supra* note 181, at 126.

243 Erwin Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter’s Approach to Judicial Review*, 66 B.U. L. REV. 47, 61–62 (1986) (footnote omitted). But see Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 97 (1989) (“Without judicial enforcement, the Constitution is little more than the parchment that sits under glass in the National Archives.”).

244 See, e.g., *Chi. v. Rumpff*, 45 Ill. 90, 99 (Ill. 1867).

[Cities], no doubt, have the power to designate the particular quarter of the city within which the business may be conducted, and prohibit it in others, and regulate and restrain them so as to prevent their becoming offensive or injurious, but in doing so all persons should be free to engage in the business within those localities by conforming to the municipal regulations.

*Id.* See also *Chi. Packing & Provision Co. v. Chicago*, 88 Ill. 221 (Ill. 1878) (explaining police power right to control businesses).

for that matter, any decision in any case, state or federal—had ever held otherwise. What *Lochner* had said was that it was the duty of the Court to look behind the facial justification of the law at its substantive effect. Just as the *Yick Wo* Court had looked behind the alleged health and safety justification for the law and seen the anti-Chinese intent, so the *Lochner* Court found that the regulation had no relation to “the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor . . . .”<sup>245</sup> The *Lochner* Court explicitly recognized the right of the state to pass legitimate health and safety regulations, which were equally binding upon all those involved in that trade.

However, this did not satisfy the Progressives, because at the heart of Progressivism was an abandonment of the age-old distinction between public and private activity. The common law had always permitted government to regulate activities that had public effects—that is, nuisances, or other such effects upon third persons who were protected because they had not chosen to take on such burdens. Private activities, by contrast, could not be regulated because society was not concerned in them. Over the course of the Progressive Era, however, the concept of “public effects” was broadened more and more in order to accommodate increasing regulation of eventually almost every private activity.<sup>246</sup> For example, John Dewey, probably the most important Progressive intellectual, explicitly denounced “the notion that there are two different ‘spheres’ of action and of rightful claims; that of political society and that of the individual, and that in the interest of the latter the former must be as contracted as possible.”<sup>247</sup> Of course, since all actions have *some* attenuated public effects, Progressivism found an opportunity to abandon nearly all restraints on governmental power, and to replace limited government with, in Dewey’s words, “that form of social organization, extending to *all the areas and ways of living*, in which the powers of individuals

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245 *Lochner v. New York*, 198 U.S. 45, 64 (1905).

246 See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 41–42 (Yale Univ. Press, 1976) (1922) (“[With the coming of Progressivism,] [f]reedom of engaging in lawful callings came to be restricted, and an elaborate process of education and examination to be imposed upon those who would engage in them, lest there be injury to the public health, safety, or morals.”). Cf. John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 HASTINGS CONST. L.Q. 115, 171–72 (2002).

[O]ne of the most striking developments in the trajectory of liberal thought from its classical to its contemporary variants is the movement, from moralistic to paternalistic modes of justification, with respect to the increasing number of laws that limit private and consensual activity. . . . [T]he dark side of modern progressivism has been its willingness to limit individual liberty in the name of individual security or well-being.

*Id.*

247 JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 5 (Capricorn Books 1963) (1935).

shall not be merely released from mechanical external constraint but shall be fed, sustained and *directed*.<sup>248</sup> The abandonment of the distinction between public and private, and the resulting abandonment of limitations on government power, are typified in *Carolene Products* and its sister cases.<sup>249</sup>

*Lochner* had stood merely for the proposition that state action which imposed a burden on the individual's right to make contracts must be justified by evidence that the statute was a legitimate attempt to protect the health and safety of citizens. *Carolene Products* announced that such evidence would simply be presumed to exist—a presumption so strong that, to overcome it, a challenger must demonstrate the utter irrationality of the challenged regulation.<sup>250</sup> This sort of reasoning arguably reached its height when the Court found, in *Wickard v. Filburn*, that Congress' power to "regulat[e] . . . commerce . . . among the states" meant it could regulate the private gardens of individuals who grew wheat only for their own private consumption.<sup>251</sup> Contrast this with the *Case of the City of London*, where the Court refused to find Jacob Wagoner liable for breaking the regulation of candle-makers, because the evidence "doth not shew that he sold any candles, &c. [sic] for if he made them for his own use, without selling any for lucre or gain, he might well do it, as every one may bake or brew, &c. [sic] for his own use, without selling bread or beer . . . ."<sup>252</sup>

248 *Id.* at 31 (emphasis added). Roscoe Pound was similarly candid: "The political and juristic preaching of today leads logically to absolutism." ROSCOE POUND, *CONTEMPORARY JURISTIC THEORY* 9 (1940).

249 As Roger Pilon writes,

The value-laden distinction between two kinds of rights ["fundamental" rights versus "economic" rights, from *Carolene Products*] is nowhere to be found in the Constitution, of course. It was written from whole cloth to pave the way for the redistributive and regulatory programs of the New Deal. Indeed, Rexford Tugwell, one of the principal architects of the New Deal, said as much some 30 years after *Carolene Products* was decided: "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document [*i.e.*, the Constitution] intended to prevent them."

Pilon, *supra* note 231, at 31 (footnote omitted).

250 It is ironic that Justice Brandeis of all people endorsed this position. Brandeis is associated with the so-called "Brandeis Brief," a mechanism by which a mound of sociological and statistical data would be submitted to a court to illustrate the validity of a proposed scheme. But once on the Court, Brandeis held that no such evidence was even *necessary*. I am indebted to Professor Randy E. Barnett for this observation.

251 317 U.S. 111, 124 (1942).

252 77 Eng. Rep. 658, 669 (K.B. 1610) (footnotes omitted). Another ironic note is to be found in *Bush v. Seabury*, 8 Johns. 418 (N.Y. Sup. Ct. 1811). There a statute permitted city officials to regulate public markets, with the single exception that they could not regulate the price of bread offered for sale. The court rejected the plaintiff's arguments against the statute as *reductio ad absurdum*: "Extravagant cases may be stated of the abuse of the power," the court said, "as by an ordinance to regulate the sale of wheat, &c. but this is not a logical way to test the existence of the power." *Id.* at 420–21. By the time of *Wickard*, what the New York court had thought too absurd for discussion had become national economic policy and constitutional law.

Another criticism of the economic liberty cases is the argument that they embodied “conservative” values, and tended to perpetuate class distinctions. Justice Souter, for instance, has said that *Lochner* and its progeny perpetuated the “ordering of economic and social relationships.”<sup>253</sup> In fact, precisely the opposite is true. The free market is a great disrupter of social stratification. Only in government-controlled economies can a stable class structure safely take root; while in a free market, each individual may pursue his own dreams and make his own place in the world—or, more to the point, *her* own place. Consider for example one case which arose nearly a century ago, when for the first time ever, women were trying to become lawyers. In *Bradwell v. Illinois*, Myra Bradwell attempted to practice the profession of law, but an existing occupational regulation prevented her from doing so.<sup>254</sup> When she sued, the Court upheld the regulation on the same grounds that such regulations are justified today: that she did not know what was best for her, but her state did.<sup>255</sup> *Bradwell*, which might be called “the *Slaughter-House* For Her,” is a great illustration of how nothing ossifies the stable, class-structured society, where everybody “knows his or her place,” more efficiently than the bureaucratic state. The great strides which have been made by women in the legal profession since the outdated era of *Bradwell* evidence the point. Those who believe a woman’s place is in the home have much to gain by making it harder for her to get a business license, harder to get a job, harder for her to pursue her dreams. Alternatively, those who believe that a grown woman has the right to make her own contracts, and does not need an older, wiser government to save her from herself, should embrace the free market. It is unfortunate for the latter group that today, the overwhelming majority of legal academics agree with Souter’s paternalistic, and yes, *conservative* view.<sup>256</sup>

## VII. THE RIGHT TO EARN A LIVING IN TODAY’S WORLD

Prior to the advent of rational basis review, the Court had defended the idea of the right to pursue a lawful occupation. In *Meyer v. Nebraska*, the Court listed this right among others which were protected by the word “liberty” in the Fourteenth Amendment:

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<sup>253</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 166 (1996) (Souter, J., dissenting).

<sup>254</sup> 83 U.S. (16 Wall.) 130, 131–32 (1872).

<sup>255</sup> *Id.* at 142.

<sup>256</sup> I am hardly the first to point out this convergence of left and right in opposition to the free market. There are some better analyses of this phenomenon. See generally DINESH D’SOUZA, *THE VIRTUE OF PROSPERITY: FINDING VALUES IN AN AGE OF TECHNO-AFFLUENCE* (2000); VIRGINIA POSTREL, *THE FUTURE AND ITS ENEMIES: THE GROWING CONFLICT OVER CREATIVITY, ENTERPRISE, AND PROGRESS* (1998).

[I]t denotes not merely freedom from bodily restraint but also *the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.* The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.<sup>257</sup>

Even after *Carolene Products*, and even while the Court upheld legislation that infringed on free economic action, it did not entirely abandon the idea of the right to pursue a lawful calling. In *Takahashi v. Fish & Game Commission*, the Court reviewed a California law which repealed the state's prior practice of granting fishing licenses to residents regardless of citizenship.<sup>258</sup> In 1943, the state began issuing these licenses only to citizens, which meant that Japanese immigrants like Mr. Takahashi, who by federal law could not acquire U.S. citizenship, were no longer permitted to work as fishermen.<sup>259</sup> The state asserted that its "proprietary interest in fish in the ocean waters within 3 miles of the shore . . . justified the State in barring all aliens in general and aliens ineligible to citizenship in particular from catching fish."<sup>260</sup> As in *Lochner*, the Court did not stop at this asserted interest, however, and, as in *Yick Wo* and *Truax*, it found that the law was actually an attempt to discriminate against Japanese immigrants, stating:

To all intents and purposes and in effect the provision in the 1943 and 1945 amendments are the same, the thin veil used to conceal a purpose being too transparent. Under each and both, alien Japanese are denied a right to a license to catch fish on the high seas for profit . . . this discrimination constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground of classification and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.<sup>261</sup>

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<sup>257</sup> 262 U.S. 390, 399-400 (1923) (citations omitted) (emphasis added).

<sup>258</sup> 334 U.S. 410, 413-14 (1948).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 414.

<sup>261</sup> *Id.* at 426-27 (quoting trial court).

Still, *Carolene Products* had announced the regime under which America still lives—that economic regulations would be subjected only to “rational basis review.” The right of the individual to earn an honest living has suffered greatly at the hands of rational basis review,<sup>262</sup> and an example of the hostility with which the “economic substantive due process” cases are held can be seen in Justice David Souter’s concurring opinion in *Washington v. Glucksberg*.<sup>263</sup> Souter likened the economic due process cases to the infamous *Dred Scott* case, in which the Supreme Court had upheld a constitutionality of slavery.<sup>264</sup> The *Lochner* Court had “harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused.”<sup>265</sup> The irony of likening the economic liberty cases to *Dred Scott* eluded Justice Souter, as it would not have eluded, say, Frederick Douglass, who captured the importance of the freedom of contract in his memoirs, when he recalled his feelings on receiving his first wages as a free man:

[T]he dear lady put into my hand *two silver half-dollars*. To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—that it was mine—that my hands were my own, and could earn more of the precious coin—one must have been in some sense himself a slave.<sup>266</sup>

Nevertheless, Souter wrote almost as powerfully in his dissent in *Seminole Tribe v. Florida*:

It was the defining characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic

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<sup>262</sup> See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976). In this case, the Supreme Court struck down a federal minimum wage law which set wage standards for employees of State governments. *Id.* at 856. Nowhere in the opinion did the Court consider the rights of those employees who would inevitably lose their jobs as a result of the forced increase in costs of employment. The Court instead held that the law would “significantly alter or displace the States’ abilities to structure employer-employee relationships.” *Id.* at 851. Yet the minimum wage statute in *Adkins* significantly altered the employee’s and the employer’s ability to structure *their own* relationships. One would think that such private actors should have even more freedom of contract than a State government, since the latter is a state actor. But *Usery* was based purely on protecting the efficient working of governments, and was not truly concerned with the rights of employees to seek employment on their own terms.

<sup>263</sup> 521 U.S. 702, 752–89 (1997) (Souter, J., concurring).

<sup>264</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

<sup>265</sup> 521 U.S. at 761. *Cf.* *State v. Goodwill*, 10 S.E. 285, 287 (W. Va. 1889) (“The enjoyment or deprivation of these rights and privileges, [i.e., the right to pursue a lawful occupation] constitutes the essential distinction between freedom and slavery; between liberty and oppression.”).

<sup>266</sup> Frederick Douglass, *The Life and Times of Frederick Douglass*, reprinted in DOUGLASS: AUTOBIOGRAPHIES 453, 654 (Henry Louis Gates, Jr. ed., 1994).

matters as constitutionally suspect. And yet the superseding lesson . . . that action within the legislative power is not subject to greater scrutiny merely because it trenches upon the case law's ordering of economic and social relationships, seems to have been lost on the Court.<sup>267</sup>

Yet the economic substantive due process cases were not at all what Souter claimed. Neither *Lochner* nor *Adkins* held that the common law could not be reached by the legislature, or that it trumped the Constitution. They simply said that laws which infringed on common law rights—which rights had been incorporated by the Constitution's text and by the Fourteenth Amendment—must in fact have the health and safety effect which the legislature claimed, and not be mere pretexts for seizing economic power for economic or political pressure groups.<sup>268</sup> Souter's characterization of *Adkins* as holding that it “treated the common-law as paramount,” is belied by *Adkins*' own text: “There is, of course, no such thing as absolute freedom of contract” and “[i]t must frequently yield to the common good.”<sup>269</sup>

Still, in deriding the right to earn an honest living, Souter is in the company of most legal scholars. In modern academia, the common law right to earn an honest living has received only minimal notice. In two masterful 1994 articles, Professor Wayne McCormack referred to it as “the right of livelihood,”<sup>270</sup> arguing that “the range from economic to personal liberty choices is a spectrum, not a dichotomy.”<sup>271</sup> Just because a person chooses to act in such a way that brings him profit, McCormack argued, does not mean that the act should lose its protection as the act of a person entitled to freedom: “Property and liberty may be two words that express the opposite ends of a spectrum of human conduct from the most autonomous (liberty) to the most interconnected (prop-

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<sup>267</sup> 517 U.S. 44, 166 (1996) (Souter, J., dissenting) (citations omitted). Justice Souter is generally considered the most liberal member of today's Court, but he is joined in this interpretation by the arch-conservative Robert Bork. See BORK, *supra* note 164, at 47 (“Perhaps there ought to have been a constitutional provision invalidating those [economic regulations]. But there was not, and the Court had no business striking them down.”).

<sup>268</sup> See *In re Jacobs*, 98 N.Y. 98, 110 (N.Y. 1885).

<sup>269</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525, 546, 561 (1923).

<sup>270</sup> McCormack, *Economic*, *supra* note 132. See also Peter Huang, *Preventing Post-PepsiCo Disaster: A Proposal for Refining the Inevitable Disclosure Doctrine*, 15 SANTA CLARA COMPUTER & HIGH TECH. L.J. 379, 405 (“The government should not be able to take away the right to control one's livelihood without adequate safeguards.”); Wayne McCormack, *Property and Liberty – Institutional Competence and the Functions of Rights*, 51 WASH. & LEE L. REV. 1 (1994) [hereinafter McCormack, *Property*]; Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 21 (1999) (“[A]ny abridgment of the right to pursue a calling or to make a contract that does not fall within the police power so defined is arbitrary and inconsistent with the meaning attributed to the Due Process Clause by those authorities on which Justice Souter relied.”).

<sup>271</sup> See McCormack, *Property*, *supra* note 270, at 59.

erty).<sup>272</sup> This is simply a restatement of Madison's belief that just government does not "deny to part of its citizens that free use of their faculties, and free choice of their occupations, which . . . are the means of acquiring property strictly so called."<sup>273</sup>

Perversely, the term "right to livelihood" has more frequently become attached to an argument in favor of a Constitutional right to *welfare payments*—that is, a right to be maintained above a specified poverty level, at the expense of others who work.<sup>274</sup> This is most certainly not what Coke and subsequent common law courts had in mind. Rather, they sought specifically to enforce an individual's "negative right" to be free from interference while going about the business of earning an honest living, under the most minimal restrictions necessary and proper for protecting consumers or preventing public dangers and nuisances.<sup>275</sup> This is, as Chancellor Kent said, a guaranty of freedom of action—in short, it is the freedom of contract. It is what Locke called "a *Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own."<sup>276</sup> While all along the common law had stipulated that government may impose regulations on the practice of that right—as Locke says, "[man has] an Understanding to direct his Actions . . . and liberty of Acting . . . within the bounds of that Law he is under"<sup>277</sup>—those regulations could be unreasonable infringements on freedom when they deprived a person of his freedom to pursue a lawful occupation. This requires some exercise of judgment with regard to the reasonableness of those restrictions. This substantive due process protection is in the tradition of what is now nearly eight hundred years of common law, and in the defense of a right which was certainly "deeply rooted in this Nation's history and tradition."<sup>278</sup>

The emptiness of the prevailing view of economic liberties is nowhere more clearly revealed, than by the fact that the right to earn a living has proven too important for the Court or the academy to ignore completely. One rarely finds a detractor of *Lochner* who is consistent enough to call for the reversal of *Yick Wo* or the

<sup>272</sup> *Id.*

<sup>273</sup> See Madison, *supra* note 91, at 516.

<sup>274</sup> See, e.g., Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1133 n.9 (1999) (including a long list of articles in which "[s]cholars have put forward a range of normative arguments in favor of welfare rights").

<sup>275</sup> The bold assertion that there is no distinction between positive rights and negative rights is nothing new. See Tom G. Palmer, Book Review, 19 CATO J. 331 (1999).

<sup>276</sup> LOCKE, *supra* note 94, at 324.

<sup>277</sup> *Id.*

<sup>278</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).



revival of *Bradwell*.<sup>279</sup> In a variety of cases, the Supreme Court and state courts have invoked this right, and even struck down licensing schemes which infringe upon it. One of the legal areas in which this issue has arisen was in the anti-communist hysteria of the first half of the twentieth century. *Barsky v. Bd. of Regents of the State of New York*,<sup>280</sup> involved a doctor whose license was revoked when he refused to submit to an investigation into his alleged communist sympathies. The Court upheld this action, but the arch-liberal Justice William Douglas dissented, writing that:

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. . . . It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. . . .  
 . . . [So] the question here is not what government must give, but rather what it may not take away.<sup>281</sup>

This is *exactly* the holding of *Lochner*, *Adkins*, and other now reviled cases: laws which infringe on a person's right to pursue a lawful calling should be subjected to substantive judicial scrutiny. Douglas' view was echoed decades later in *Board of Regents v. Roth*.<sup>282</sup> There, the Court reviewed the complaint of a professor from a state college who was fired for criticizing the administration of the school. The Court held that the professor did have the right "to engage in any of the common occupations of life," and that "[t]here might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated."<sup>283</sup>

Today, licensing statutes are all too frequently used as a method of monopolizing trade for a few privileged individuals or corporations.<sup>284</sup> The regulation of taxicabs is an example common in American states. In Colorado, a man named Leroy Jones, who made a living by selling hotdogs at Denver's Mile-High Stadium,

279 One who was so consistent was Justice Hugo Black, who dissented in *Griswold v. Connecticut*, on the grounds that the case, like the pre-New Deal cases, embodied what he called the "shocking doctrine" that some activities were beyond the reach of government. 381 U.S. 479, 519 (1965). "I had thought," Black said, "that we had laid that formula, as a means for striking down state legislation, to rest once and for all." *Id.* at 522.

280 347 U.S. 442, 445 (1954).

281 *Id.* at 472-73.

282 408 U.S. 564 (1972).

283 *Id.* at 572-73.

284 David Bernstein has done much outstanding work demonstrating that the primary victims of occupational licensing are poor minorities. See generally David E. Bernstein, *Lochner, Parity, And The Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999); David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89 (1994); David E. Bernstein, *Roots of The "Underclass": The Decline of Laissez-Faire Jurisprudence And The Rise of Racist Labor Legislation*, 43 AM. U.L. REV. 85 (1993).

decided to start his own taxi company.<sup>285</sup> But in order to operate a taxicab in Colorado, one must be granted a certificate of public convenience and necessity—that is, approval by a state board that a new taxi company is needed in the city.<sup>286</sup> Of course the board is run by a handful of taxi operators with no interest in increasing their competition. But even if it were to operate under the purest of motivations, how does one go about proving that a city needs a new business, of whatever sort?<sup>287</sup> Nobody could have known, in the 1960s, that Americans *needed* electronic mail, cellular telephones, or compact disc players, and these things would never have come about, had their introduction into commerce been predicated on approval by a state board made up of the manufacturers of stationery, rotary dial phones, or record players. Jones sued, basing his claim on, *inter alia*, his right to pursue a lawful occupation, as protected by the Fourteenth Amendment.<sup>288</sup> Of course, he lost. The court held that “the argument that the clause creates a substantive right to pursue one’s lawful occupation or profession free from state limitations was laid to rest long ago by the United States Supreme Court.”<sup>289</sup> Fortunately, the state legislature changed the law, to allow more competition.<sup>290</sup>

One recent case illustrates even more clearly the problem of licensing statutes. In *Craigmiles v. Giles*, a Tennessee law, which made it illegal for a person to sell a coffin without being a licensed funeral director, was at issue.<sup>291</sup> This license required a person to pay a large fee and attend classes in subjects like embalming—subjects of little importance to a person who merely wanted to sell a box.<sup>292</sup> A number of casket retailers sued, arguing that this scheme violated their right to earn a living, for the aggrandizement of those who already possessed funeral director licenses.<sup>293</sup> The state defended the regulation as a necessary public health and safety measure, but the district court rejected this argument, calling it “somewhat of a joke,” and found in favor of the casket sellers: “The requirement certainly has nothing to do with public

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285 See CLINT BOLICK, *TRANSFORMATION: THE PROMISE AND POLITICS OF EMPOWERMENT* 76–80 (1998).

286 *Jones v. Temmer*, 829 F. Supp. 1226, 1229 (D. Colo. 1993), *vacated by* 57 F.3d 921 (10th Cir. 1995). Note the similarity to the regulatory scheme at issue in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

287 This point is more thoroughly developed in ARKES, *supra* note 223, at 51–61.

288 829 F. Supp. at 1233. *Cf.* *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 337 (1948) (striking down taxi licensing scheme because “the power in a municipal corporation to license or regulate a useful trade does not carry the implied authority to . . . create a monopoly therein”) (quoting 36 AM. J. JURIS. 524).

289 *Jones*, 829 F. Supp. at 1233–34 (quoting *Galahad v. Weinshienk*, 555 F. Supp. 1201, 1207 (D. Colo. 1983)).

290 See *Jones v. Temmer*, 57 F.3d 921, 922 (10th Cir. 1995).

291 110 F. Supp. 2d 658, 659 (E.D. Tenn. 2000), *aff’d*, 312 F.3d 220 (6th Cir. 2002).

292 *Id.* at 660.

293 *Id.* at 659, 661.

health and safety. A casket is nothing more than a container for human remains."<sup>294</sup> The court even explained that while "[i]t is not for this trial court to breathe new life into the Privileges and Immunities Clause 127 years after its demise. . . the argument of the *Slaughter-House* dissenters may reflect historical truth[, and] it may be time, as Justice Thomas suggests . . . to take another look at the Privileges and Immunities Clause and its place within the Fourteenth Amendment."<sup>295</sup> In December, the Sixth Circuit Court of Appeals affirmed.<sup>296</sup> "[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose," the court noted.<sup>297</sup> Although the court declined to address the *Slaughter-House Cases*, it noted that the licensing scheme was "nothing more than an attempt to prevent economic competition."<sup>298</sup>

The danger of licensing schemes becoming a method for monopolizing trade was also touched on in a series of recent anti-trust cases.<sup>299</sup> In 1963, an American Medical Association committee, which was formed to investigate the claims of chiropractic medicine, determined their claims were scientifically unsound, and that under medical ethics principles, no doctor could be permitted to refer patients to chiropractors, or even to associate with chiropractors.<sup>300</sup> While they may have had sound scientific reasons for reaching this conclusion, this clearly interfered with not only the rights of chiropractors to pursue their businesses, but with the right of doctors to refer their patients to specialists if, in their medical judgment, such a referral was proper. But more importantly, the AMA's special position—essentially in control of the career of every doctor in the country—led it to become a monopoly. Wrote one Circuit Court,

Getting needed information to the market is a fine goal, but the district court found that the AMA was not motivated solely by

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<sup>294</sup> *Craigmiles*, 110 F. Supp. 2d at 662, 664 n.3. Cf. *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) ("Tennessee's justifications for the 1972 amendment come close to striking us with 'the force of a five-week-old, unrefrigerated dead fish. . . .'" (quoting *United States v. Searan*, 259 F.3d 434, 447 (6th Cir. 2001))).

<sup>295</sup> *Id.* at 665–67.

<sup>296</sup> *Craigmiles*, 312 F.3d 220 (2002).

<sup>297</sup> *Id.* at 224.

<sup>298</sup> *Id.* at 225. *But see* *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002) (mem.) (upholding identical statute in Oklahoma).

<sup>299</sup> *Wilk v. AMA*, 895 F.2d 352 (7th Cir. 1990); *Chiropractic Coop. Ass'n of Michigan v. AMA*, 867 F.2d 270 (6th Cir. 1989); *Myers v. ADA*, 695 F.2d 716 (3d Cir. 1982). Due to "rational relationship scrutiny," recent cases addressing the right to earn a living have in general been *antitrust* cases as opposed to cases against wrongful *government action*. *See, e.g., Twine v. Liberty Nat'l Life Ins. Co.*, 311 So. 2d 299 (Ala. 1975). Private contracts in restraint of professions have been disfavored by the common law for centuries, just as state action, which does the same thing. Cf. *Tomlinson v. Humana, Inc.*, 495 So. 2d 630 (Ala. 1986). While the AMA cases did not involve issues of state action, the unique position of the AMA in licensing doctors should raise such questions.

<sup>300</sup> *Wilk*, 895 F.2d at 356.

such altruistic concerns. Indeed, the court found that the AMA intended to "destroy a competitor," namely, chiropractors. It is not enough to carry the day to argue that competition should be eliminated in the name of public safety.<sup>301</sup>

Today, the Supreme Court and other courts continue to refer, in dicta, to the individual's right to pursue a lawful occupation.<sup>302</sup> In some dicta, it has even been referred to as a "fundamental" right.<sup>303</sup> In different contexts it has abided by the rule that statutes in derogation of common law rights should be strictly construed,<sup>304</sup> and it has noted that "[l]iberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."<sup>305</sup> In *Toomer v. Witsell*,<sup>306</sup> the Court held "that commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause."<sup>307</sup> As recently as 1999 the Supreme Court held that the Fourteenth Amendment protects the right to "choose one's field of private employment . . . subject to reasonable government regulation."<sup>308</sup> But the Court upheld the regulation in that case. Likewise, in *United Building & Construction Trades Council v. Mayor of Camden*,<sup>309</sup> the Court wrote that "the pursuit of a common calling" is "[c]ertainly" one of the "most fundamental of those privileges protected" by the Privileges and Immunities Clause of Article Four. But the Court upheld the regulation there as well.<sup>310</sup>

In *Lowe v. SEC*,<sup>311</sup> the Court struck down an injunction which had been secured by the Securities and Exchange Commission against a group of former investment advisors. These advisors had lost their SEC licenses, and thus could no longer offer professional investment advice. Instead they began to publish a newsletter expressing their opinions on stock market investments. The

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301 *Id.* at 361 (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978)).

302 *See, e.g.*, *Lebbos v. Judges of Superior Court*, 883 F.2d 810, 818 (9th Cir. 1989); *Benigni v. City of Hemet*, 868 F.2d 307, 312 (9th Cir. 1988) (explaining that substantive due process "protects a liberty or property interest in pursuing the 'common occupations or possessions of life.'" (quoting *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238-39 (1957)). *See also* *Chalmers v. City of Los Angeles*, 762 F.2d 753, 757 (9th Cir. 1985).

303 *See, e.g.*, *New Hampshire v. Piper*, 470 U.S. 274, 281 n.10 (1985).

304 *See, e.g.*, *Norfolk Redev. & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35 (1983).

305 *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

306 334 U.S. 385 (1948).

307 *Id.* at 403 (emphasis added). The Court is referring to the Article Four Privileges and Immunities Clause, not to the Fourteenth Amendment. *Id.* *See also* *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (privileges and immunities clause of Article Four prohibits "state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State").

308 *Connecticut v. Gabbert*, 526 U.S. 286, 292 (1999).

309 465 U.S. 208 (1984).

310 *Id.* at 219, 221.

311 472 U.S. 181 (1985).

SEC enjoined them on the grounds that the loss of their licenses prohibited them from offering the public investment advice.<sup>312</sup> The investors responded that their right to publish was protected by the First Amendment, and the Court agreed.

This issue involves a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment. The Court determined long ago that although “[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, . . . there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed . . . for the protection of society.” Regulations on entry into a profession, as a general matter, are constitutional if they “have a rational connection with the applicant’s fitness or capacity to practice” the profession.<sup>313</sup>

State courts have also protected this right. Texas courts have held that citizens “hav[e] a vested property right in making a living.”<sup>314</sup> In 1938, a New York court held that a statute requiring podiatrists to obtain licenses could not be applied to shoe salesmen.<sup>315</sup> This rule was followed in a Connecticut case, *Connecticut Chiropody Society, Inc. v. Murray*, in which the court held that “[a] statute which restricts the conduct of an occupation which was lawful at common law should be construed with reasonable strictness.”<sup>316</sup> Wyoming has also held that “[s]tatutes which impose restrictions on trade or common occupations, or which levy an excise tax upon them, are generally construed strictly.”<sup>317</sup>

In *Estes v. Gadsden*, the Alabama Supreme Court upheld the constitutionality of a broad licensing tax “for the privilege of engaging in or following any trade, occupation or profession within the corporate limits of the city and covers all salaried or wage-earning employees.”<sup>318</sup> At the same time, though, the court noted that “[t]he right to earn a livelihood is an inalienable right guaranteed by the Bill of Rights.”<sup>319</sup> Likewise, the California Supreme Court has declared the right to earn a living a “fundamental”

<sup>312</sup> *Id.* at 184–85.

<sup>313</sup> *Id.* at 228 (citations omitted). See also *Commodity Trend Serv., Inc. v. CFTC*, 1999 U.S. Dist. LEXIS 15877 (E.D. Ill. 1999).

<sup>314</sup> *Smith v. Decker*, 213 S.W.2d 632, 634 (Tex. 1958).

<sup>315</sup> *People v. Dr. Scholl’s Foot Comfort Shops, Inc.*, 13 N.E.2d 750 (N.Y. 1938).

<sup>316</sup> 153 A.2d 412, 414 (Conn. 1959). See also *Hart v. Bd. of Exam’rs of Embalmers*, 26 A.2d 780, 782 (Conn. 1942) (embalmer’s licensing scheme “restricts a common right and thus derogates from the common law and should be strictly construed in favor of the right”) (internal citation omitted).

<sup>317</sup> *State v. Capital Coal Co.*, 88 P.2d 481, 483 (Wyo. 1939). See also *County of Natrona v. Casper Air Serv.*, 536 P.2d 142 (Wyo. 1975).

<sup>318</sup> 94 So. 2d 744, 746 (Ala. 1957).

<sup>319</sup> *Id.* at 750.

one.<sup>320</sup> Like Texas, Arizona considers the right of occupation a property right.<sup>321</sup> And at least one Georgia case has held that a person's "right to earn a living is not to be denied him without his day in court."<sup>322</sup> But other courts, for instance in Hawaii, have declared that the right to earn a living is not a fundamental right.<sup>323</sup>

New York courts have recognized this right,<sup>324</sup> and have even stated that "[m]onopolistic restrictions on the right to earn a living are odious devices."<sup>325</sup> Yet recently, the Supreme Court of New York stated that "[t]he right to do business has never been considered a fundamental right."<sup>326</sup> This confusion persists elsewhere. In Florida, for instance, where the Supreme Court has declared that "[t]he fundamental right to earn a livelihood in pursuing some lawful occupation is protected by the Constitution, and in fact, many authorities hold that the preservation of such right is one of the inherent or inalienable rights protected by the Constitution."<sup>327</sup> Citing the Supreme Court, the Eleventh Circuit has likewise said that one of the Fourteenth Amendment's protections is the right of the individual "to engage in any of the common occupations of life."<sup>328</sup> Yet the Eleventh Circuit has also stated that "[t]he [Supreme] Court, however, has never held that the right to

320 See *Conway v. State Bar of California*, 767 P.2d 657, 675 n.7 (Cal. 1989) (Kaufman, J., dissenting). See also *Sei Fujii v. State of California*, 242 P.2d 617 (Cal. 1952) (restrictions on immigrants owning land interferes with right to earn a living).

321 *Buehman v. Bechtel*, 114 P.2d 227, 231 (Ariz. 1941).

322 *Leakey v. Ga. Real Estate Comm'n*, 55 S.E.2d 818, 819 (Ga. Ct. App. 1949).

323 *Nagle v. Bd. of Ed.*, 629 P.2d 109, 116 (Haw. 1981) (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976)).

324 See, e.g., *Ribotsky v. Lupkin*, 452 N.Y.S.2d 806 (N.Y. Sup. Ct. 1982); *Howell v. Benson*, 432 N.Y.S.2d 835 (N.Y. Sup. Ct. 1980).

325 *Di Carlo v. State Liquor Auth.*, 282 N.Y.S.2d 834, 836 (N.Y. Sup. Ct. 1967).

326 *Ricketts v. City of New York*, 688 N.Y.S.2d 418, 422 (N.Y. Sup. Ct. 1999) (quoting *Tel. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 564 F. Supp. 880, 891 (N.D. Ill. 1982)). It is particularly interesting to compare this case with *Robinson v. Watkins*, 90 Eng. Rep. 165 (K.B. 1702), which involved practically the same facts—only, almost three centuries earlier. See *supra* text accompanying note 78. *Ricketts*, like *Temmer*, reveals a continuing problem that some authors have called "transit racism." See Robert D. Bullard et al., *The Costs and Consequences of Suburban Sprawl: The Case of Metro Atlanta*, 17 GA. ST. U. L. REV. 935, 967–70 (2001). Regulation of the taxicab industry has a profoundly negative impact on racial minorities, while benefiting established, politically powerful cartels. The power of taxi licensing extends even further. In 1955, Martin Luther King's Montgomery bus boycott was almost destroyed when city officials used the licensing laws to enjoin the carpool network which the boycotters established in order to get from one place to another without using the buses. The city argued that the boycotters were operating a taxi company without a license, and actually did get the injunction. As a result, for the last month of the boycott, the protesters were forced to walk. See also TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 145, 193–94 (1989); WALTER E. WILLIAMS, THE STATE AGAINST BLACKS 75–86 (1982).

327 *State ex rel. Hosack v. Yocum*, 186 So. 448, 451 (Fla. 1939); *accord Campos v. INS*, 32 F. Supp. 2d 1337, 1347 (S.D. Fla. 1998).

328 *Silverstein v. Gwinnett Hosp. Auth.*, 861 F.2d 1560, 1566 (11th Cir. 1988) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923))).

pursue a particular occupation is a fundamental right, and it has not applied strict scrutiny review to classifications affecting an individual's pursuit of his or her occupation."<sup>329</sup>

This, in fact, is the reason for such confusion. While it is sometimes politically expedient for courts to refer to the right of occupation as a fundamental right—and while previous generations very much thought it fundamental—applying the strict scrutiny which is used whenever government interferes with *other* fundamental rights would mean rolling back most of the vast governmental edifice which has been built upon *Carolene Products*.<sup>330</sup> We see then two great ironies. The first is that courts' reluctance to apply strict scrutiny in this matter has required that when courts *do* wish to protect the right to earn a living, they must do so under clauses of the Constitution, such as the Equal Protection Clause, or legal theories, such as Due Process, which were not primarily meant for that job. Yet this is precisely what the left complains of with regard to the economic substantive due process cases—that they added to the definition of “due process” rights which were not intended to be protected under that clause.

While courts often refer in *dicta* to the right to earn a living, they rarely step in to protect that right from the interference of groups legally protected from competition. This is due simply to a single reason: rational relationship scrutiny. As one commentator has written, “*Slaughter-House* would be a difficult case today, except that the hard questions would be hidden by the assumption, built into ‘rational basis scrutiny,’ that the states generally do not act for forbidden purposes.”<sup>331</sup> But that assumption is a notorious and blatant fiction.<sup>332</sup>

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329 Jones v. Bd. of Comm'rs of the Ala. State Bar, 737 F.2d 996, 1000 (11th Cir. 1984). It is of course true that the Supreme Court has not applied strict scrutiny to infringements of this right since 1937.

330 As one commentator has put it:

[E]mbracing economic substantive due process would require that liberals reject some deeply ingrained beliefs and practices. For example, they would have to abandon Progressive myths about the old Court, quit casting a blind eye on government's economic irrationality, partiality, and predatoriness, and stop winking at pluralist log-rolling. Worst of all, liberals would have to admit that the supposedly malign and ignorant reactionaries on the old Court knew things about business and government that they and their Progressive forbears were unwilling or unable to see.

Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 968–69 (1999) (internal citations omitted).

331 Harrison, *supra* note 136, at 1468 (emphasis added).

332 H.L. Mencken once wrote of Oliver Wendell Holmes:

The weak spot in his reasoning, if I may presume to suggest such a thing, was his tacit assumption that the voice of the legislature was the voice of the people. There is, in fact, no reason for confusing the people and the legislature: the two, in these later years, are quite distinct. . . . The typical lawmaker of today is a man wholly devoid of principle—a mere counter in a grotesque and knavish game. If the right pressure could be applied to him he would be cheerfully in favor of polygamy, astrology or cannibalism.

This is the second great irony: although Holmes, Brandeis, and their descendants are often portrayed as enemies of formalism,<sup>333</sup> the rational basis test which they fashioned enshrines formalism *à outrance*. The *Carolene Products* presumption of constitutionality is a *prime* exercise in formalism. So long as the government's action bears some connection to a minimally rational economic policy, the Court refuses to look further, to the real motive or real effect of the policy. This is the very definition of formalism.

### VIII. CONCLUSION

The Constitution was formed in large part to protect the individual's right to pursue a business without wrongful interference, a right that was "deeply rooted in this Nation's history and tradition."<sup>334</sup> Although this right is an old one, it embodies important liberal values of self-assertiveness and social mobility. The coming of the New Deal, and the enshrinement of its quack economic theories, required the abandonment of this long and important tradition, and a new deference to political regulation that ignored the fact that such regulatory powers are often exercised at the behest of special interest groups who prosper at the expense of those with less political power. It was to prevent this sort of political jockeying that the Constitution was written. Unfortunately, for many people today, the right to pursue happiness, by earning a living, is void where prohibited by law. That right, and those people, deserve to be protected by our courts today, just as they were protected by our courts for many centuries before the New Deal.

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H.L. MENCKEN, A MENCKEN CHRESTOMATHY 260-61 (H.L. Mencken ed., 1962). If Holmes' views were generally accepted, Mencken wrote, "there would be scarcely any brake at all upon lawmaking, and the Bill of Rights would have no more significance than the Code of Manu." *Id.* at 260.

<sup>333</sup> See, e.g., Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

<sup>334</sup> Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).



APPENDIX A<sup>†</sup>

The following is a list of state cases between 1823—when *Corfield v. Coryell* was decided—and 1873—the year the *Slaughter-House Cases* were decided—in which the courts discussed or protected the common law right to earn a living.

Hayden v. Noyes, 5 Conn. 391, 397 (1824), *available at* 1824 WL 83, at \*5 (“Every person has a common law right, to fish in a navigable river or arm of the sea, until, by some legal mode of appropriation, this common right is extinguished.”); *Smith v. Spooner*, 20 Mass. 229, 230 (1825), *available at* 1825 WL 2067, at \*2 (“Every man of full age and sound mind is at liberty to make contracts . . . unless by statute provision he is disabled. And disabling statutes of that nature should be construed strictly, for though founded in policy and a just regard to the public welfare, they are in derogation of private rights.”); *Dunham & Daniels v. Trustees of Rochester*, 5 Cow. 462, 466 (N.Y. 1826) (“[I]t does not follow that any man is to depend, for the fair and innocent exercise of his business, on the will of the [city, or]; that they have the power of licensing his trade, at their pleasure; prohibiting it altogether; or crippling it by heavy charges and grievous penalties.”); *In re Nightingale*, 28 Mass. 168, 174 (1831) (The challenged regulation “does [not] operate as an improper restraint of trade, but is a wholesome regulation of it.”); *Austin v. Murray*, 33 Mass. 121, 126 (1834) (“[T]he law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation.”); *City of Hudson v. Thorne*, 7 Paige Ch. 261 (N.Y. Ch. 1838) (“If the manufacture of pressed hay within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power expressly given by their charter to prevent the carrying on of such manufacture; but as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business.”); *Town of Columbia v. Beasley*, 20 Tenn. 232, 240–41 (1839), *available at* 1839 WL 1286, at \*4–5 (“The 5th plea alleges that the tax was imposed with a view to prohibit the defendant from pursuing a lawful occupation, and not for the purpose of raising a revenue. . . . A by-law for oppression is void.”); *Mobile v. Yuille*, 3 Ala. 137, 139 (1841), *available at* 1841 WL 123, at \*2 (“[T]he enjoyment of all the rights of property, and the utmost freedom of action which may consist with the public welfare,

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<sup>†</sup> All citations and direct quotes in the appendices have been verified using the electronic versions of these materials available on Westlaw. *Chapman Law Review* is not responsible for errors that may be contained in the electronic versions.

is guarantied to every man, and no restraint can be lawfully imposed by the Legislature in relation thereto, which the paramount claims of the community do not demand, or which does not operate alike on all.”); *Rockwell v. Hubbell’s Adm’rs*, 2 Doug. 197, 200 (1846), available at 1846 WL 2864, at \*2 (“Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its own views of policy and humanity. It must reside in every state, to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community.”); *Whitney v. Bartholomew*, 21 Conn. 213, 217 (1851), available at 1851 WL 574, at \*1 (“The trade and occupation of carriage-making, or of a blacksmith, is a lawful and useful one; and a building erected for its exercise, is not a nuisance *per se*.”); *Mays v. Cincinnati*, 1 Ohio St. 268, 273 (1853) (“[I]nterference with the natural right of acquisition and enjoyment guarantied by the constitution, can only be justified when public necessity clearly demands it.”); *People v. Toynbee*, 11 How. Pr. 289 (N.Y. Sup. Ct. 1855) (striking down anti-liquor law as infringement of right to sell goods); *State v. Wheeler*, 25 Conn. 290, 292 (1856), available at 1856 WL 981, at \*2 (“[W]e see no ground on which a prohibition of the owning or keeping of an article for the purpose of a sale, which the legislature had no rightful power to prevent, could be upheld.”); *In re New Orleans Draining Co.*, 11 La. Ann. 338, 352 (1856), available at 1856 WL 4729, at \*15 (attorney arguing that “government cannot say to [a citizen] that he shall follow this or that occupation, because the government thinks that it will be either for his own, or the public good.”); *Davis v. City of New York*, 14 N.Y. 506, 524 (1856) (holding that city government “had no power to grant to any person a [monopoly] franchise for transporting passengers on the public streets, for profit, for a single day, and the attempt to do so was absolutely void.”); *Prevost v. Greneaux*, 60 U.S. 1, 4 (1856) (attorney arguing that “[s]o far as statutes for the regulation of trade impose fines or create forfeitures, they are doubtless to be construed strictly as penal, and not liberally as remedial laws.”); *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19, 35 (1856), available at 1856 WL 912, at \*10 (“[T]he policy of the law is to encourage trade, by the free competition of all who may choose to engage in it, and it cannot recognize a right in the plaintiffs to interfere for the purpose of preventing a public nuisance, on the ground of an interest they have, as competitors with the defendants, for the public patronage in this business.”); *Ex parte Newman*, 9 Cal. 502, 517 (1858) (“The right to protect and possess property is not more clearly protected by the Constitution than the right to acquire.”);

Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 547 (1858), *available at* 1857 WL 2157, at \*5 (“Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity.”); City of Davenport v. Kelley, 7 Iowa 102, 107 (1858), *available at* 1858 WL 230, at \*4 (upholding regulation because “[i]t regulates, but does not restrain [trade], and as a regulation there is no conceivable objection to it.”); Phelps v. Rooney, 9 Wis. 70 (1859), *available at* 1859 WL 2821, at \*2 (court agreeing with counsel that “[a]ll statutes which impose restrictions on trade or common occupations, must be construed strictly.”); Russell v. Sloan, 33 Vt. 656 (1861), *available at* 1861 WL 3363 (refusing to apply anti-liquor law to sale of “quack medicines” because law must be strictly construed); Drexel & Co. v. Commonwealth, 46 Pa. 31 (1863), *available at* 1863 WL 4920, at \*4 (“Statutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be construed strictly.”); Wreford v. People, 14 Mich. 41, 46 (1865), *available at* 1865 WL 2123, at \*4 (Police “power can only be exercised to do away with what are legally nuisances, and does not authorize the council, as it could not, to interfere with what is not a nuisance in fact.”); New Orleans, Jackson & Great N. R.R. Co. v. Bailey, 40 Miss. 395 (1866), *available at* 1866 WL 1889 (describing tort duties of those engaged in their “lawful calling”); City of Chicago v. Rumpff, 45 Ill. 90, 96 (1867), *available at* 1867 WL 5226, at \*3 (“Hence their by-laws must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interest, of the corporation, are void. And of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly.”); City of Bloomington v. Wahl, 46 Ill. 489, 492 (1868), *available at* 1868 WL 4914, at \*2 (“The ordinance must be reasonable, uniform in application throughout the limits in which it has operation; it must not be in restraint of trade; it must not create oppressive monopolies, but must be calculated to advance the general welfare of the inhabitants of the municipality.”); Ducat v. City of Chicago, 48 Ill. 172, 178 (1868), *available at* 1868 WL 5076, at \*3 (Privileges and immunities clause means “that the citizens of all the States should have the peculiar advantage of acquiring and holding real as well as personal property, and that such property should . . . not be liable to any taxes or burdens which the property of the citizen is not subject to.”); Hayes v. City of Appleton, 24 Wis. 542, 545 (1869), *available at* 1869 WL 2114, at \*1 (“The selling of property at public auction being a lawful business . . . it follows that [the challenged regulation] is an unreasonable and unlawful interference with the freedom of trade, and that the ordinance is for that reason void.”);

*Pieri v. Town of Shieldsboro*, 42 Miss. 493, 495 (1869), *available at* 1869 WL 3769, at \*2 (city's order that lumberyard remove its lumber invalid because "It cannot be seriously contended that the corporate authorities of a town can, by an arbitrary ordinance, destroy private property by force, or compel the owner of it to have it removed, unless it was a nuisance, and so declared in the ordinance."); *United States v. Singer*, 27 F. Cas. 1082, 1084 (N.D. Ill. 1870) (No. 16, 292) (striking down a liquor taxation scheme for being "a series of restrictions and impositions, and a system of inquisition and espionage upon distilling—admitted by the act to be a lawful occupation—which if extended to all other kinds of business, would make the collection of taxes odious and oppressive and indeed well nigh intolerable."); *Parrott v. Barney*, 18 F. Cas. 1236, 1243 (C.C.D. Cal. 1871) (No. 10, 773) ("[W]hy should a person innocently ignorant of the qualities of a dangerous thing unconsciously brought upon his premises in the pursuit of a lawful calling, not only be compelled to sustain the damage suffered himself, but, also, that suffered by his neighbor from an accident resulting therefrom without his fault. . . . In my judgment, the law is not so rigorous and unreasonable."); *Gale v. Village of Kalamazoo*, 23 Mich. 344, 355 (1871), *available at* 1871 WL 5613, at \*6 ("[Monopolies] are founded in destruction of trade, and cannot be tolerated for a moment."); *Barling v. West*, 29 Wis. 307, 315 (1871), *available at* 1871 WL 2973, at \*4 (striking down ordinance requiring license to sell "lemonade, ice cream, cakes, fruit, etc., [because it] is a perfectly lawful trade, and its restraint or regulation is not demanded by the public welfare."); *Moore v. Letchford*, 35 Tex. 185, 216 (1871), *available at* 1872 WL 7381, at \*17 (power to exempt certain items from seizure in bankruptcy "must reside in every state, to enable it to secure its citizens . . . in those pursuits which are necessary to the existence and well being of every community.").

In *Smith v. Foster*, 41 N.H. 215 (1860), the New Hampshire Supreme Court held a contract illegal for being made on the Sabbath, and drew a distinction between one's *ordinary* calling and one's *secular* calling, and held that "blue laws" were constitutional as restrictions on the latter, not the former. This was more fully explained in *George v. George*, 47 N.H. 27 (1866), *available at* 1866 WL 1962, at \*1 (holding that making a will did not qualify as secular labor). Following this rule of strict construction, in *Ah Hee v. Crippen*, 19 Cal. 491 (1861), Justice Field, later a dissenter in the *Slaughter-House Cases*, held that a law requiring licenses for operating mines could not require the licensing of mines operated on privately held land.

## APPENDIX B

For many years before *Lochner v. New York*, it was an established principle that: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health . . . and when it appears that [public health] is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen." *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 319 (1872).

*See also* *Foster v. Essex Bank*, 16 Mass. 245, 270-71 (1819); *Town of Goshen v. Town of Stonington*, 4 Conn. 209 (1822); *Vanderbilt v. Adams*, 7 Cow. 349 (N.Y. Sup. Ct. 1827); *Coates v. City of New York*, 7 Cow. 585 (N.Y. Sup. Ct. 1827); *Wally's Heirs v. Kennedy*, 10 Tenn. 554 (1831); *In re Nightingale*, 28 Mass. 168, 174 (1831); *Baker v. Boston*, 29 Mass. 184, 197-98 (1831); *Glenn v. City of Baltimore*, 5 G. & J. 424 (1833); *Austin v. Murray*, 33 Mass. 121, 125-26 (1834); *In re Goddard*, 33 Mass. 504, 509-11 (1835); *Pierce v. State*, 13 N.H. 536 (1843); *Walker v. Bd. of Pub. Works*, 16 Ohio 540 (1847); *Green v. Savannah*, 6 Ga. 1 (1849); *Our House, No. 2 v. State*, 4 Greene 172 (Iowa 1853); *Mays v. City of Cincinnati*, 1 Ohio St. 268, 272 (1853); *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140 (1855); *People v. Hawley*, 3 Mich. 330 (1854); *Westervelt v. Gregg*, 12 N.Y. 202 (1854); *Guy v. Hermance*, 5 Cal. 73 (1855); *People v. Toynbee*, 11 How. Pr. 289 (N.Y. Sup. Ct. 1855); *State v. Wheeler*, 25 Conn. 290 (1856); *Town Council of Winnsboro v. Smart*, 45 S.C.L. (11 Rich.) 551 (S.C. Ct. App. 1858); *City of New York v. Second Ave. R. Co.*, 21 How. Pr. 257 (N.Y. Sup. Ct. 1861); *Ames v. Port Huron Log Driving & Booming Co.*, 11 Mich. 139 (1863); *Ash v. People*, 11 Mich. 347 (1863); *City of New York v. Second Ave. R. Co.*, 32 N.Y. 261, 272-74 (1865); *Coe v. Shultz*, 2 Abb. Pr. (n.s.) 193 (N.Y. Sup. Ct. 1866); *Roosevelt v. Godard*, 52 Barb. 533 (N.Y. Sup. Ct. 1868); *City of Bloomington v. Wahl*, 46 Ill. 489 (1868); *Hayes v. City of Appleton*, 24 Wis. 542 (1869); *Craig v. Kline*, 65 Penn. 399 (1870); *City of St. Louis v. Fitz*, 53 Mo. 582 (1873); *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191 (1873); *Weismer v. Village of Douglas*, 64 N.Y. 91, 99 (1876); *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 319 (1872); *People ex rel. Bolton v. Albertson*, 55 N.Y. 50, 55 (1873); *Toledo, Wabash & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37 (1873); *Farwell v. City of Chicago*, 71 Ill. 269 (1874); *Henderson v. Mayor of New York*, 92 U.S. 259, 271 (1875); *In re Deansville Cemetery Ass'n.*, 66 N.Y. 569 (1876); *Shepperd v. Sumter County Com'rs*, 59 Ga. 535 (1877); *City of St. Paul v. Traeger*, 25 Minn. 248 (1878); *City of Baltimore v. Radecke*, 49 Md. 217 (1878); *Stuart v. Palmer*, 74 N.Y. 183 (1878); *In re Cheesebrough*, 78 N.Y. 232 (1879); *Lowry v. Rainwater*, 70 Mo. 152 (1879); *In re Ryers*, 72 N.Y. 1, 8 (1878); *Intoxicating Liquor Cases*, 25 Kan. 751, 765

(1881); *State v. Addington*, 12 Mo. App. 214 (Mo. Ct. App. 1882), *aff'd*, 77 Mo. 110 (Mo. 1882); *Joseph v. Randolph*, 71 Ala. 499 (1882); *State v. Hipp*, 38 Ohio St. 199 (1882); *In re Eureka Basin Warehouse & Mfg. Co.*, 96 N.Y. 42 (1884); *State v. Mott*, 61 Md. 297 (1884); *State v. Bean*, 91 N.C. 554 (1884); *City of Mankato v. Fowler*, 32 Minn. 364, 365–66 (1884); *Miller v. Jones*, 80 Ala. 89 (1885); *Millett v. People*, 7 N.E. 631 (Ill. 1886); *In re Frazee*, 30 N.W. 72 (Mich. 1886); *Amperse v. Common Council of Kalamazoo*, 26 N.W. 222 (Mich. 1886); *State v. Divine*, 4 S.E. 477, 482–83 (N.C. 1887); *City of San Francisco v. Liverpool & London & Globe Ins. Co.*, 15 P. 380 (1887); *Quintini v. Mayor of Bay St. Louis*, 1 So. 625, 628 (Miss. 1887); *People ex rel. Kuhn v. Common Council*, 38 N.W. 470, 471–72 (Mich. 1888); *People v. Haug*, 37 N.W. 21, 29 (Mich. 1888) (Sherwood, C.J., dissenting); *People v. Gillson*, 109 N.Y. 389, 404–05 (1888); *Ragio v. State*, 6 S.W. 401 (Tenn. 1888); *State v. Goodwill*, 10 S.E. 285, 286 (W.Va. 1889); *Chaddock v. Day*, 42 N.W. 977, 978 (Mich. 1889); *Hughes v. Recorder's Court*, 42 N.W. 984, 984 (Mich. 1889); *People v. Armstrong*, 41 N.W. 275, 293 (Mich. 1889); *Moore v. City of Minneapolis*, 45 N.W. 719, 719 (Minn. 1890); *City of Jacksonville v. Ledwith*, 7 So. 885, 888–89 (Fla. 1890); *State v. Mahner*, 9 So. 480, 481 (La. 1891); *Ex parte Tuttle*, 91 Cal. 589, 591 (1891); *People v. Wagner*, 49 N.W. 609 (Mich. 1891); *San Antonio & A.P. Ry. Co. v. Wilson*, 19 S.W. 910, 912 (Tex. Ct. App. 1892); *Moore v. City of St. Paul*, 51 N.W. 219, 220 (Minn. 1892); *State v. Dubarry*, 11 So. 718, 719 (La. 1892); *State ex rel. McCue v. Sheriff of Ramsey County*, 51 N.W. 112, 113 (Minn. 1892); *State v. Moore*, 18 S.E. 342, 345 (N.C. 1893); *Ex parte Whitwell*, 32 P. 870, 872 (Cal. 1893); *State v. Loomis*, 22 S.W. 350, 352 (Mo. 1893); *Commonwealth v. Fowler*, 28 S.W. 786, 788 (Ky. 1894); *Smiley v. MacDonald*, 60 N.W. 355, 357 (Neb. 1894); *Low v. Rees Printing Co.*, 59 N.W. 362, 364 (Neb. 1894); *Ritchie v. People*, 40 N.E. 454, 456 (Ill. 1895); *Ex parte Jentzsch*, 44 P. 803, 804 (Cal. 1896); *Shaver v. Pennsylvania Co.*, 71 F. 931 (C.C.N.D. Ohio 1896); *Chicago, Burlington & Quincy R.R. Co. v. State ex rel. City of Omaha*, 66 N.W. 624, 628 (Neb. 1896); *State v. Hunt*, 40 S.E. 216, 217 (N.C. 1901); *Price v. People*, 61 N.E. 844, 846 (Ill. 1901); *Inhabitants of Winthrop v. New England Chocolate Co.*, 62 N.E. 969 (Mass. 1902); *Wenham v. State*, 91 N.W. 421, 424–25 (Neb. 1902); *City of Sonora v. Curtin*, 70 P. 674, 675 (Cal. 1902); *Iler v. Ross*, 90 N.W. 869, 873 (Neb. 1902); *Anderson v. State*, 96 N.W. 149, 150 (Neb. 1903); *Ex parte Dickey*, 77 P. 924, 925 (Cal. 1904); *People ex rel. Armstrong v. Warden*, 76 N.E. 11 (N.Y. 1905).

This principle was not confined to state cases. In *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871); for instance (an eminent domain case) the Court rejected “[statutory]

construction [which] would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for *invasion of private right under the pretext of the public good*, which had no warrant in the laws or practices of our ancestors." *Id.* at 178 (emphasis added). As the Court explained in *Mugler v. Kansas*, the Supreme Court held: "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." 123 U.S. 623, 661 (1887). *See also* *Brown v. Maryland*, 25 U.S. 419, 444 (1827); *United States v. Martin*, 94 U.S. 400, 403–04 (1876); *Shields v. Ohio*, 95 U.S. 319, 324–25 (1877); *Boyd v. United States*, 116 U.S. 616, 635 (1886); *Minnesota v. Barber*, 136 U.S. 313, 320 (1890); *Budd v. People*, 143 U.S. 517, 531–32 (1892) and cases cited therein; *Lawton v. Steele*, 152 U.S. 133, 137 (1894); *Holden v. Hardy*, 169 U.S. 366, 389–90 (1898); *Otis v. Parker*, 187 U.S. 606, 608 (1903). Even Justice Oliver Wendell Holmes believed it proper to inquire whether the statute in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), was "justified as a protection of personal safety." *Id.* at 414. He found that it was not.

While this reasoning was not necessarily universal—see, for instance, *Wiggins Ferry Co. v. City of St. Louis*, 102 Ill. 560 (1882), and *Braun v. Chicago*, 110 Ill. 186 (1884)—the precedents were certainly strong enough to provide a foundation for *Lochner*.

## APPENDIX C

The following is a list of federal cases between the 1873 *Slaughter-House Cases* and 1937's *Carolene Products* decision that address the common law right to earn a living. This list is obviously not complete, as I have intentionally left off cases discussed in the text and those which are already well known (*Lochner*, for instance).

*Holden v. Hardy*, 169 U.S. 366, 391 (1898) ("as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."); *Williams v. Fears*, 179 U. S. 270, 274 (1900) ("The liberty, of which the deprivation without due process of law is forbidden, 'means not only the right of the citizen to be free from the mere physical restraint of his person . . . [but also] to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation . . .'"); *Atkin v. Kansas*, 191 U.S. 207, 223 (1903) ("If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best,—as undoubtedly it is . . ."); *Chicago, Burlington & Quincy R.R. Co. v. McGuire*, 219 U. S. 549, 566 (1911) ("the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution."); *Murphy v. California*, 225 U.S. 623, 628 (1912) ("The 14th Amendment protects the citizen in his right to engage in any lawful business . . ."); *Buchanan v. Warley*, 245 U.S. 60, 78–79 (1917) ("Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color.") (citations omitted); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 374 (1918) ("to contract is a part of the liberty guaranteed to every citizen."); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1921) ("complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference . . ."); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924) ("a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."); *Terrace v. Thompson*, 263 U.S. 197, 215 (1923) ("the Constitution protects . . . [the plaintiff] in his right to earn a livelihood by following the ordinary occupations of life.") (citations omitted); *Norfolk & W. Ry. Co. v. Pub. Serv. Comm'n of W. Va.*, 265 U.S. 70, 74 (1924) ("The validity of regulatory mea-



tures may be challenged on the ground that they transgress the Constitution, and thereupon it becomes the duty of the court, in the light of the facts in the case, to determine whether the regulation is reasonable and valid or essentially unreasonable, arbitrary and void.”); *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 536 (1925) (“Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in . . . many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers.”) (citations omitted); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 415 (1926) (“The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment.”); *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1, 9 (1927) (“the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights . . . .”); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 113 (1928) (“A state cannot, ‘under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.’”).

## APPENDIX D

The following state cases from the so-called “era of *laissez-faire*”—between 1873 and 1937—defend the right to earn a living.

See *Joyce v. City of East St. Louis*, 77 Ill. 156 (1875), available at 1875 WL 8278, at \*2 (carriage licensing scheme must be strictly construed); *Commonwealth v. Bacon*, 76 Ky. 210, 214 (Ky. App. 1877), available at 1877 WL 7649, at \*2 (“In this country . . . the right of the citizen to acquire, hold, and enjoy property is guaranteed by the fundamental law . . .”); *Bertholf v. O’Reilly*, 74 N.Y. 509, 515 (1878) (“the right to liberty [includes an individual’s] right to exercise his faculties and to follow a lawful avocation for the support of life; the right of property, the right to acquire power and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the State.”); *Baltimore v. Radecke*, 49 Md. 217, 230 (1878), available at 1878 WL 6549, at \*6 (ordinance for prohibiting steam engines invalid because “it commits to the unrestrained will of a single public officer the power” to destroy businesses); *City of St. Paul v. Traeger*, 25 Minn. 248, 252 (1878) (“when, as in this case, the ordinance which is sought to be sustained operates in restraint of an occupation or pursuit useful in its character, and which is so recognized at common law and under the laws of the state, it is especially necessary to show that the authority for its passage has been expressly or otherwise unequivocally conferred.”); *In re Parrott*, 1 F. 481, 498 (C.C.D. Cal. 1880) (“No enumeration would, I think, be attempted of the privileges, immunities, and exemptions of the most favored nation, or even of man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor. It is as sacred as the right to life, for life is taken if the means whereby we live be taken.”); *Intoxicating Liquor Cases*, 25 Kan. 751, 761 (1881), available at 1881 WL 944, at \*7 (“The law does not attempt to prescribe who may and who may not become druggists. That question each individual settles for himself.”); *State v. Hipp*, 38 Ohio St. 199, 222 (1882) (“one who conducted such business in a lawful manner was entitled, under the law as it then existed, to the same protection which was accorded to dealers in other articles of personal property . . .”); *Butzman v. Whitbeck*, 42 Ohio St. 223, 230–31 (1884) (law may not invest private landowner “with the vast discretion of determining whether the dealer upon his premises shall prosecute his business as a lawful traffic, or whether he shall remain under the condemnation of the law . . .”); *State v. Mott*, 61 Md. 297, 308–09 (1884), available at 1884 WL 5915, at \*6 (“it is well settled that a power simply to regulate does not embrace a power to prohibit or destroy a trade or occupation.”); *City of Mankato v. Fowler*, 20 N.W. 361, 362 (Minn. 1884) (“the business of an auc-

ioneer is a lawful and useful one, and there would seem to be no reasonable warrant . . . for exacting so large a sum as a license fee, the result of which, it appears, is not to regulate but to suppress such business.”); *In re Jacobs*, 98 N.Y. 98, 106–07 (1885) (“Liberty . . . means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights . . . are infringements upon his fundamental rights of liberty . . . .”); *Sarrls v. Commonwealth*, 83 Ky. 327, 331 (Ky. 1885) (“while the Legislature has the power to regulate the sale of liquors to be used as a beverage, or to prohibit its sale for that purpose altogether, it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as medicine.”); *People v. Marx*, 2 N.E. 29, 34 (N.Y. 1885) (“Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition.”); *Amperse v. Common Council of Kalamazoo*, 26 N.W. 222, 223 (Mich. 1886) (“The right of a married woman to engage in and carry on any legal business in her own right, and in her own name, is no longer an open question in this state.”); *Potter v. Common Council of Homer*, 26 N.W. 208, 210 (Mich. 1886) (Where licensing board refuses license to qualified applicant, “[i]t is tyrannical as well as unlawful to hinder any one who is ready to furnish security from conducting his lawful business.”); *Godcharles & Co. v. Wigeman*, 6 A. 354, 356 (Pa. 1886) (“[A person] may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.”); *People v. Gillson*, 17 N.E. 343, 345 (N.Y. 1888) (“a person living under our Constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.”); *In re Hauck*, 38 N.W. 269, 276 (Mich. 1888) (“absolute prohibition cannot be enacted under a title to regulate . . . .”); *People v. Haug*, 37 N.W. 21, 27 (Mich. 1888) (“The great charter made it unlawful to impose any penalty or forfeiture which should deprive a man of what is translated his ‘contentment,’ or a person in any kind of business, whether commercial or otherwise, of the means of continuing that business.”); *People ex rel. Kuhn v. Common Council of Detroit*, 38 N.W. 470, 471 (Mich. 1888) (“Liberty . . . means . . . to pursue such callings and avocations as may be most suitable to develop [a person’s] capacities, and to give them their highest enjoyment.”); *State v. Fire Creek*

Coal & Coke Co., 10 S.E. 288, 289 (W.Va. 1889) (“[one has] the right of managing his own private business . . . .”); *Ex parte* Kubach, 24 P. 737, 737 (Ca. 1890) (“any person is [at] liberty to pursue any lawful calling . . . .”); *City of Jacksonville v. Ledwith*, 7 So. 885, 888 (Fla. 1890) (“the sale of [goods] may, under this grant, be restricted to markets duly established under the other, where the regulations do not constitute an illegal restraint or a prohibition of the trade . . . .”); *Commonwealth v. Perry*, 28 N.E. 1126, 1127 (Mass. 1891) (“The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it.”); *Moore v. City of St. Paul*, 51 N.W. 219, 220 (Minn. 1892) (declaring license requirement void because of the “arbitrary and unequal scale of charges as is provided for . . . .”); *San Antonio & Aransas Pass Ry. Co. v. Wilson*, 19 S.W. 910, 912 (Tx. App. 1892) (“Unquestionably, the legislature may subject any occupation, business, or class to reasonable regulations, when required by public interest and welfare, but in all illustrations of the exercise of this power it will be found there was some circumstance of threatened damage to the public that required the regulation. No well-considered case can be found sustaining a penalty on an ordinary contract, where public interest was not involved.”) (citation omitted); *Ex parte* Theisen, 11 So. 901, 903 (Fla. 1892) (discussing “the ordinary vocations of life which a man has an inherent right to pursue, such as keeping a market, a dairy, or conducting a laundry, and the like . . . .”); *State v. Dubarry*, 11 So. 718, 719 (La. 1892) (“the ordinance is illegal and void, by reason of the provisions contained in the first section, which makes the establishment of private markets thereafter to depend upon the applicant obtaining ‘permission of the city council.’”); *Frorer v. People*, 31 N.E. 395, 397 (Ill. 1892) (“The privilege of contracting is both a liberty and a property right . . . .”); *State v. Costello*, 23 A. 868, 869 (Conn. 1892) (“the act in question is one clearly in derogation of a common private right. According to the claim of the state, it disables a certain class of persons of full age, of sound mind, and in all respects legally capable of entering into a contract, from making a certain class of contracts. Such statutes are to be construed strictly, and in favor of the right.”); *Sherlock v. Stuart*, 55 N.W. 845, 847 (Mich. 1893) (“any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away.”); *Ex parte* Whitwell, 32 P. 870, 872 (Cal. 1893) (“the right of the citizen to engage in such a business, or follow such a profession, is protected by the constitution . . . .”); *Braceville Coal*

Co. v. People, 35 N.E. 62, 63 (Ill. 1893) (“[L]iberty, as that term is used in the constitution . . . embrace[s] the right of every man to . . . adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare.”); State v. Moore, 18 S.E. 342, 345 (N.C. 1893) (“a man’s right to liberty includes ‘the right to exercise his faculties, and to follow a lawful vocation for the support of life.’”); Low v. Rees Printing Co., 59 N.W. 362, 364 (Neb. 1894) (“To forbid an individual or class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty . . . .”); Leep v. St. Louis, Iron Mtn. & S. Ry. Co. 25 S.W. 75, 77 (Ark. 1894) (“The right to acquire and possess property necessarily includes the right to contract, for it is the principal mode of acquisition, and is the only way by which a person can rightly acquire property by his own exertion. Of all the ‘rights of persons’ it is the most essential to human happiness.”); Commonwealth v. Fowler, 28 S.W. 786, 787 (Ky. 1894) (“Every one has the right to follow an innocent calling without permission from the government.”); *In re Eight-Hour Law*, 39 P. 328, 329 (Colo. 1895) (“The bill submitted also violates the right of parties to make their own contracts, [a] right guarantied [sic] by our bill of rights, and protected by the fourteenth amendment to the constitution of the United States.”); Ritchie v. People, 40 N.E. 454, 455 (Ill. 1895) (“Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. . . . [T]he laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner.”) (citation omitted); *Ex parte Jentzsch*, 44 P. 803, 805 (Cal. 1896) (“[the challenged law] works an invasion of individual liberty, the liberty of free labor which it pretends to protect.”); Shaver v. Pennsylvania Co., 71 F. 931, 934 (C.C.N.D. Ohio 1896) (“employees [sic] . . . are capable of deciding for themselves whether they want to contract for such protection. It is not within the powers of a legislature to assume that this class of men need paternal legislation, and that, therefore, they will protect them by depriving them of the power to contract as other men may.”); Keen v. City of Waycross, 29 S.E. 42, 43 (Ga. 1897) (“the law recognizes in no one a right to create or maintain a monopoly.”); State v. Mahner, 9 So. 480, 480 (La. 1891) (“The ordinance is not general in its operation. It does not affect all citizens alike who follow the same occupation which it attempts to regulate.”); Banta v. City of Chicago, 50 N.E. 233, 237 (Ill. 1898) (state may tax those occupations, among others “which, because of exceptional and particular reasons affecting public policy, are deemed proper subjects for supervision or regulation by the state.”); Ruhstrat v. People, 57 N.E. 41, 43 (Ill. 1900) (“[The] enjoyment by the citizen, upon terms of

equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade . . . is a general part of his rights of liberty and property as guaranteed [sic] by the fourteenth amendment . . . ."); *City of Atlanta v. Stein*, 36 S.E. 932, 933 (Ga. 1900) ("It cannot be seriously denied that the ordinance tended to defeat competition and encourage monopoly. . . . It is not within the power of municipal authorities to enact legislation of this kind."); *Valentine v. Berrien Circuit Judge*, 83 N.W. 594, 595 (Mich. 1900) ("The constitution guaranties [sic] to citizens the right to engage in lawful business, unhampered by legislative restrictions, where no restrictions are required for the protection of the public."); *Hudspeth v. Hall*, 38 S.E. 358, 359 (Ga. 1901) ("the creation or encouragement of a monopoly is opposed to public policy."); *Price v. People*, 61 N.E. 844, 846 (Ill. 1901) (upholding regulation because it "does not seek to prohibit the pursuit of the occupation of an employment agent by a private citizen, but only the regulation of that occupation."); *City of Sonora v. Curtin*, 70 P. 674, 675 (Cal. 1902) ("[A]ny person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away.") (quoting JUDGE COOLEY, *CONSTITUTIONAL LIMITATIONS* 744 (6th ed.)); *Mathews v. People*, 67 N.E. 28, 34 (Ill. 1903) (The Supreme Court interprets the Fourteenth Amendment to mean "that all persons should be equally entitled to pursue their happiness and acquire and enjoy property . . . ."); *Ex parte Dickey*, 77 P. 924, 925 (Ca. 1904) ("This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the constitution."); *People ex rel. Armstrong v. Warden of N.Y.*, 76 N.E. 11, 12 (N.Y. 1905) ("The cases are abundant which hold that the individual has the right to carry on any lawful business, or earn his living in any lawful way, and that the legislature has no right to interfere with his freedom of action in that respect, or otherwise place restraints upon his movements."); *Commonwealth v. Strauss*, 78 N.E. 136, 137 (Mass. 1906) ("The rights relied upon under the fourteenth amendment to the Constitution of the United States . . . are . . . the right of every person to his life, liberty and property, including freedom to use his faculties in all lawful ways, 'to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or vocation . . . .'"); *Wyeth v. Thomas*, 86 N.E. 925, 927 (1909) ("The right to enjoy life, liberty and the pursuit of happiness is secured to every one under the Constitution of Massachusetts. This includes the right to pursue any proper vocation to obtain a livelihood."); *City of Spokane v. Macho*, 98 P. 755, 755 (Wash. 1909) ("The vice of the section under

discussion lies in this: That it makes an act criminal in one who may be engaged in a lawful business . . . ."); *Columbia Trust Co. v. Lincoln Inst. of Ky.*, 129 S.W. 113, 115–16 (Ky. 1910) (“Every one has the right to follow an innocent calling without permission from the government. . . .’ It is useless to multiply authorities on so obvious a proposition.”); *State v. Withnell*, 135 N.W. 376, 378 (Neb. 1912) (“While a city having authority ‘to define, regulate, suppress and prevent nuisances’ cannot arbitrarily use it to prohibit harmless and inoffensive private enterprises, the acts of the city council in exercising such police power may be held conclusive, if the subject of municipal legislation might or might not be a nuisance, depending upon conditions and circumstances.”); *Noe v. Town of Morristown*, 161 S.W. 485, 486 (Tenn. 1913) (“[For] any occupation or business within common right . . . the Legislature is forbidden to create a monopoly.”); *People v. Brazee*, 149 N.W. 1053, 1054 (Mich. 1914) (“The Legislature of this state is not empowered by the Constitution to regulate contracts between its citizens who are engaged in legitimate commercial business . . . .”) (quoting *Valentine v. Berrien Circuit Judge*, 83 N.W. 594, 595 (Mich. 1900)); *Rhodes v. J.B.B. Coal Co.*, 90 S.E. 796, 797–98 (W. Va. 1916) (“Another rule of interpretation is that a statute in derogation of the common law, which imposes restrictions upon trade or common occupation, should be construed strictly.”); *Osgood v. Tax Comm’r*, 126 N.E. 371, 371 (Mass. 1920) (“Tax statutes must be construed strictly. The power to tax must be conferred by plain words or it does not exist. It is not to be extended by implication or by invoking the spirit of the law.”); *Hamilton v. Vaughan*, 179 N.W. 553, 558 (Mich. 1920) (Fellows, J., dissenting) (“prohibition [of an occupation] must bear some reasonable relation to the public good, or the public health, or the public morals, or the public safety, or the public welfare. The right to regulate I concede; the right to prohibit I deny. . . . [T]he right of the state to regulate a business under its police power does not carry with it the right to destroy, the right to prohibit . . . .”); *City of Waycross v. Caulley*, 136 S.E. 139, 140 (Ga. 1926) (“The ordinance purports to grant an exclusive franchise to the individuals mentioned as grantees, which would deny a skilled butcher having an established business the right to slaughter at the abattoir or elsewhere his own animals for food to be used in the city. To the extent that the ordinance denies such right it creates a monopoly.”); *New York Cent. R.R. Co. v. Cent. New Eng. Ry. Co.*, 162 N.E. 324, 328 (Mass. 1928) (“[T]he act of Congress and the order of the Interstate Commerce Commission will not be construed to deprive the Boston & Albany Railroad Company . . . of its vested rights unless it appears by express words or plain implication that such was the intention of both Congress and the commission.”).