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Protecting Economic Liberties

Bernard H. Siegan*

I. INTRODUCTION

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

II. THE MAGNA CARTAS OF 1215 AND 1225[†]

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

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

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

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

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

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

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

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

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

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

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

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

5 *Id.* at 454.

6 *Id.* at 375.

7 HUME, *supra* note 1, at 430-31.

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

9 *Id.*

10 *Id.*

11 *Id.* at 81.

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

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

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

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

III. COKE AND BLACKSTONE INTERPRET THE COMMON LAW

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

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

¹² 1 WILLIAM BLACKSTONE, COMMENTARIES *123-24.

¹³ 1 *id.* at 124.

¹⁴ EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *45 (William S. Hein Co. 1986) (1797) [hereinafter COKE, THE SECOND PART OF THE INSTITUTES].

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 *Id.*

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

24 *Id.* at *45.

25 *Id.* at *45–47.

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

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

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

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

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

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

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

1. The Supremacy of the Common Law

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

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

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

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

²⁷ *Wynehamer v. People*, 13 N.Y. 378, 432–33 (1856) (Selden, J., concurring).

²⁸ 77 Eng. Rep. 646 (K.B. 1610).

²⁹ *Id.* at 651.

³⁰ *Id.* at 652 (citations omitted).

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

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

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

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

³¹ *Id.* at 651-52.

³² *Id.* at 652.

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

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

ration of Rights and a Framers of the United States Constitution, cited Coke in a 1772 Virginia case³⁵ as authority for the proposition that “[a]ll acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void.”³⁶ Thus, Coke’s view informed the very beginnings of American jurisprudence.

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

2. Common Law Protections of Economic Liberties

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

a. Illegal Monopolies and Other Restraints on Practice of Trade

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

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

36 *Id.* at 115.

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

38 *Id.* at 13–14.

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

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

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

42 *Id.* at 770.

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

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

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

Based in part on the decision in *Davenant, Darcy v. Allen* (also known as *The Case of Monopolies*)⁴⁷ held that a grant of letters patent by Queen Elizabeth to Darcy, her groom, for the exclusive making, importing, and merchandising of playing cards contravened common law and was void.⁴⁸ Unlike the *Davenant* case, which involved an ordinance of a guild, the *Monopolies* case concerned a royal grant. Coke did not participate as a judge in the latter decision since he was at the time Solicitor General and responsible for defending the contested patent.⁴⁹ He had long maintained that a monopoly was forbidden by the Civil Law, and by the Magna Carta, as well as by certain statutes. That he accepted (and applauded) the ruling is evident from his inclusion of its principles in defining the meaning of liberties in Chapter 29.⁵⁰ The defendant pleaded that as a resident of London he was protected under the Magna Carta to engage freely in commerce, and this included obtaining royal grants.⁵¹ The *Monopolies* decision held that the grant created various monopolies and that a monopoly was against the common law because it limited trade to the detri-

43 *Id.*

44 *Id.* at 771.

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

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

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

48 *Id.* at 1263-64.

49 *Id.* at 1261.

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

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

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

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

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

52 *Id.* at 1263.

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

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

55 *Id.* at 1219.

56 *Id.* at 1220.

57 *Id.* at 1219.

58 *Id.*

59 *Id.* at 1220.

60 *Id.*

61 *Id.* at 1219.

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

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

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

63 *Id.*

64 *Id.* at 1058.

65 *Id.* at 1059.

66 *Id.* at 1057.

67 *Id.* at 1059.

68 *Id.*

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

70 *Id.* at 1013.

71 *Id.*

72 *Id.* at 1012-13.

b. The King's Prerogatives and Other Restraints

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

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

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

⁷³ 1 WILLIAM BLACKSTONE, COMMENTARIES *232.

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

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

⁷⁶ *Id.* at 563.

⁷⁷ 77 Eng. Rep. 1294 (K.B. 1606).

⁷⁸ *Id.* at 1294–95.

⁷⁹ *Id.* at 1295.

⁸⁰ *Id.*

⁸¹ *Id.*

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

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

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

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

⁸² *Id.* at 1295-96.

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

⁸⁴ 77 Eng. Rep. 1139 (K.B. 1610).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1140-42.

⁸⁹ *Id.* at 1142.

⁹⁰ *Id.* at 1141.

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

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

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

⁹¹ *Id.* at 1142.

⁹² *Id.*

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

⁹⁴ 77 Eng. Rep. 1341 (K.B. 1609).

⁹⁵ *Id.* at 1341–42.

⁹⁶ *Id.* at 1342.

⁹⁷ *Id.* at 1341–42.

⁹⁸ 505 U.S. 1003 (1992).

⁹⁹ *Id.* at 1029 n.16.

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

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

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

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

101 *Id.*

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

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

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

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

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

107 *Id.* at 292.

108 *Id.* at 50.

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

B. William Blackstone and his *Commentaries*

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

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

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

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

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

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

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

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

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

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

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

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

According to Edmund Burke, the eminent English politician and commentator of the late eighteenth century, nearly as many of Blackstone’s *Commentaries* (1765-1769) were sold in America as in England.¹²⁰ In *Hammond’s Blackstone*,¹²¹ a compilation of the original commentaries, William G. Hammond, its author, states that in examining twenty-five hundred volumes of American law reports covering the period from 1787 to 1890, Blackstone was referred to or quoted more than any other writer by various courts in the United States.¹²² William Carey Jones, the author of *Jones’s Blackstone*, another compilation, states that as of 1915 Blackstone had been cited and usually accepted in almost ten thousand cases since 1784.¹²³ As indicated in a 1999 decision, United States Supreme Court justices refer to Blackstone as the commentator “whose works constituted the preeminent authority on English law for the founding generation.”¹²⁴

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

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

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

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

121 WILLIAM G. HAMMOND, *HAMMOND’S BLACKSTONE*, at viii-xiii (1890).

122 *Id.*

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

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

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

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

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

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

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

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

127 ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 205 (Liberty Press 1985) (1966).

128 1 WILLIAM BLACKSTONE, *COMMENTARIES* *125, 130, 134.

129 4 *id.* at *417.

130 1 *id.* at *140.

131 1 *id.* at *120.

132 1 *id.* at *45.

133 1 *id.* at *46.

134 U.S. CONST. art. I, §§ 9, 10.

135 3 U.S. (3 Dall.) 386 (1798).

136 *Id.* at 390-91.

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

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

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

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

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

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

138 1 WILLIAM BLACKSTONE, *COMMENTARIES* *134.

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

140 1 WILLIAM BLACKSTONE, *COMMENTARIES* *134–35.

141 2 *id.* at *2.

142 1 *id.* at *135.

tection of owners offered by the laws of trespass¹⁴³ and nuisance.¹⁴⁴ While Blackstone believed in the parliamentary supremacy that existed at the time he wrote, he also interpreted “law of the land” to be protective of the rights of life, liberty, and property, none of which government could rightfully limit.¹⁴⁵

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

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

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

143 1 *id.*

144 3 *id.* at *209–10, 219–21.

145 1 *id.* at *120–41.

146 4 *id.* at *155.

147 4 *id.* at *158–59.

148 WILLIAM D. GRAMPP, *ECONOMIC LIBERALISM* 109 (1965).

149 1 WILLIAM BLACKSTONE, *COMMENTARIES* *120–21.

150 1 *id.* at *121.

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

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

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

IV. THE UNITED STATES CONSTITUTION

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

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

¹⁵¹ 1 *id.* at *121-22.

¹⁵² 1 *id.* at *75-78.

¹⁵³ *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

¹⁵⁴ ARTICLES OF CONFEDERATION art. IV.

¹⁵⁵ *Id.* art. II.

¹⁵⁶ *Id.* art. IX.

¹⁵⁷ *Id.* art. XIII.

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

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

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

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

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

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

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

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

163 *Id.*

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

165 *Id.* at 143-44.

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

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

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

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

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

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

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

169 See WARREN, *supra* note 158.

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

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

172 1 *id.*

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

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

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

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

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

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

174 *Id.* at 354–55.

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

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

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

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

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

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

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

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

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

180 See U.S. CONST. arts. I-III.

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

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

183 *Id.* at 190-218.

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

185 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

193 *Id.* at 308-09.

194 205 U.S. 454 (1907).

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

196 249 U.S. 47 (1919).

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

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

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

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

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

¹⁹⁸ *Schenck*, 249 U.S. at 52.

¹⁹⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES *122.

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

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

²⁰² *Id.*

²⁰³ 10 U.S. (6 Cranch) 87 (1810).

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

The famous jurist and scholar James Kent explained:

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

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

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

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

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

²⁰⁶ 2 Johns. Ch. 162 (N.Y. Ch. 1816).

²⁰⁷ *Id.* at 164-66.

²⁰⁸ *Id.* at 166-67.

²⁰⁹ *Id.* at 166.

²¹⁰ *Id.* at 167.

²¹¹ *Id.* at 168.

²¹² 77 U.S. (10 Wall.) 497 (1870).

²¹³ 80 U.S. (13 Wall.) 166 (1871).

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

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

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

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

²¹⁵ *Id.*

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

²¹⁷ *Id.* at 174, 182.

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

²¹⁹ *Id.* at 139.

²²⁰ 83 U.S. (16 Wall.) 36 (1873).

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

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

²²³ *Id.* at 77-78.

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

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

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

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

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

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

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

A. Common Law Interpretations of the Due Process Clauses

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

The common law provided meaning for the Due Process of Law clauses that are contained in the Fifth and Fourteenth Amendments of the Constitution. When the Fourteenth Amendment was framed, the Constitution of the United States and the constitutions of most states contained a Due Process or Law of the Land Clause, with both intended to have the same meaning.²³³ Under the rule of *stare decisis*, only the decisions in which the United States Supreme Court construed the Fifth Amendment’s Due Process Clause are relevant to ascertaining the meaning of the Fourteenth Amendment’s Due Process Clause. During the years when the Fourteenth Amendment was framed and ratified (1866 and 1868), any judge, lawyer, or private individual who wanted to know the meaning of the Due Process Clause of the Fifth Amendment would have to read and be guided by *Murray’s Lessee v. Hoboken Land & Improvement Co.*, decided unanimously by the Supreme Court in 1856.²³⁴

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

229 U.S. CONST. amend. XIV, § 1.

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

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

232 *Id.* at 2765.

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

234 *Id.* at 272, 274.

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

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

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

²³⁵ *Id.* at 275-76.

²³⁶ *Id.* at 275.

²³⁷ *Id.* at 276.

²³⁸ *Id.* at 274-75.

²³⁹ *Id.* at 276-77.

²⁴⁰ 1 COKE, THE FIRST PART OF THE INSTITUTES, *supra* note 15.

²⁴¹ 10 F. Cas. 1135 (C.C.D. R.I. 1852) (No. 5,764).

²⁴² 15 N.C. (4 Dev.) 1 (1833).

²⁴³ 4 Hill 140 (N.Y. Sup. Ct. 1843).

²⁴⁴ 10 Tenn. (2 Yer.) 260 (1829).

²⁴⁵ 10 Tenn. (2 Yer.) 599 (1831).

²⁴⁶ 18 Tenn. (10 Yer.) 59 (1836).

²⁴⁷ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 274 (1856).

²⁴⁸ *Id.* at 276.

²⁴⁹ *Id.* at 277.

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

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

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

²⁵⁰ *Id.*

²⁵¹ 15 N.C. (4 Dev.) 1 (1833).

²⁵² *Id.* at 16.

²⁵³ 4 Hill 140 (N.Y. Sup. Ct. 1843).

²⁵⁴ *Id.* at 147-48.

²⁵⁵ 10 F. Cas. 1135 (C.C.D. R.I. 1852) (No. 5,764).

²⁵⁶ *Id.* at 1141.

²⁵⁷ *Id.* at 1140.

²⁵⁸ 10 Tenn. (2 Yer.) 599 (1831).

²⁵⁹ *Id.* at 605-08, 615, 621-23.

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

Each of these six cases was based in part on Coke's interpretation of the Magna Carta that prohibited termination of an existing right without either due process of law or in violation of the law of the land. The variety of rights protected in these cases discloses the wide coverage of the due process of law concept and its general applicability for securing liberty. Although the United States Supreme Court refers to the Due Process clauses as "process" and "proceeding" in its *Murray's Lessee* opinion,²⁶⁶ the cases reported relate to substantive and procedural due process, as is evident from its citation of both substantive²⁶⁷ and procedural²⁶⁸ due process. According to the Court, due process of law means the same as law of the land, which Coke interpreted as a general protection against governmental oppression.²⁶⁹

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

²⁶⁰ *Id.*

²⁶¹ 18 Tenn. (10 Yer.) 59 (1836).

²⁶² *Id.* at 69, 78.

²⁶³ 10 Tenn. (2 Yer.) 260 (1829).

²⁶⁴ *Id.* at 269, 271.

²⁶⁵ *Id.* at 271.

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

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

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

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

²⁷⁰ 10 Tenn. (2 Yer.) at 271.

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

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

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

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

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

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

²⁷¹ 59 U.S. (18 How.) 272 (1856).

²⁷² 4 Hill 140 (N.Y. Sup. Ct. 1843).

²⁷³ *Id.* at 147.

²⁷⁴ 15 N.C. (4 Dev.) 1 (1833).

²⁷⁵ *Id.* at 13-14.

²⁷⁶ 10 F. Cas. 1135 (C.C.D. R.I. 1852) (No. 5,764).

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

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

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

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

²⁷⁷ *Id.* at 1140.

²⁷⁸ *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260, 270-71 (1829) (Catron, C.J., concurring).

²⁷⁹ See *supra* notes 230-32 and accompanying text.

²⁸⁰ See *supra* note 232 and accompanying text.

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

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

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

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

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

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

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

²⁸⁴ *Id.* at 150–51.

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

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

²⁸⁷ 1 *id.* at 168–69.

²⁸⁸ 1 *id.* at 168.

ject: and forming often a majority in the legislative Councils, with interested views, contrary to the interest, and views, of their Constituents, join in a perfidious sacrifice of the latter to the former. A succeeding election it might be supposed, would displace the offenders, and repair the mischief. But how easily are base and selfish measures, masked by pretexts of public good and apparent expediency? How frequently will a repetition of the same arts and industry which succeeded in the first instance, again prevail on the unwary to misplace their confidence?

How frequently too will the honest but unenlightened representative be the dupe of a favorite leader, veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the glowing colours of popular eloquence?²⁸⁹

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

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

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

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

289 1 *id.* at 168–69.

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

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

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

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

That is not just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. . . .

A just security to property is not afforded by that government under which unequal taxes oppress one species of property and reward another species; where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor

If there be a government then which prides itself on maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to

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

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

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

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 267–68.

²⁹⁷ *Id.* at 268.

²⁹⁸ *Id.* at 267.

the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the inference will have been anticipated, that such a government is not a pattern for the United States.

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights.²⁹⁹

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

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

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

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

C. From 1897 to the late 1930s: United States Supreme Court Protection of Economic Liberties^{††}

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

299 *Id.* at 268–69.

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

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

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

302 165 U.S. 578 (1897).

303 198 U.S. 45 (1905).

304 208 U.S. 161 (1908).

305 236 U.S. 1 (1915).

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

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

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

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

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

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

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

³⁰⁹ *Allgeyer*, 165 U.S. at 589.

³¹⁰ *Id.* at 579.

³¹¹ *Id.* at 584-85.

³¹² *Id.* at 579-80.

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

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

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

Justice Harlan amplified these observations:

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

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

³¹³ *Id.* at 589.

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

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

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

³¹⁷ *Powell*, 127 U.S. at 684.

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

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

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

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

³¹⁸ *Lochner v. New York*, 198 U.S. 45, 52 (1905).

³¹⁹ *Id.* at 64.

³²⁰ *Id.* at 58.

³²¹ *People v. Lochner*, 69 N.E. 373, 374 (N.Y. 1904).

³²² 198 U.S. at 52 (5-4 decision).

³²³ *Id.* at 74-76 (Holmes, J., dissenting).

³²⁴ *Id.* at 76 (Holmes, J., dissenting).

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

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

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

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

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

³²⁶ *Id.* at 56–58.

³²⁷ *Id.* at 57.

³²⁸ *Id.* at 57–58.

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

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

³³¹ 77 Eng. Rep. at 651–52.

³³² 1 WILLIAM BLACKSTONE, COMMENTARIES *126.

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

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

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

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

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

³³⁴ 274 U.S. 357 (1927).

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

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

³³⁷ *Id.* at 61.

³³⁸ *Id.* at 59.

³³⁹ *Id.* at 60-61.

³⁴⁰ *Id.* at 61.

³⁴¹ *Id.* at 64.

³⁴² *Id.* at 60-61.

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

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

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

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

344 *Id.* at 55, 59.

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

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

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

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

349 *Id.*

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

351 *Lochner*, 198 U.S. at 63-64.

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

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

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

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

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

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

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

356 198 U.S. at 53, 61.

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

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

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

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

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

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

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

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

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

362 381 U.S. 479 (1965).

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

364 *See supra* text accompanying note 318.

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

366 1 *id.* 45.

367 1 *id.*

368 1 *id.*

369 1 *id.* at 46–47.

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

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

In New York, as elsewhere, the baking industry was split between sizeable bakeries whose plants had been specifically built or fully converted for such purposes, and small bakeries, operating out of limited, often subterranean quarters not originally intended for such use. The Bureau of the Census reports that in 1905, there were 3,164 bakeries in New York State, of which 2,870 were owned by individuals, 228 by firms, and 64 by corporations.³⁷⁵ In that year, the individuals employed 10,804 workers, the firms 1,672, and the corporations 5,232, averaging 3.76, 7.33, and 81.75 workers per enterprise, respectively.³⁷⁶ Percentages of total bakery output maintained by each group was 62.5, 9.7, and 27.8.³⁷⁷ The New York trend was also toward bigger operations: in 1900, individuals had owned 2,767, firms 188, and corporations 44 bakery establishments.³⁷⁸ These figures indicate that during the periods studied, the baking industry was very competitive; it was virtually impossible for employers to control wages.

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

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

372 *Id.* at 36.

373 *Id.*

374 *Id.* at 37, 97.

375 BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE AND LABOR, BULLETIN No. 59, *CENSUS OF MANUFACTURERS: 1905*, NEW YORK 30 (1906).

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

377 *Id.*

378 *Id.* at 726, 729.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

392 *Id.*

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

Id.

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

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

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

Nor was the legislative mandate essential to achieve shorter working hours.³⁹⁶ The average length of the workday for bakery employees nationally declined from about ten hours in 1909, to nine hours in 1914, to eight hours in 1919, lengthening slightly in 1921.³⁹⁷ A survey of working hours for union workers in various industries shows that on the average, union bakers worked 64.5 hours per week in 1890; 59.3 in 1905; 52.5 in 1915; and 47.8 in 1926.³⁹⁸

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

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

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

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

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

³⁹⁷ *Id.* at 61.

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

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

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

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

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

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

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

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

⁴⁰¹ *Adair*, 208 U.S. at 166-69.

⁴⁰² *Id.* at 169-71.

⁴⁰³ *Id.* at 180.

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

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

⁴⁰⁶ *Id.* at 6-7, 26.

⁴⁰⁷ 208 U.S. at 174-75.

⁴⁰⁸ 236 U.S. at 13.

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

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

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

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

⁴⁰⁹ *Id.* at 17.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

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

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

⁴¹⁵ *Id.* at 532, 537-38, 556-57.

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

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

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

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

⁴¹⁶ *Id.* at 557.

⁴¹⁷ *Id.*

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

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

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

⁴²¹ *Id.* at 139.

⁴²² *Id.* (quoting John Stuart Mill).

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

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

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

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

In the era of *Lochner*, *Adair*, and *Coppage*, real wages were rising, working hours decreasing, and the country's wealth growing.⁴²⁹ "By 1914, the national income exceeded that of the United Kingdom, Germany, France, Austria-Hungary, and Italy combined[,] and per capita income was well above that of any other great nation."⁴³⁰ Between the end of the Civil War and beginning of World War I, real gross national product grew at a historically high rate.⁴³¹ It is estimated that the purchasing power of wages (exclusive of agriculture), measured by the relationship of wages either to wholesale or to retail prices, trebled between 1840 and 1914-15.⁴³² Working hours declined substantially; and the average daily scheduled work hours in manufacturing and mechanical establishments decreased from 11.5 in 1850, to 9.8 in 1900, and then to 8.5 in 1920⁴³³—a reduction of about twenty-five percent for the entire period. The average work hours per week in all manufacturing industries declined from 60 in 1890 to 50.3 in 1926.⁴³⁴

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

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

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

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

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

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

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

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

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

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

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

a. Entry into Business

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

In response to Liebmann's constitutional challenge, two philosophical opponents squared off—Sutherland for the majority of six, and Brandeis for the minority of two⁴⁴² (one Justice not participating). The majority said that Oklahoma had not presented justification to warrant infringing Liebmann's liberty to enter the market.⁴⁴³ The facts did not disclose a natural monopoly or threats to public health or safety.⁴⁴⁴ Brandeis's dissenting opinion, which outweighed (32-10 pages) and outpointed (57-0 footnotes) his opponent's, also dealt much more with economic theory than did Sutherland's.⁴⁴⁵ Yet Brandeis's opinion reflected a perspective that would find limited favor among economists today.

⁴³⁵ 285 U.S. 262 (1932).

⁴³⁶ *Id.* at 271.

⁴³⁷ *Id.* at 272.

⁴³⁸ *Id.* at 278–80 (discussing how the legislation prevented small ice distributors from competing with the larger distributors).

⁴³⁹ *Id.* at 281 (Brandeis, J., dissenting).

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.* at 271, 280.

⁴⁴³ *Id.* at 278–79.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at 280–311 (Brandeis, J., dissenting).

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

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

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

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

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

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

⁴⁴⁶ *Id.* at 311.

⁴⁴⁷ *Id.* at 277.

⁴⁴⁸ *Id.* at 277-78.

⁴⁴⁹ *Id.* at 278-79.

⁴⁵⁰ *Id.* at 279.

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

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

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

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

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

⁴⁵¹ *Id.* at 280.

⁴⁵² *Id.* at 282, 292.

⁴⁵³ *Id.* at 291–93.

⁴⁵⁴ *Id.* at 304.

b. Regulation of Prices

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

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

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

455 *Nebbia v. New York*, 291 U.S. 502, 515 (1934).

456 *Id.* at 516.

457 *Id.*

458 See Milk Control Act, ch. 158, §§ 300-19, 1934 N.Y. Laws 558 (repealed 1934).

459 *Id.* § 312(a).

460 *Nebbia*, 291 U.S. at 550-51.

461 *Id.* at 515.

462 *Id.*

463 291 U.S. 502, 539 (1934).

464 See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (upholding economic due process but later overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

465 *Nebbia*, 291 U.S. at 525.

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

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

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

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

⁴⁶⁶ *Id.* at 531.

⁴⁶⁷ *Id.* at 534–35.

⁴⁶⁸ *Id.* at 539.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 543 (McReynolds, J., dissenting). Justice McReynolds wrote for Justices Van Devanter, Sutherland, and Butler. *Id.* at 559.

⁴⁷¹ *Id.* at 544.

⁴⁷² *Id.* at 548.

⁴⁷³ *Id.*

whether of milk or grain or pork or coal or shoes or clothes—constitutional provisions may be declared inoperative⁴⁷⁴

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

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

Justice McReynolds concluded:

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

⁴⁷⁴ *Id.* at 548–49, 551.

⁴⁷⁵ *Id.* at 552–55.

⁴⁷⁶ *Id.* at 556.

⁴⁷⁷ *Id.* at 556–57.

⁴⁷⁸ *Id.* at 557–58.

⁴⁷⁹ *Id.* at 558–59.

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

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

480 *Id.* at 524–27, 536–37.

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

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

483 *Id.* at 1, 3.

484 *Id.*

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

486 *Id.*

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

488 *Id.*

489 *Id.*

to three-quarters in 1933.⁴⁹⁰ This data suggests a significant causal relationship between consumption of milk and its price.

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

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

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

⁴⁹⁰ *Id.*

⁴⁹¹ *Nebbia v. New York*, 291 U.S. 502, 518 (1934).

⁴⁹² *La Guardia Fights Rise in Milk Price*, N.Y. TIMES, Apr. 21, 1934, at 17.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ *Grocers Accuse State Milk Board*, N.Y. TIMES, Apr. 26, 1934, at 18.

⁴⁹⁶ Milk Control Act, ch. 158, § 312(c), 1934 N.Y. Laws 558 (repealed 1934).

⁴⁹⁷ See *supra* notes 492-93 and accompanying text.

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

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

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

3. Wage Rates

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

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

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

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

501 *Id.* at 542.

502 *Id.*

503 *Id.*

504 *Id.* at 542-43.

505 *Id.* at 525.

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

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

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

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

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

⁵⁰⁶ *Id.* at 561-62.

⁵⁰⁷ *Id.* at 558-59.

⁵⁰⁸ *Id.* at 557-58.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.* at 558-59.

⁵¹¹ *Id.* at 560-61.

⁵¹² *Id.* at 553.

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

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

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

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

⁵¹³ *Id.* at 557.

⁵¹⁴ *Id.* at 561.

⁵¹⁵ *Id.* at 562, 567 (Taft, C.J., & Holmes, J., dissenting).

⁵¹⁶ *Id.* at 566, 569–70.

⁵¹⁷ *Id.* at 563–64. (Taft, C.J., dissenting).

⁵¹⁸ *Id.* at 563.

⁵¹⁹ *Id.* at 567–68. (Holmes, J., dissenting).

⁵²⁰ *Id.* at 570.

⁵²¹ *Id.*

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

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

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

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

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

523 *Id.* at 397-99.

524 *Id.* at 386.

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

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

527 *Id.* at 391.

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

529 *Id.* at 125-26.

530 *Id.* at 127.

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

Aviation, Inc., complained that the law gave male employees an unfair advantage because it denied women overtime employment and certain positions with the company.⁵³² They alleged that the act violated their rights under the Due Process and Equal Protection Clauses and the Civil Rights Act of 1964.⁵³³ A lower court dismissed the case on the theory that prior decisions had foreclosed examination of the issue.⁵³⁴ A circuit court sent the case back for consideration, observing that circumstances and understanding of the problem had changed over the years.⁵³⁵

In another post-*Parrish* case, the employer refused to promote a female employee solely because she would have to engage in duties prohibited under the California Labor Code that limited the hours and work of women.⁵³⁶ A federal court found that the statute discriminated against women on the basis of their sex and therefore violated the provisions of the Federal Civil Rights Act of 1964.⁵³⁷

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

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

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

532 *Id.* at 1122.

533 *Id.*

534 *Id.*

535 *Id.*

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

537 *Id.* at 1224.

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

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

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

The United States Filled Milk Act⁵⁴² prohibited the shipment in interstate commerce of any product consisting of skimmed milk and a fat or oil other than milk fat, which resembled milk or cream.⁵⁴³ The defendant manufactured and distributed "Milnut," a compound of condensed skimmed milk and coconut oil and was indicted under the Act on the ground that this product "is an adulterated article of food, injurious to the public health."⁵⁴⁴ The statute was directed at compounds which, although safe for consumption, might be substituted for milk, denying the consumer the nutrients contained in milk.⁵⁴⁵ Congress rejected efforts to limit the legislation solely to requiring that the Milnut containers fully disclose their contents.⁵⁴⁶

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

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

539 *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

540 *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

541 *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

542 21 U.S.C. §§ 61-63 (1952).

543 *Carolene Prods.*, 304 U.S. at 145-46.

544 *Id.*

545 *Id.* at 148-49.

546 *Id.* at 148 n.2 (summarizing the House and Senate Reports).

547 Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 402 (1987).

548 *Id.* at 398.

549 *Id.* at 404.

550 *Id.*

551 *Id.* at 399.

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

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

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

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

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

553 *Id.* at 152 n.4.

554 *Id.* at 146.

555 *Id.*

556 *Id.*

557 *Id.*

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

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

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

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

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

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

⁵⁵⁹ Act of May 26, 1977, ch. 268, 1977 Minn. Laws 440.

⁵⁶⁰ *Id.* § 2.

⁵⁶¹ *Id.* § 1.

⁵⁶² *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458 (1981).

⁵⁶³ *Id.* at 460.

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

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

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

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

Justice Brennan, writing for the Court, stated:

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

566 *Clover Leaf Creamery Co. v. Minnesota*, 289 N.W.2d 79, 85 (Minn. 1979).

567 *Id.* at 86.

568 *Clover Leaf Creamery*, 449 U.S. at 474.

569 *Id.* at 464.

570 *Id.* at 469.

571 *Id.* at 461–63.

572 *Id.* at 462–63.

573 *Id.* at 465.

574 *Id.*

575 *Clover Leaf Creamery Co. v. Minnesota*, 289 N.W.2d 79, 85–87 (Minn. 1979).

576 *Id.* at 86.

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

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

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

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

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

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

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

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.* at 309.

⁵⁸¹ *Id.*

⁵⁸² *Id.*

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

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

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

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

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

V. CONCLUSION

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

⁵⁸⁵ *Id.* at 977.

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

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

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

⁵⁸⁹ *Id.* at 315, 318-19.

⁵⁹⁰ *Id.* at 319-20.

⁵⁹¹ *Id.* at 316.

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

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

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

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

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

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

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

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

596 See *supra* Part IV.

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

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