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Economic Liberty "In A World Of Pure Imagination": A Theoretical Analysis Of Willy Wonka, Natural Rights, and The New Age Of Innovation

Tammy M. Eick*

*Nova Southeastern University

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ECONOMIC LIBERTY "IN A WORLD OF PURE IMAGINATION"¹: A THEORETICAL ANALYSIS OF WILLY WONKA, NATURAL RIGHTS, AND THE NEW AGE OF INNOVATION

TAMMY M. EICK*

"Invention, my dear friends, is ninety-three percent perspiration, six percent electricity, four percent evaporation, and two percent butterscotch ripple."²

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I. INTRODUCTION

There is something uniquely captivating about the original film *Willy Wonka and the Chocolate Factory*³ that seems to touch the heart and spirit,

* Tammy M. Eick, J.D. Candidate, 2019, Nova Southeastern University, Shepard Broad College of Law. Tammy would like to first give thanks to God, always and for all things. She would also like to thank Professor Ishaq Kundawala for his invaluable mentorship and encouragement. For all of their hard work and dedication on refining this Comment, she gives many thanks to her fellow colleagues of the *Nova Law Review*. And finally, a special thank you to her loving parents, for everything.

1. LESLIE BRICUSSE & ANTHONY NEWLEY, *Pure Imagination, on "WILLY WONKA & THE CHOCOLATE FACTORY": MUSIC FROM THE ORIGINAL SOUNDTRACK OF THE PARAMOUNT PICTURE* (Paramount Records 1971).

2. See WILLY WONKA & THE CHOCOLATE FACTORY (Warner Bros. Pictures 1971).

3. See Casey Robinson, *Born to Be Wild(er): The Willy Wonka Effect*, FORDHAM OBSERVER: ARTS/CULTURE (Sept. 29, 2016),

regardless of one's age.⁴ Throughout the film we learn that if there was one thing Willy Wonka valued above all else, it was the limitless belief he had in the capacity of his imagination.⁵ Like Wonka, entrepreneurs are also driven by some unknown force of relentless hope and optimism.⁶ Even in failure, they still find value.⁷

Having the freedom to choose how one builds their life financially has long been a core value weaved into the quilt-work of the American dream.⁸ This is fundamentally true for those born with an entrepreneurial spirit.⁹ As the creator of a confectionary enterprise, Willy Wonka is much like the metaphorical embodiment of the entrepreneurial spirit itself.¹⁰ According to the *2013 Forbes Top Fictional 15*, Wonka's fictional portfolio, valued against "real-world commodity and share prices," puts his net worth somewhere in the neighborhood of \$2.3 billion.¹¹ Not bad, for a *candy man*.¹²

<http://www.fordhamobserver.com/born-to-be-wilder-the-willy-wonka-effect/>; WILLY WONKA & THE CHOCOLATE FACTORY, *supra* note 2. The second cinematic adaptation starred Johnny Depp as Willy Wonka. CHARLIE AND THE CHOCOLATE FACTORY (Warner Bros. Pictures 2005).

4. See Robinson, *supra* note 3.

5. See ROALD DAHL, CHARLIE AND THE CHOCOLATE FACTORY 18 (First Omnibus ed. 2003) (1964); WILLY WONKA & THE CHOCOLATE FACTORY, *supra* note 2; Zach Heller, *Willy Wonka Is a Marketing Genius*, BE INNOVATION (June 3, 2009, 12:10 PM), <http://www.zachheller.com/2009/06/03/willy-wonka-is-a-marketing-genius/>.

6. See Perry E. Gresham, *Liberty and the Entrepreneur*, FOUND. ECON. EDUC. (Oct. 1, 1985), <http://www.fee.org/articles/liberty-and-the-entrepreneur/>.

7. *Id.*

8. See Thomas S. Dicke, *The Small Business Tradition*, ORG. AM. HISTORIANS: MAG. HIST., Fall 1996, at 11, 11; Felix Livingston, *The Entrepreneur as a Defender of Liberty*, FOUND. ECON. EDUC. (Sept. 1, 1996), <http://www.fee.org/articles/the-entrepreneur-as-a-defender-of-liberty>; *Economic Liberty*, INST. FOR JUST., <http://www.ij.org/issues/economic-liberty/> (last visited Apr. 18, 2018).

9. See Gresham, *supra* note 6.

10. Steve Strauss, *Willy Wonka, Entrepreneur Extraordinaire*, USA TODAY: MONEY (Sept. 2, 2016, 6:38 PM), <http://www.usatoday.com/story/money/columnist/strauss/2016/09/02/willy-wonka-entrepreneur-extraordinaire/89780100/>.

11. David M. Ewalt, *The 2013 Forbes Fictional 15*, FORBES: TECH. (July 31, 2013, 12:29 PM), <http://www.forbes.com/sites/davidewalt/2013/07/31/the-2013-forbes-fictional-15/>; #10 *Wonka, Willy*, FORBES: LISTS, <http://www.forbes.com/lists/2005/fictional/10.html> (last visited Apr. 18, 2018). "Each year Forbes calculates the net worth of the wealthiest characters from novels, movies, television and games, constructing portfolios based on those stories, and valuing them using real-world commodity and share prices." Ewalt, *supra*.

12. WILLY WONKA & THE CHOCOLATE FACTORY, *supra* note 2.

However, the economic realities faced by entrepreneurs in America today paint a much different picture.¹³ The rapidly diminishing cost of information is fundamentally changing how developed countries operate; impacting not only the economy, but also the political institution itself.¹⁴ Many believe that America is falling behind in this new era.¹⁵ Global access to low-cost information has given rise to a surge in global competition—which, in turn, is “quickly separating winners from losers, [and revealing that] [t]he spoils are going to the boldest innovators,” say the finance experts at McKinsey & Company.¹⁶ To survive, businesses across all major industries are uprooting their business models to be rebuilt, fostering one thing above all: Innovation¹⁷—not just breakthrough innovation, but *continuous innovation*.¹⁸

This major development in the American economy serves to highlight the broad impact over-government regulation has on entrepreneurs.¹⁹ *For the ninth time* since 2008, the United States has dropped on the global Index of Economic Freedom for entrepreneurs.²⁰

A new study by the Mercatus Center at George Mason University revealed that over-government regulation “has created a considerable drag on the economy, amounting to an average reduction in the annual growth rate of the U.S. gross domestic product (“GDP”) of 0.8[%.]”²¹ In addition, “[t]he

13. See Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Remarks at the George Mason Law Review’s 20th Annual Antitrust Symposium: Advancing Economic Liberty 1 (Feb. 23, 2017) (transcript available with the Federal Trade Commission); NAT’L SMALL BUS. ASS’N, 2017 NSBA SMALL BUSINESS REGULATIONS SURVEY 2 (2017), <http://www.nsba.biz/wp-content/uploads/2017/01/Regulatory-Survey-2017.pdf>.

14. See Julian Birkinshaw, *Beyond the Information Age*, WIRED, <http://www.wired.com/insights/2014/06/beyond-information-age/> (last visited Apr. 18, 2018).

15. See Vijay Vaitheeswaran & Iain Carson, *The Age of Mass Innovation*, ECONOMIST (Oct. 11, 2007), <http://www.economist.com/node/9928291>.

16. Alex Kazaks et al., *The Age of Innovation, in DIGITAL DISRUPTION IN INSURANCE: CUTTING THROUGH THE NOISE* 27, 28 (2017), <http://www.mckinsey.com/industries/financial-services/our-insights/the-age-of-innovation>; see also Birkinshaw, *supra* note 14.

17. See C.K. PRAHALAD & M.S. KRISHNAN, *THE NEW AGE OF INNOVATION: DRIVING COCREATED VALUE THROUGH GLOBAL NETWORKS* 2–3 (2008); Vaitheeswaran & Carson, *supra* note 15.

18. PRAHALAD & KRISHNAN, *supra* note 17, at 2.

19. See Ohlhausen, *supra* note 13, at 1; NAT’L SMALL BUS. ASS’N, *supra* note 13, at 2.

20. See Anthony B. Kim, *US Economic Freedom Has Hit a Historic Low. What Happened?*, HERITAGE FOUND.: INT’L ECON. (Feb. 15, 2017), <http://www.heritage.org/international-economies/commentary/us-economic-freedom-has-hit-historic-low-what-happened>.

21. Bentley Coffey et al., *The Cumulative Cost of Regulations* 1 (Apr. 2016) (unpublished working paper) (on file with George Mason University Mercatus Center).

growth of government has been accompanied by increase[d] cronyism [which] has undermined the rule of law and perceptions of fairness.”²²

In trying to deconstruct the regulatory issues faced by entrepreneurs, federal administrators have even acknowledged that “many . . . Americans still face significant government barriers that restrict participation in the economy. [Moreover is that] few of these barriers have a substantial public safety or health rationale,” stressed standing Chairman of the Federal Trade Commission (“FTC”), Maureen Ohlhausen.²³

Despite the growing public dissatisfaction with government, and the rising economic hardships faced by many, the courts have almost universally chosen not to get involved.²⁴ Rather, courts leave it to the *democratic process* itself as relief for plaintiffs who have been injured by arbitrary government abuse.²⁵ But this was not always so.²⁶ There was a time in America’s history when the Supreme Court of the United States declared that economic liberty was a fundamental right protected under the Fifth and Fourteenth Amendments of the United States Constitution.²⁷

The unfortunate reality is that for many—particularly conservatives—on the judicial bench, this period of constitutional history represents an abhorrent activity; often colorfully referred to by names such as: *Judicial activism*, *judicial overreach*[], or *legislat[ing] from the bench*.²⁸ However it is phrased, the emphasis remains the same—that is, that the proper role of judges when reviewing economic regulations is to defer to the Legislature.²⁹

Decades of such judicial deference has left the Legislature and administrative agencies with virtually free rein, resulting in vast regulatory accumulation.³⁰ “The buildup of regulations over time [has] lead[] to duplicative, obsolete, conflicting, and even contradictory rules,” making it

22. Kim, *supra* note 20.

23. Ohlhausen, *supra* note 13, at 1.

24. See *Vance v. Bradley*, 440 U.S. 93, 96–97 (1979); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 147–48, 154 (1938); Richard E. Levy, *Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 330 (1995); Ohlhausen, *supra* note 13, at 1, 3–4.

25. *Vance*, 440 U.S. at 97.

26. See *Lochner v. New York*, 198 U.S. 45, 53 (1905); Livingston, *supra* note 8.

27. *Lochner*, 198 U.S. at 53; Livingston, *supra* note 8.

28. Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 535 (2015); Levy, *supra* note 24, at 350; Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

29. See Colby & Smith, *supra* note 28, at 535–36; Sunstein, *supra* note 28, at 874.

30. See Levy, *supra* note 24, at 344; NAT’L SMALL BUS. ASS’N, *supra* note 13, at 2.

difficult for entrepreneurs and businesses to comply.³¹ With over-complicated, costly compliance demands, in conjunction with the competitive market, it leaves no question as to why small business has been on the decline.³²

The goal of this Comment is to add current economic developments to the discourse of originalist jurisprudence reform; aided with a little help from Willy Wonka himself, who might yet be able to still inspire.³³ Part II will delve into economic liberty, focusing on its importance to the individual and to society; as well as discussing the current events leading to its gradual decline.³⁴ Part III will examine the historical, constitutional barriers to economic liberty, and how they have shaped current barriers.³⁵ Part IV will shed light on the rising defense for economic liberty in lower federal courts, and from both the private and public sectors.³⁶ Finally, Part V will set forth a conclusion supported by the political philosophy of America's Founding Fathers.³⁷

II. ECONOMIC LIBERTY

The definition of economic liberty is largely dependent on who is asked to define it.³⁸ On an individual level, the definition is often a reflection of one's view on the relationship between government and *individual autonomy*.³⁹ For example, liberal progressives might argue it means having the ability to earn a *livable wage* to cover the basic needs for one's self and family.⁴⁰ Modern conservatives might argue it means having the ability to pursue "the occupation of [one's choosing] without unnecessary government interference."⁴¹ Regardless of where one's policy preference sits on the ideological spectrum, economic liberty has always represented the American

31. Coffey et al., *supra* note 21, at 1.
 32. NAT'L SMALL BUS. ASS'N, *supra* note 13, at 2; *see also* Gresham, *supra* note 6.
 33. *See infra* Parts II–V.
 34. *See infra* Part II.
 35. *See infra* Part III.
 36. *See infra* Part IV.
 37. *See infra* Part V.
 38. *See* Terry Miller & Anthony B. Kim, *Chapter 2: Defining Economic Freedom*, in 2017 INDEX OF ECONOMIC FREEDOM 19, 19 (2017).
 39. *Id.*
 40. Terrance Heath, *What Is "Economic Freedom," and Who Is It For?*, OURFUTURE.ORG (Feb. 2, 2016), <http://www.ourfuture.org/20160202/what-is-economic-freedom-and-who-is-it-for>.
 41. *Economic Liberty*, *supra* note 8; *see also* Miller & Kim, *supra* note 38, at 25.

values of enabling “social mobility, economic opportunity, and personal freedom.”⁴²

For a basic definition, economic liberty can be understood as an individual’s ability to undertake certain “economic pursuits—[such as] producing, selling, and buying goods, services, and labor—as [one] choose[s].”⁴³ Economic scholars have long argued that economic freedom “is [the] key to economic growth, rising living standards, and political liberty.”⁴⁴ In this sense, economic liberty can be understood as an important means to achieve other valuable ends.⁴⁵ Ends that not only benefit one person, but also benefit society as a whole.⁴⁶

A. *Wonka the Entrepreneurial Icon*

“My dear boy, do you ask a fish how it swims? . . . Or a bird how it flies? . . . No sir’ree, you don’t! They do it because they were born to do it.”⁴⁷ Just as audiences were told that Wonka “was born to be a candy man,” many others are said to have been *born to be* entrepreneurs.⁴⁸ Few would deny that entrepreneurs play a vital role to the success of a nation’s economic growth.⁴⁹ What inspires entrepreneurs is something former Deputy Assistant Attorney General and Professor of Law, Philip Weiser, refers to as

42. See Dicke, *supra* note 8, at 11.

43. Lane Kenworthy, *THE GOOD SOCIETY* (2016) (ebook).

44. *Id.*

45. *Id.*

46. *Id.*; see also Miller & Kim, *supra* note 38, at 25; Christopher Koopman & Adam Thierer, *FTC’s New Economic Liberty Task Force Is a Step in Right Direction*, HILL (Apr. 5, 2017, 8:20 AM), <http://www.thehill.com/blogs/pundits-blog/the-administration/327240-ftcs-new-economic-liberty-task-force-is-a-step-in-right>.

47. Robinson, *supra* note 3; see also WILLY WONKA & THE CHOCOLATE FACTORY, *supra* note 2.

48. Robinson, *supra* note 3; WILLY WONKA & THE CHOCOLATE FACTORY, *supra* note 2.

49. See André van Stel, *Entrepreneurship and Economic Growth: Some Empirical Studies i* (Mar. 10, 2005) (unpublished Ph.D. dissertation, University of Rotterdam) (on file with author) (detailing a doctorate thesis that provides an extensive, empirical discussion on the positive “relation[ship] between entrepreneurship, [business ownership], and economic growth.”); Aaron K. Chatterji & David Robinson, *The Golden Age of American Entrepreneurship*, TECHCRUNCH: CRUNCH NETWORK (June 30, 2016), <http://www.techcrunch.com/2016/06/30/the-golden-age-of-american-entrepreneurship/>. “Entrepreneurs have been embraced by both political parties, along with a wide swath of the American people, who tell pollsters they trust small business more than almost any other institution.” Chatterji & Robinson, *supra*.

entrepreneurial DNA—a common trait that drives them “to try, and then ultimately, to succeed.”⁵⁰ As Perry Gresham, defined it:

The entrepreneur in America can be truly classified a rare bird. [One that] differs from the conventionally defined businessman in many ways. The entrepreneur’s motives are not merely to avoid loss; turn a modest profit, if possible; defend the organization; maintain a position; and win approval for exemplary conduct. The entrepreneur is possessed above all with drive, insight, and ingenuity.⁵¹

The fictional character Willy Wonka first appeared in Roald Dahl’s 1964 children’s novel, *Charlie and the Chocolate Factory*.⁵² In 1971, its cinematic adaptation, *Willy Wonka and the Chocolate Factory*, opened in theaters.⁵³ Despite the film being a box office flop, it would later become a beloved cult classic for many Americans.⁵⁴ In 2014, the film, *Willy Wonka and the Chocolate Factory*, would be named a *cinematic treasure* that was to then be preserved, for all time, on the National Film Registry in the Library of Congress for its significance in American culture.⁵⁵

Dahl’s joyful, yet devious, storyline has provided fertile ground for countless fan theories, even to this day.⁵⁶ In many ways, Charlie’s journey is a *classic underdog story*, whose popularity can be accredited to what some scholars have theorized as being a reflection of our desire for justice.⁵⁷ Although Charlie is technically the story’s protagonist,⁵⁸ for many, it is Willy Wonka’s child-like character who continues to inspire today.⁵⁹

50. Philip J. Weiser, *Innovation, Entrepreneurship, and the Information Age*, 9 J. ON TELECOMM. & HIGH TECH. L. 1, 2 (2011).

51. Gresham, *supra* note 6.

52. See DAHL, *supra* note 5, at 15.

53. See *Cinematic Treasures Named to National Film Registry*, LIBR. CONG. (Dec. 17, 2014), <http://www.loc.gov/item/prn-14-210/>.

54. Allannah Faherty, *8 Amazing Facts You Probably Never Knew About Willy Wonka & the Chocolate Factory*, MOVIE PILOT (Aug. 23, 2017, 4:18 AM), <http://www.moviepilot.com/p/willy-wonka-and-the-chocolate-factory-facts/2491839>; *Cinematic Treasures Named to National Film Registry*, *supra* note 53.

55. *Cinematic Treasures Named to National Film Registry*, *supra* note 53.

56. See Chris Heady, ‘Willy Wonka’ Is a Lot Creepier 45 Years Later, USA TODAY: LIFE (June 27, 2016, 6:12 PM), <http://www.usatoday.com/story/life/movies/2016/06/25/willy-wonka-45th-anniversary-rewatch/86287052/>.

57. Jacob M. Held, *On Getting Our Just Desserts: Willy Wonka, Immanuel Kant, and the Summum Bonum*, in ROALD DAHL AND PHILOSOPHY: A LITTLE NONSENSE NOW AND THEN 19, 19–20 (Jacob M. Held ed., 2014).

58. See Robinson, *supra* note 3.

59. See Amy Feldman, *How Project 7’s Tyler Merrick Channeled His Inner Willy Wonka to Turn Around His Gum Startup*, FORBES: ENTREPRENEURS (July 12, 2017, 7:30

Despite some of the story's critics,⁶⁰ many still see Wonka as something of an entrepreneurial icon.⁶¹ In recent years, several entrepreneurs have been dubbed the *Willy Wonka* of various consumer products, such as cars,⁶² soap,⁶³ gum,⁶⁴ cheese,⁶⁵ and even marijuana.⁶⁶ In the world of coffee, former Starbucks CEO, Howard Schultz, has credited Willy Wonka as being the primary inspiration for the company's new, high-end, Seattle-based coffeehouse, the "Reserve Roastery and Tasting Room."⁶⁷ Schultz, who stepped down as CEO to focus on the company's new premium brand, said in a media interview that, "[the company's] intent with the Roastery was to create a multi-sensory retail experience not only that would elevate coffee, but that was really unlike *any* retail experience *in the world*."⁶⁸ Since then, other big retailers—such as Whole Foods and Urban Outfitters—have followed Starbucks's lead towards incorporating Wonka's style of experience-driven marketing.⁶⁹ As the Business Insider reports, Wonka's

AM), <http://www.forbes.com/sites/forbestreptalks/2017/07/12/how-project-7s-tyler-merrick-channeled-his-inner-willy-wonka-to-turn-around-his-gum-startup/>.

60. See Chryl Corbin, *Deconstructing Willy Wonka's Chocolate Factory: Race, Labor, and the Changing Depictions of the Oompa-Loompas*, 19 BERKELEY MCNAIR RES. J., Apr. 2012, at 47, 53. "The fact that Wonka *smuggled* the Oompa-Loompas out of Africa in crates and into this factory speaks to its illegality and takes on the characteristic of the Trans-Atlantic Slave Trade." *Id.* at 53 (citation omitted). "And what I found was that the classic I remember, being full of childlike fantasy, is actually kind of a story about a raging psychopath who solicits children worldwide to murder." Heady, *supra* note 56.

61. See Strauss, *supra* note 10.

62. James Quinn, *Is Tesla's Elon Musk the Willy Wonka of the Car Making World?*, TELEGRAPH: BUS. (June 2, 2016, 10:04 AM), <http://www.telegraph.co.uk/business/2016/06/01/is-teslas-elon-musk-the-willy-wonka-of-the-car-making-world/>.

63. Chris Weller, *Inside the Surreal LUSH Factories, Where the Willy Wonka of Soap Is Reinventing Cosmetics*, BUS. INSIDER: TECH INSIDER (Sept. 30, 2016, 10:00 AM), <http://www.businessinsider.com/lush-factory-photo-tour-inside-the-willy-wonka-factory-of-soap-2016-9>.

64. Feldman, *supra* note 59.

65. Chloe Sorvino, *The Big Cheese*, FORBES, June 13, 2017, at 100, 102.

66. Julian Sonny, *Meet Tripp Keber, the 'Willy Wonka of Weed' Trying to Bring Marijuana Vending Machines to a City Near You*, ELITE DAILY: CULTURE (Feb. 25, 2014, 4:20 PM), <http://www.elitedaily.com/life/culture/meet-tripp-keber-the-willy-wonka-of-weed-trying-to-bring-marijuana-vending-machines-to-a-city-near-you/>.

67. See Justin Bariso, *Starbucks Is Making a Major Change That Just May Alter the Way the World Drinks Coffee*, INC.: BEST INDUSTRIES (Mar. 20, 2017), <http://www.inc.com/justin-bariso/starbucks-is-making-a-major-change-that-just-may-alter-the-way-the-world-drinks-.html>.

68. *Id.*; Kate Taylor, *Willy Wonka's Chocolate Factory Is the Blueprint for the Future of Retail*, BUS. INSIDER: RETAIL (July 17, 2016, 1:13 PM), <http://www.businessinsider.com/starbucks-whole-foods-invest-in-experience-2016-7> (emphasis added).

69. Taylor, *supra* note 68.

Chocolate Factory has become “the blueprint for the future of retail.”⁷⁰ The importance of Willy Wonka’s influence as an inspirational, entrepreneurial icon is becoming increasingly more important as America’s economy continues to decline.⁷¹

B. *Entrepreneurs in the New Age of Innovation*

In the United States, the small business sector employs “nearly half of the [current] workforce, and produc[es] over one-third” of the nation’s GDP.⁷² In addition to being the leading creator of jobs in the private sector, small business is also credited as being the driving force behind innovation.⁷³

1. New Age of Innovation

Innovation has become a buzzword in recent years.⁷⁴ As Professor Kevin Werbach playfully observed, “[i]nnovation: [It is] something everyone is in favor of . . . yet no one really understands it.”⁷⁵ Virtually every definition of innovation will be based on what it produces, rather than a process itself.⁷⁶ For example, “[i]nnovation is significant positive change .

70. *Id.*

71. See André van Stel et al., *The Effect of Entrepreneurial Activity on National Economic Growth*, 24 *SMALL BUS. ECON.* 311, 312 (2005).

The last two decades have witnessed both large—conglomerate—companies increasingly concentrating on core competences and experiencing mass lay-offs—especially in traditional manufacturing industries—and high-technology innovative small firms hav[e] come to the forefront of technological development in many—new—industries. These developments would suggest the key importance for modern economies [is] a sound entrepreneurial climate for achieving economic progress.

Id.

72. Dicke, *supra* note 8, at 11. “United States small businesses employed 57.9 million people, or 47.8% of the private workforce, in 2014.” *Small Business Profile*, 2017 U.S. SMALL BUS. ADMIN.: OFF. ADVOCACY 1.

73. Dicke, *supra* note 8, at 15–16.

74. See Scott Berkun, *The Best Definition of Innovation*, SCOTT BERKUN (Apr. 3, 2013), <http://www.scottberkun.com/2013/the-best-definition-of-innovation/>; *Why Innovation Is Tough to Define — and Even Tougher to Cultivate*, KNOWLEDGE@WHARTON: INNOVATION (Apr. 30, 2013), <http://knowledge.wharton.upenn.edu/article/why-innovation-is-tough-to-define-and-even-tougher-to-cultivate/>.

75. *Why Innovation Is Tough to Define — and Even Tougher to Cultivate*, *supra* note 74.

76. See Berkun, *supra* note 74.

[H]ere is the best definition: Innovation is significant positive change. [It is] a result. [It is] an outcome. [It is] something you work towards achieving on a project. If you are successful at solving important problems, peers you respect will call your work innovative and you an innovator. Let them choose the word.

Id.

. . . [It is] an outcome. [It is] something you work towards achieving on a project.”⁷⁷ The importance of entrepreneurship—and the impact of innovation—becomes particularly important when placed in context with developments in *The Information Age*.⁷⁸

The Information Age began in 1970, with the invention of the microcomputer.⁷⁹ Forty years later, one-half of the Earth’s population is connected by smartphone—for perspective, in 2017, that is approximately 3,739,698,500 people.⁸⁰ In simple terms, internet and technology has made it easier than ever to share massive volumes of information on a global scale.⁸¹ “The impact of entrepreneurship in the information age is being felt across the globe.”⁸² The surge of globally accessible information has led to an equally forceful surge of new innovations in digital technology, which many have suggested are fundamentally changing “not only business, but [also] society, politics, and the economy.”⁸³ For this reason, many scholars have more accurately termed our current era as being: *The New Age of Innovation*.⁸⁴

The concept of a *New Age of Innovation* was first introduced by Professor C.K. Prahalad, who argues that a new global market of competition is rising, which is being fueled “by digitization, ubiquitous connectivity, and

77. *Id.*

78. Weiser, *supra* note 50, at 3; Ryan Allis, *Entering the Innovation Age*, STARTUP GUIDE, <http://www.startupguide.com/world/the-innovation-age/> (last visited Apr. 18, 2018).

79. Allis, *supra* note 78.

80. See *World Internet Usage and Population Statistics: March 31, 2017 - Update*, INTERNET WORLD STATS (Mar. 31, 2017), <http://www.internetworldstats.com/stats.htm> [<http://web.archive.org/web/20170627173210/http://www.internetworldstats.com/stats.htm>].

81. See Allis, *supra* note 78. “The Information Age . . . has brought with it the greatest forty-five years in the history of human progress, leading to substantial increases in life-expectancy, per capita income, and literacy and significant decreases in infant mortality and the number of people living in poverty around the world.” *Id.*

82. Weiser, *supra* note 50, at 3.

Increasingly, entrepreneurs are finding business models that can deliver the information age to populations around the world. Consider, for example, how Iqbal Quadir, a Bangladeshi who emigrated to the [United States], developed a plan for using microfinance to enable women in villages to buy mobile phones and charge for access to them. Based on that plan, Bangladesh now has over 270,000 *phone ladies*, who, using a specially designed mobile phone with long-lasting batteries, are selling minutes to local villagers. The venture now enjoys annual revenues in the neighborhood of \$1 billion—all by tapping an entrepreneurial spirit and hunger for access to the information age.

Id.

83. Birkinshaw, *supra* note 14.

84. See PRAHALAD & KRISHNAN, *supra* note 17, at 6.

globalization.”⁸⁵ Because of this, it is now imperative for the survival of firms—in all industries—to restructure their organization in order to foster innovation as “not just episodic big breakthroughs,” but *continuous innovation*.⁸⁶

2. Impact of Regulations on Innovation

The rise of digital information technology has led to what some Harvard scholars have termed as *disruptive innovation*.⁸⁷ The theory of disruptive innovation is that “a smaller company with fewer resources can unseat an established, successful business by targeting segments of the market that have been neglected by the incumbent, typically because it is focusing on more profitable areas.”⁸⁸ The impact of disruptive innovation, as explained by finance experts at the \$8.8 billion dollar management firm, McKinsey & Company, is that:

Digital technology is disrupting industry after industry—and quickly separating winners from losers. The spoils are going to the boldest innovators. A McKinsey survey of more than 2000 executives in industries affected by digital disruption shows that the companies with the highest revenue and earnings growth led the disruption

Most insurers, though, do not have innovation in their DNA. Regulation has curbed incumbents’ ability to experiment . .

85. *Id.* at 6, 11. “*The New Age of Innovation* focuses on how information technologies and access to a global network of resources present a new competitive environment for companies, creating new opportunities and prerequisites for successfully achieving and sustaining continuous change and innovation.” Paulo Figueiredo, *The New Age of Innovation: Driving Cocreated Value Through Global Networks* by C.K. Prahalad and M.S. Krishnan, 28 J. PRODUCT INNOVATION MGMT. 138, 138 (2011) (book review); see also Basil Moftah, *The Global State of Innovation*, FORBES: INVESTING (May 28, 2015, 9:35 AM), <http://www.forbes.com/sites/basilmoftah/2015/05/28/the-global-state-of-innovation/>.

By all accounts, we are living in a golden age of innovation. In the last decade alone, we have witnessed the introduction [of] landmark inventions, from driverless cars, to bionic limb reconstructions, to the discovery of the Higgs Boson. Advancements like these are inspiring new generations of innovators, agents of change, and curious minds to dream of a better future.

On the surface, our analysis confirmed this thesis, finding that total worldwide patent volume has reached a record high, with over 2.1 million unique inventions published over the past year.

Moftah, *supra*.

86. See PRAHALAD & KRISHNAN, *supra* note 17, at 2–3.

87. Birkinshaw, *supra* note 14; Rosamond Hutt, *What Is Disruptive Innovation?*, WORLD ECON. F.: AGENDA (June 25, 2016), <http://www.weforum.org/agenda/2016/06/what-is-disruptive-innovation/>.

88. Hutt, *supra* note 87.

. . . But innovate they must. . . . [T]hey will get left behind if they fail simultaneously to use digital technology to innovate and build new business.⁸⁹

In the global economy, “[t]he international dynamics of entrepreneurship [and innovation] are spurring competition between countries.”⁹⁰ Curtis Carlson, head of California’s Stanford Research Institute, warns that “America’s information technology, services, and medical-devices industries are about to be lost.”⁹¹ The biggest threats, Carlson points out, are from India and China.⁹² Sergey Brin, co-founder of Google, when asked about whether government should regulate innovation said: “[T]he best innovation policy is probably one that does the least. Liberty is a powerful force.”⁹³ Robert Fridel observed that “[t]echnology and the pursuit of improvement are ultimate expressions of freedom; of the capacity of humans to reject the limitations of their past and their experience, to transcend the boundaries of their biological capacities and their social traditions.”⁹⁴

When both Google co-founders, Sergey Brin and Larry Page, were asked if there was any future of Google entering the health industry, Page expressed flatly that:

[H]ealth is just so heavily regulated, [it is] just a painful business to be in. . . . Even though we have some health projects, [we will] be doing it to a certain extent. But I think the regulatory burden in

89. Kazaks et al., *supra* note 16, at 28; *America’s Best Midsize Employers List: #66 McKinsey & Company*, FORBES: 2017 RANKING, <http://www.forbes.com/companies/mckinsey-company/> (follow “#66 America’s Best Midsize Employers” hyperlink; then follow “#66 McKinsey & Company” hyperlink) (last visited Apr. 18, 2018). According to Forbes, McKinsey & Company was estimated to be valued at \$8.8 billion at the end of the 2016 fiscal year. *America’s Best Midsize Employers List: #66 McKinsey & Company, supra*.

90. Weiser, *supra* note 50, at 4.

91. Vaitheeswaran & Carson, *supra* note 15.

92. *Id.*

“I predict that millions of jobs will be destroyed in our country, like in the 1980s when American firms refused to adopt total-quality management techniques while the Japanese surged ahead.” The only way out, [Carlson] insists, is “to learn the tools of innovation” and forge entirely new, knowledge-based industries in energy technology, biotechnology, and other science-based sectors.

Id.

93. *Id.*

94. *Id.*

the [United States] is so high . . . it would dissuade a lot of entrepreneurs.⁹⁵

Regulatory build-up concerns are not only appearing in insurance, technology, and health, but are also showing up in banking and finance.⁹⁶ In a letter to the Office of Comptroller of the Currency last year, the Independent Community Bankers of America wrote that:

Community banks today are subject to an unprecedented level of regulation and supervisory review that regulators continually point to as a signal of great financial strength in the vast financial services industry. . . . [T]he biggest barrier to future innovation for community banks is the regulatory burden these institutions face on a daily basis.⁹⁷

3. Impact of Regulations on Entrepreneurship

A 2017 survey conducted by the National Small Business Association (“NSBA”) revealed that the average small business owner spends \$12,000 each year on government regulations.⁹⁸ The average regulatory start-up cost for small businesses is almost seven times that—at the cost of \$83,019.⁹⁹ The study also revealed that 44% of businesses reported spending a minimum of forty hours each year dealing with federal regulations, with 30% spending the same amount on state and local regulations.¹⁰⁰ When coupled with the market risks already inherent in the start-up industry, these unchecked regulatory burdens “represent a major hurdle . . . [for] many would-be entrepreneurs.”¹⁰¹

95. Colleen Taylor, *Google Co-Founders Talk Regulation, Innovation, and More in Fireside Chat with Vinod Khosla*, TECHCRUNCH (July 6, 2014), <http://www.techcrunch.com/2014/07/06/google-co-founders-talk-long-term-innovation-making-big-bets-and-more-in-fireside-chat-with-vinod-khosla/>.

96. *See id.*; JD Alois, *Community Banks Tell US Government Regulatory Burden Hurts Innovation*, CROWDFUND INSIDER (June 5, 2016, 9:49 PM), <http://www.crowdfundinsider.com/2016/06/86514-community-banks-tell-us-government-regulatory-burden-hurts-innovation/>.

97. Letter from Karen M. Thomas, Senior Exec. Vice President, Gov’t Relations & Pub. Policy, Indep. Cmty. Bankers of Am., to the Honorable Thomas J. Curry, Comptroller of the Currency 2, 6 (May 31, 2016) (on file with author); *see also* Alois, *supra* note 96.

98. NAT’L SMALL BUS. ASS’N, *supra* note 13, at 2.

99. *Id.* at 9.

100. *Id.* at 5.

101. *Id.* at 9; *see also* Sreekanth Ravi, *When Launching Your Startup, Consider These 5 Risks*, ENTREPRENEUR: STARTING BUS. (May 21, 2014), <http://www.entrepreneur.com/article/234094>.

In 2017, the Heritage Foundation released its global Index of Economic Freedom.¹⁰² The results of this study caught the attention of FTC’s acting chairwoman, Maureen Ohlhausen, who emphasized in her remarks at the George Mason Law Review’s Twentieth Annual Antitrust Symposium that: “For the ninth time since 2008, America has lost ground. The United States now ranks [seventeenth] out of 180 ranked economies. Business freedom and labor freedom, two of the twelve factors evaluated, are among those that have declined since 2011.”¹⁰³

Ohlhausen particularly expressed her concerns about excessive occupational licensing regulations and the disproportionate impact they have on lower and middle-class Americans.¹⁰⁴ Many of the current occupational licensing regulations beg the question of what, if any, legitimate state interest in protecting public health and safety they could possibly be advancing to justify limiting the economic liberties of Americans.¹⁰⁵

Occupational licensing stands out as a particularly *egregious* example of this erosion in economic liberty. In the 1950s, less than [5%] of jobs required a license. Estimates today place that figure between 25 and 30[%]. Today, licensing requirements reach far beyond doctors, electricians, and other fields where public health and safety issues are clearer. Instead, licensing requirements extend to auctioneers, interior designers, make-up artists, hair-braiders, and numerous other occupations.

The public safety and health rationale for regulating many of those occupations ranges from dubious to ridiculous. Consumers can, and do, easily evaluate the quality of interior designers, make-up artists, hair-braiders, and others. I challenge anyone to explain why the state has a legitimate interest in protecting the public from rogue interior designers carpet-bombing living rooms with ugly throw pillows.

. . . .

The proliferation of unnecessary and overbroad occupational licensing regimes not only burdens consumers and the economy, it hurts many average Americans who want to enter these occupations. A 2011 study using standard economic models estimated that restrictions from occupational licensing resulted in

102. TERRY MILLER ET AL., INST. OF ECON. FREEDOM, 2017 INDEX OF ECONOMIC FREEDOM (2017).

103. Ohlhausen, *supra* note 13, at 2 (footnotes omitted).

104. *Id.* at 3–4.

105. *See id.* at 1, 3–4.

up to 2.85 million fewer jobs with an annual cost to consumers of \$203 billion.¹⁰⁶

Two important points can be drawn from the impact excessive regulations have on economic liberty: (1) that innovation, entrepreneurship, and economic liberty are growing increasingly important in the rapidly advancing digital age; and (2) that the time may now be ripe to re-examine judicial review of economic regulations.¹⁰⁷

III. CONSTITUTIONAL CHALLENGES TO ECONOMIC LIBERTY

For over a century, the legal institution has been at odds in a *great intellectual debate* on the meaning of economic liberty in constitutional law.¹⁰⁸ Legal scholars often define economic liberty as an individual right.¹⁰⁹ Specifically, as a property and contract right—that is, “the right to acquire, use, and possess private property, and the right to enter into private contracts of one’s choosing.”¹¹⁰ The Institute for Justice and many other organizations take the position that economic rights are fundamental rights, protected under the Federal Constitution.¹¹¹ However, for almost a century, the Supreme Court has taken a very different stance on the topic of individual economic

106. *Id.* at 3–4 (emphasis added).

Market dynamics . . . naturally weed out those who provide a poor service, without danger to the public. For many other occupa[nts], the costs of added regulation limit the number of providers and drive up prices. These costs often dwarf any public health or safety need and may actually harm consumers by limiting their access to beneficial services.

Id. at 3.

107. See Birkinshaw, *supra* note 14; *Economic Liberty Backgrounder*, INST. FOR JUST., <http://www.ij.org/issues/economic-liberty/backgrounder/> (last visited Apr. 18, 2018).

108. Robert A. Lawson, *Economic Freedom*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* 124, 124 (David R. Henderson ed., 2008).

109. See Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5, 5 (2012). Georgetown University of Law, Professor Randy Barnett, takes on the task of defending the right to contract, as an economic liberty, under the Privileges or Immunities Clause. *Id.*

110. *Id.*

111. See *Economic Liberty Backgrounder*, *supra* note 107.

The philosophy of [the Institute for Justice] . . . is simple: People have a right to engage in productive activity—i.e., to make a living—free from undue government interference. The [United States] Supreme Court and lower federal courts acknowledge the existence of that right but have all too often refused to enforce it in any meaningful way. [The Institute for Justice] aims to correct that error by demonstrating that economic liberty not only matters morally, but that protection for economic liberty has a genuine basis in the text, history, and original meaning of the [United States] Constitution and that economic liberty is entitled to a meaningful level of judicial review.

Id.

rights.¹¹² Unlike many of the unenumerated privacy rights protected under substantive due process, such as marriage and reproduction, the Supreme Court has long rejected recognizing economic liberty as a fundamental right.¹¹³ However, there was a time in constitutional history when the Supreme Court was not so deferential towards legislative intrusions on economic liberties.¹¹⁴ In fact, there was a time when “the Court stood in [strong] opposition to an ever-increasing tide of economic and social legislation.”¹¹⁵ History remembers it beginning in 1905, when the Supreme Court issued one of its most notorious constitutional rulings, which would later become the namesake for an era in *Lochner v. New York*.¹¹⁶

A. *Lochner v. New York*

For decades, the conventional narrative has been that the Supreme Court’s ruling in *Lochner* “was obviously and irredeemably wrong.”¹¹⁷ It has been referred to as “the touchstone of judicial error,” which now firmly resides in *the American [constitutional] anticanon*.¹¹⁸ Most often, *Lochner* is cited for the evils of *judicial overreach* or *judicial activism*—that is, the “illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.”¹¹⁹ Despite the overwhelming consensus among legal scholars of *Lochner*’s disfavored status, the reason for *why Lochner was wrong* is still a matter of unsettled debate.¹²⁰

112. See Colby & Smith, *supra* note 28, at 530–31.

113. See *id.* at 529; Levy, *supra* note 24, at 344.

114. Levy, *supra* note 24, at 342–44.

115. *Id.* at 342–43.

116. 198 U.S. 45 (1905); see also Colby & Smith, *supra* note 28, at 528, 533, 535.

117. Colby & Smith, *supra* note 28, at 528; see also *Lochner*, 198 U.S. at 64–65.

118. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380, 417–18 (2011) (quoting David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1, 2 (2003)); see also *Lochner*, 198 U.S. at 45; Colby & Smith, *supra* note 28, at 536. The *American anticanon* is often understood in *legal and political culture* to be among the few Supreme Court decisions “whose central propositions all legitimate decisions must refute.” Greene, *supra* at 380. They are often identified as being “the Supreme Court’s worst decisions” for their *weak constitutional analysis*. *Id.* However, the author interestingly argues that the “anticanonical cases do not involve unusually bad reasoning, nor are they uniquely morally repugnant.” *Id.* Rather, they are a product of *historical happenstance*, and their status is merely reaffirmed by “subsequent interpretive communities’ use of [them] as a rhetorical resource.” *Id.*

119. Colby & Smith, *supra* note 28, at 535; Sunstein, *supra* note 28, at 874; see also *Lochner*, 198 U.S. at 45.

120. Colby & Smith, *supra* note 28, at 529, 540–41; see also *Lochner*, 198 U.S. at 45.

In *Lochner*, the Supreme Court was tasked to review the constitutionality of a New York labor regulation prohibiting bakeries from allowing their employees to work for more than sixty hours per week.¹²¹ In a five-four decision, the Court held that the labor regulation “interfere[d] with the right of contract between the employer and employe[es].”¹²² The right to contract, the Court declared, “is part of the liberty of the individual protected by the Fourteenth Amendment of the [United States] Constitution.”¹²³ After reviewing the regulation under what would later be known as strict scrutiny, the Court’s majority found that it “was not necessary to protect bakery employees from an imbalance in bargaining power, to protect the public health, or to protect the health of bakery employees.”¹²⁴ In doing so, the Court concluded that the labor regulation was “an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty.”¹²⁵

In what would later become his famous dissent, Justice Holmes rejected that the right to contract was a liberty protected under the Fourteenth Amendment.¹²⁶ Holmes argued that the Justices on the majority had wrongly decided the case based on their personal or moral agreement with “an economic theory . . . a large part of the country [did] not entertain,” rather than on the “values . . . codified in the Constitution.”¹²⁷ The Constitution, he declared, “is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.”¹²⁸ Holmes suggested that if courts are to strike down *democratically enacted* legislation in defense of “liberty in the Fourteenth Amendment,” it must be only when “it can be said that a rational and fair man necessarily

121. *Lochner*, 198 U.S. at 46, 52.

122. *Id.* at 53; Colby & Smith, *supra* note 28, at 533.

123. *Lochner*, 198 U.S. at 53. In support of its rationale, the Court noted that there may be times an “employ[ee] may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employ[ee] to earn it.” *Id.* at 52–53.

124. Colby & Smith, *supra* note 28, at 533 (footnotes omitted) (citing *Lochner*, 198 U.S. at 57, 59).

125. *Lochner*, 198 U.S. at 56.

126. *Id.* at 74–76; Colby & Smith, *supra* note 28, at 534; Sunstein, *supra* note 28, at 877–78.

127. *Lochner*, 198 U.S. at 75; Greene, *supra* note 118, at 418; *see also* Colby & Smith, *supra* note 28, at 534.

128. *Lochner*, 198 U.S. at 75. “[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.” *Id.* at 76.

would” agree that it infringed on “fundamental principles as they have been understood by the traditions of our people and our law.”¹²⁹

Much of the controversy giving rise to *Lochner*’s infamy was the apparent discrepancy between the Court’s conclusion that the New York law was not a health regulation, and “the realities of the sweatshop-era workplace” conditions of the time.¹³⁰ The next three decades would become an era, as the *activist Lochner-era Court* struck down the majority of the progressive labor, health, and workplace laws under the New Deal, which arguably may have “contribut[ed] to or worsen[ed] the Great Depression.”¹³¹ It was not until 1937 when the new, liberal-majority Supreme Court ended the *Lochner* era in the case *West Coast Hotel Co. v. Parrish*.¹³² In upholding a state minimum wage law, the Court declared that:

[T]he Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people.¹³³

The Court added that “the [L]egislature . . . necessarily [has] a wide field of discretion” to pass legislation in order to protect public health and safety.¹³⁴ In other words, in direct contrast with the *Lochner* Court, the Court announced that the Due Process Clause of the Constitution no longer protected unenumerated rights from economic regulations.¹³⁵ By doing so,

129. *Id.* at 76; Greene, *supra* note 118, at 418.

130. Colby & Smith, *supra* note 28, at 537–38; *see also Lochner*, 198 U.S. at

75.

The Legislature passed the law at issue in *Lochner* on the heels of a *New York Press* story, entitled “Bread and Filth Cooked Together,” that detailed the unsanitary conditions in many New York City bakeries. As one late-nineteenth century bakers’ union spokesman put it, “consumers like clean, wholesome bread, yet if they could go into the shops at night and see the men at work they would lose their appetites altogether.” . . . [B]akers at the turn of the century often worked [100] hours per week in abysmal conditions, and there was evidence to support their claim that working long hours in such an environment caused what they referred to as *white lung disease*.

Colby & Smith, *supra* note 28, at 538.

131. *Id.* at 538–39.

132. 300 U.S. 379 (1937); Colby & Smith, *supra* note 28, at 543.

133. *W. Coast Hotel Co.*, 300 U.S. at 391.

134. *Id.* at 393.

135. *See id.* at 391–92; Colby & Smith, *supra* note 28, at 543.

the Court effectively “promulgate[d] a jurisprudence of deference” to the Legislature.¹³⁶

B. *Shifting Scales of Selective Judicial Scrutiny*

Despite the Supreme Court having recently declared broad judicial deference to economic regulations, one year later, it made some exceptions.¹³⁷ “In the famous footnote four” of *United States v. Carolene Products Co.*,¹³⁸ the Court suggested that there may be times when *searching [judicial] scrutiny* is needed for economic legislation that interferes with enumerated rights found in the text of the Bill of Rights, restricts the political process, “or imposes burdens on [insular] minorities.”¹³⁹ The historical significance of this footnote was that it not only acknowledged the incorporation of the textual Bill of Rights into the Due Process Clause of the Fourteenth Amendment, but it also recognized that there may be non-textual rights deserving of some constitutional protection.¹⁴⁰

From Justice Stone’s footnote four, rose a bifurcated rubric of judicial scrutiny for due process challenges of economic regulations.¹⁴¹ All things that the Supreme Court has ordained as being *life, liberty, or property* under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution are considered *fundamental rights*, which are protected as such by application of *strict scrutiny* review.¹⁴² The benefit of this heightened review is that many regulations interfering with recognized fundamental rights will often be struck down for having failed to be “necessary to fulfill a compelling governmental purpose.”¹⁴³ In contrast, all other challenges to protect rights not yet recognized as being *fundamental* are left with virtually no protection under the exceedingly deferential *rational*

136. Colby & Smith, *supra* note 28, at 543.

137. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); Colby & Smith, *supra* note 28, at 544–45; Levy, *supra* note 24, at 361.

138. 304 U.S. 144 (1938).

139. *Carolene Prods. Co.*, 304 U.S. at 152 n.4; Colby & Smith, *supra* note 28, at 544; Levy, *supra* note 24, at 361.

140. Levy, *supra* note 24, at 361.

141. *Carolene Prods. Co.*, 304 U.S. at 152–53 n.4; Levy, *supra* note 24, at 361.

142. U.S. CONST. art. V; *id.* amend. XIV, § 1; Levy, *supra* note 24, at 335 n.19, 361 & n.125 (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 575–76 (4th ed. 1991)). “Strict scrutiny requires that a law be narrowly tailored, or necessary, to fulfill a compelling governmental purpose, and almost always requires the invalidation of the legislation in question. Strict scrutiny applies to legislation burdening fundamental rights or employing classifications based on race or national origin.” Levy, *supra* note 24, at 335 n.19 (citations omitted) (citing NOWAK & ROTUNDA, *supra*, at 575–76).

143. Levy, *supra* note 24, at 335 n.19 (citing NOWAK & ROTUNDA, *supra* note 142, at 575–76).

basis review.¹⁴⁴ This is a much more deferential form of review, where the court need only find some “colorable [public] health or safety justification[.]” for the regulation to be legitimate.¹⁴⁵ The practical effect will almost always result in a court upholding regulations interfering with non-fundamental rights, irrespective of the harm it may cause.¹⁴⁶

The problem, however, with this sliding scale of scrutiny is that the history of its use by the Supreme Court reflects an obvious bias against protecting economic rights.¹⁴⁷ As argued by Professor Richard Levy, the Court in *Carolene Products* “never fully explained why some rights are entitled to special protection,” and other non-textual rights are not.¹⁴⁸ In 1965, the Court’s bias was amplified by its holding in *Griswold v. Connecticut*,¹⁴⁹ when Justice Douglas argued that a non-textual *right of privacy*—specifically, the marital privacy to use contraceptives—emanated from the “specific guarantees in the Bill of Rights.”¹⁵⁰ As such, the Court held that the non-textual right to privacy was to be protected as a fundamental right under the Constitution.¹⁵¹ However, the Court’s bias against economic rights hit center stage in 1973 when it decided in *Roe v. Wade*¹⁵² that a non-textual right to abortion—under the right to privacy—was protected by the Constitution.¹⁵³

Instead of attempting to distinguish its logic from the *Lochner* error, as the *Griswold* Court had done, the Court in *Roe* simply held outright that the right to privacy was, in fact, a fundamental right, irrespective of its lack of textual support.¹⁵⁴ The parallels between the Court’s ruling in *Roe* in

144. *Id.* at 335 n.19, 337 n.39, 362 (citing NOWAK & ROTUNDA, *supra* note 142, at 575).

The most deferential form of review is the *rational basis test*, which requires only that a law be reasonably related to some conceivable legitimate purpose, and which almost always results in a decision upholding the legislation. This test applies unless there is some justification to employ a stricter form of rationality review, i.e., heightened scrutiny.

Id. at 335 n.19 (citations omitted) (citing NOWAK & ROTUNDA, *supra* note 142, at 574–75).

145. *Id.* at 335 n.19, 391 n.254 (citing *Lochner v. New York*, 198 U.S. 45, 60–61 (1905)).

146. *Id.* at 335 n.19, 361, 391 n.256 (citing NOWAK & ROTUNDA, *supra* note 142, at 574–75).

147. *See* Levy, *supra* note 24, at 360–62, 371–72.

148. *Id.* at 362; *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

149. 381 U.S. 479 (1965).

150. *Id.* at 484; Levy, *supra* note 24, at 362.

151. *Griswold*, 381 U.S. at 484–85.

152. 410 U.S. 113 (1973).

153. *See id.* at 164–65; Levy, *supra* note 24, at 360–61.

154. *See Roe*, 410 U.S. at 164–65; *Griswold*, 381 U.S. at 481–82; *Lochner v. New York*, 198 U.S. 45, 64–65 (1905); Colby & Smith, *supra* note 28, at 555.

protecting the non-textual right to privacy, and the *Lochner* Court's error in protecting the non-textual right to contract, is still an issue of contention today.¹⁵⁵

C. *The Originalist Barrier*

Unsurprisingly, many conservative judges and scholars heavily criticized the liberal Supreme Court for its preferential logic during the rise of privacy rights.¹⁵⁶ After the fall of *Lochner* in 1937, both liberals and conservatives condemned the *Lochner* Court for erroneously overreaching into the legislative domain, in order to protect non-textual rights.¹⁵⁷ However, the liberal Court's departure from judicial deference to selective incorporation of non-textual rights is beyond the scope of this Comment.¹⁵⁸ The intent of this subsection is to highlight the theory advanced by Professors Thomas Colby and Peter Smith.¹⁵⁹

What Professors Colby and Smith present in *The Return of Lochner* is an exhaustive analysis of the historical evolution of both liberal and conservative legal thought during and after *Lochner* was decided in 1905.¹⁶⁰ Their conclusion is that the theory of originalism, which underlies modern conservative legal thought, is on the verge of changing to where it will soon accept judicial protection of non-textual economic rights.¹⁶¹ Unlike the history of liberal legal thought—which quickly departed from judicial deference to incorporating non-textual privacy, and then struggled to justify itself after—conservative legal thought first requires an intellectual framework to justify incorporating non-textual economic rights.¹⁶² According to Professors Colby and Smith, “after a forthcoming period of hand-wringing and ideological and jurisprudential soul-searching, conservative legal orthodoxy will ultimately embrace judicial protection for unenumerated economic rights, including the right to contract. Conservative legal thought . . . is about to come full circle.”¹⁶³

155. See *Roe*, 410 U.S. at 164–65; *Lochner*, 198 U.S. at 63–64; Colby & Smith, *supra* note 28, at 555–56.

156. See Colby & Smith, *supra* note 28, at 528.

157. *Id.* at 528–29; see also *Lochner*, 198 U.S. at 45.

158. Colby & Smith, *supra* note 28, at 529.

159. *Id.* at 527.

160. See *Lochner*, 198 U.S. at 45; Colby & Smith, *supra* note 28, at 532–33.

161. See Colby & Smith, *supra* note 28, at 531, 580.

162. See *id.* at 555, 558–61.

163. *Id.* at 579.

IV. THE STAGE FOR DEFENSE OF ECONOMIC LIBERTY

A. *Rising Opposition in the Lower Courts*

The Supreme Court of the United States has justified its denial of greater protection of economic liberties on the *democratic process* itself.¹⁶⁴ Meaning that the proper avenue of relief for plaintiffs whose economic liberties have been injured by the Legislature is the ballot box, rather than judicial intervention.¹⁶⁵ In 1979, the Supreme Court said as much when it held, “[t]he Constitution presumes that . . . even improvident decisions will *eventually* be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted.”¹⁶⁶

In reply to the Supreme Court’s disengagement, a powerful concurring opinion in defense of economic liberties came when the United States Court of Appeals for the District of Columbia (“D.C.”) Circuit decided *Hettinga v. United States*¹⁶⁷ in 2012.¹⁶⁸ At issue was a constitutional challenge to a recent federal regulation governing the price milk processors and distributors pay to dairy farmers.¹⁶⁹ Despite there being evidence that the legislation had been specifically targeted at Hettinga, the Court was nevertheless forced to reject the plaintiff’s challenge.¹⁷⁰ However, touching on the growing concerns of many Americans, Judge Brown, joined by Chief Judge Sentelle, responded in a powerful concurring opinion:

I agree fully with the [C]ourt’s opinion. Given the long-standing precedents in this area, no other result is possible. Our

164. *Vance v. Bradley*, 440 U.S. 93, 96–97 (1979).

165. *See id.* at 97.

166. *Id.* (emphasis added) (footnote omitted).

167. 677 F.3d 471 (D.C. Cir. 2012) (per curiam).

168. *See id.* at 480–83.

169. *Id.* at 474–75.

170. *Id.* at 477, 479–80.

The Washington Post describe[s] Hein Hettinga as an American success story. He emigrated to the U.S. after World War II and started as a hired hand. By 1990, Hettinga owned half a dozen dairies and decided to build his own bottling business. A Costco vice president showed reporters copies of an e-mail he sent to Senator Reid during the legislative debate, explaining that Southern California purchasers of milk were the victims of “a brazen case of price gouging and profiteering by the strongest, largest market suppliers,” who turned a deaf ear to the company’s call for lower prices. Hein Hettinga changed all that. His arrangement with Costco “lowered the average price of milk by [twenty] cents a gallon overnight” until two senators, one from each party, pushed through the milk legislation at issue in this case.

Id. at 481–82 (quoting Dan Morgan et al., *Dairy Industry Crushed Innovator Who Bested Price-Control System*, WASH. POST, Dec. 10, 2006, at A1).

precedents forced the Hettigas to make a difficult legal argument. No doubt they would have preferred a simpler one—that the operation and production of their enterprises had been impermissibly collectivized—but a long line of constitutional adjudication precluded that claim.

...

The judiciary justifies its reluctance to intervene by claiming incompetence—apparently, judges lack the acumen to recognize corruption, self-interest, or arbitrariness in the economic realm—or deferring to the majoritarian imperative. . . . The practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows the [L]egislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions.

The hope of correction at the ballot box is purely illusory. . . . Rational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.¹⁷¹

Although the D.C. Circuit denied any form of heightened review on arbitrary economic legislation, there has been positive movement for protection of economic rights in lower federal courts for occupational licensing.¹⁷²

In *St. Joseph Abbey v. Castille*,¹⁷³ the United States Court of Appeals for the Fifth Circuit was tasked to assess the validity of a state law regulating the funeral casket market.¹⁷⁴ The court noted the significant regulatory burdens were two-fold: Under the law in question, casket sales could only “be made . . . by . . . state-licensed funeral director[s] and only at a state-licensed funeral home.”¹⁷⁵ Having found no consumer or public health and safety purpose rationally related to the regulation, the court affirmed the district court’s judgment that it violated Due Process and Equal Protection

171. *Hettinga*, 677 F.3d at 480, 482–83 (Brown, J., concurring) (citations omitted); Colby & Smith, *supra* note 28, at 575.

172. *Hettinga*, 677 F.3d at 478–79; *see also* *St. Joseph Abbey v. Castille*, 712 F.3d 215, 218, 226 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220, 222, 228–29 (6th Cir. 2002).

173. 712 F.3d 215 (5th Cir. 2013).

174. *Id.* at 217.

175. *Id.* at 218.

under the Fourteenth Amendment.¹⁷⁶ In doing so, the court said that although *great deference* was due to economic regulations, that did not “demand judicial blindness to the history of [the] challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation.”¹⁷⁷ Prefacing with its respect for the *principles of federalism*, the court announced that “[t]he principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as *economic* protection of the rulemakers’ pockets.”¹⁷⁸

Under a similar fact pattern, in *Craigmiles v. Giles*,¹⁷⁹ the United States Court of Appeals for the Sixth Circuit invalidated a state law granting state-licensed funeral directors the exclusive right to sell caskets.¹⁸⁰ Most notably, in its holding, the court emphasized that “rational basis review, while deferential, is not toothless. . . . This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.”¹⁸¹

The Sixth Circuit’s holding in *Craigmiles* is particularly noteworthy because it is the only time a federal court has expressly stated that judicial review of economic regulations could be afforded more protection than rational basis.¹⁸² [R]ational basis with bite, although not as exacting as strict scrutiny, is still movement in the right direction for federal courts.¹⁸³

V. CONCLUSION

If contemporary constitutional jurisprudence has accepted that the non-textual right to privacy is found within the meaning of *liberty* in the Due Process Clause of the Fifth and Fourteenth Amendments, could it not also extend that logic to economic rights?¹⁸⁴ In *Griswold*, the Court drew from the Bill of Rights the concept of personal liberty, from which it justified

176. *Id.* at 226; *see also* U.S. CONST. amend. XIV, § 1.

177. *St. Joseph Abbey*, 712 F.3d at 226.

178. *Id.* at 226–27.

179. 312 F.3d 220 (6th Cir. 2002).

180. *Id.* at 222, 228.

181. *Id.* at 229 (quoting *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998)).

182. *See id.*

183. *See id.*; Levy, *supra* note 24, at 400 n. 301.

184. *See* U.S. CONST. art. V; *id.* amend. XIV § 1; *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965); *Lochner v. New York*, 198 U.S. 45, 53 (1905). *Contra* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–92 (1937).

holding that the right to privacy was a fundamental right.¹⁸⁵ Later, in *Roe*, the Court reaffirmed the existence of the right to privacy in “the Fourteenth Amendment’s concept of personal liberty” and extended protection for it in “the Ninth Amendment’s reservation of rights to the people.”¹⁸⁶ Just as the right to privacy emanates from the Bill of Rights, could the right to contract and the right to private property emanate from not only the Bill of Rights, but also the Declaration of Independence?¹⁸⁷

Within the very text of the Declaration, it leaves no doubt “that all [people] are created equal, [and] that they are endowed by their Creator with certain unalienable Rights” the chief of which are expressly “Life, Liberty, and the pursuit of Happiness.”¹⁸⁸ These fundamental rights “did not simply come from a piece of paper,” but rather emanated from the natural rights inherent in all, which existed *before* government.¹⁸⁹ It is only the People’s *consent* to be governed that empowers governments to regulate.¹⁹⁰ This is the social contract between the people and their government—that only for the necessary purpose of protecting these rights is the government authorized to act.¹⁹¹

When judges engage with these principles as they review government regulations, they engage in what current Justice Thomas terms as a *higher law*.¹⁹² This is a law that resonates with the “political philosophy of the Founding Fathers,” “of limited government, of . . . separation of powers, and of . . . judicial restraint that flows from the commitment to limited government.”¹⁹³

For Justice Thomas, “the Constitution is a *logical* extension of the principles of the Declaration of Independence,” “whether explicitly invoked or not.”¹⁹⁴ “If the Constitution is not a logical extension of the principles of the Declaration of Independence, important parts of the Constitution are inexplicable.”¹⁹⁵ Justice Thomas adds that it was also Abraham Lincoln whose opposition to slavery advanced that “[w]ithout the guidance of the

185. *Griswold*, 381 U.S. at 483–85; *see also* U.S. CONST. amend. XIV § 1.

186. *Roe*, 410 U.S. at 153.

187. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *Griswold*, 381 U.S. at 484; Barnett, *supra* note 109, at 5; Levy, *supra* note 24, at 362; Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 68 (1989).

188. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

189. Thomas, *supra* note 187, at 68.

190. *Id.* at 64.

191. *See id.*

192. *Id.* at 63.

193. *Id.*

194. Thomas, *supra* note 187, at 64, 68 (emphasis added).

195. *Id.* at 65.

Declaration of Independence . . . the Constitution can be a mask for *the most awful tyranny*, and not just over a particular race.”¹⁹⁶

If there is one thing to take away from Willy Wonka, it is to believe in the power of entrepreneurial inspiration and innovation.¹⁹⁷ Just as Willy Wonka reflects the entrepreneurial spirit, the American entrepreneur reflects the spirit of the Founding Fathers.¹⁹⁸ Entrepreneurship has long been considered the heart of the American dream.¹⁹⁹ Since its founding, “Americans have pictured small business as [the] equalizing force providing social mobility, economic opportunity, and personal freedom.”²⁰⁰ As America marches ever forward into the challenges of the new age of innovation, will the Supreme Court continue to pay obedient deference to the *regulatory leviathan*?²⁰¹ Or, will it appeal to a *higher law*, in the spirit of the Founding Fathers, to right the scales of democracy?²⁰² One hopes for the latter.²⁰³

196. *Id.* (emphasis added).

197. *See* Strauss, *supra* note 10.

198. *See* Livingston, *supra* note 8; Strauss, *supra* note 10.

199. *See* Dicke, *supra* note 8, at 16; Livingston, *supra* note 8.

200. Dicke, *supra* note 8, at 11.

201. Livingston, *supra* note 8; *see also* Birkinshaw, *supra* note 14.

202. *See* Thomas, *supra* note 187, at 63; Livingston, *supra* note 8.

203. *See* Thomas, *supra* note 187, at 68–69.