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Buchanan and the Right to Acquire Property

James W. Ely Jr.

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JAMES W. ELY, JR*

It is most appropriate to mark the 100th anniversary of the significant Supreme Court opinion in *Buchanan v. Warley*.[1] Despite some renewed interest by scholars, this landmark ruling has not received the recognition it deserves.[2] In *Buchanan* the Supreme Court invalidated a Louisville ordinance imposing residential segregation in the city by barring persons from occupying property in areas in which the majority of houses were not occupied by persons of their race. As the Court perceived, the practical effect of the ordinance was to inhibit the sale and purchase of land. The avowed purpose was to require separate racial blocks for white and black persons.[3] The Court struck this ordinance down as a deprivation of property without due process of law, asserting that, by virtue of the Fourteenth Amendment, the ordinance could not extinguish "those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color."[4] The case is especially remarkable because it was decided in an era when racial segregation was ascendant in much of the United States. The outcome, however, was consistent with a widely shared societal norm stressing the importance of property ownership. One can only speculate as to the subsequent neglect of *Buchanan*. Perhaps the property-centered reasoning of *Buchanan* proved an awkward fit for post-New Deal constitutionalism, which downplayed the rights of property owners and urged judicial deference to legislative controls over economic matters.[5] Likewise, the

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* Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University.

[1] Buchanan v. Warley, 245 U.S. 60 (1917).

[2] *See* Colloquium, *Rethinking* Buchanan v. Warley, 51 VAND. L. REV. 787–1002 (1998).

[3] For a discussion of the background of *Buchanan*, *see generally* Patricia Hagler Minter, *Race, Property, and Negotiated Space in the American South: A Reconsideration of* Buchanan v. Warley, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 345–69 (Sally E. Hadden & Patricia Hagler Minter eds., 2013); Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J. S. HIST. 179 (1968) (discussing segregation in the early twentieth century); Elizabeth A. Herbin-Triant, *Race and Class Friction in North Carolina Neighborhoods: How Campaigns for Residential Law Divided Middling and Elite Whites in Winston-Salem and North Carolina's Countryside, 1912-1915*, J. S. HIST. 531–72 (2017) (exploring residential law and class tensions in North Carolina).

[4] *Buchanan*, 245 U.S. at 79.

[5] DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 91 (2011) (maintaining that *Buchanan* "is forgotten, or over-looked, because it does not accord with the caricature of Lochner-era jurisprudence presented by most legal

ruling, couched in terms of property rights, does not readily comport with the standard civil rights narrative grounded on equal protection jurisprudence.[6] Consequently, *Buchanan* remains something of a constitutional orphan.

In any event, *Buchanan* had a considerable impact at the time. To illustrate, *Buchanan* halted the growing movement to adopt racial segregation laws in a number of cities.[7] It thus spared the United States from the problems arising from legally mandated residential apartheid. Leon A. Higginbotham, Jr. aptly noted, "*Buchanan* was of profound importance in applying a brake to decelerate what would have been run-away racism in the United States."[8]

However, rather than focusing on the decision as a fledgling step toward equal rights, I will explore the ramifications of *Buchanan* in understanding the role of property rights in the polity. Clearly, the *Buchanan* decision was grounded on the constitutionally protected right to acquire property. For example, Justice William R. Day, speaking for the Court, defined property in expansive terms: "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."[9] Justice Day insisted that the Fourteenth Amendment operated "to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."[10] In reaching his conclusion, Day affirmed a long-standing tenet of American constitutionalism – that property rights were not confined to protection of the status quo but encompassed the opportunity to acquire property.[11]

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historians and constitutional scholars.").

[6]*See* Richard A. Epstein, *Lest We Forget:* Buchanan v. Warley *and Constitutional Jurisprudence of the 'Progressive' Era,* 51 VAND. L. REV. 787, 789 (1998) ("Instructively, *Buchanan* was decided on grounds that had far more to do with the protection of property than with the guarantee of equal protection."); David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?* 126 YALE L.J. F. 287, 301 (2016) (pointing out that *Buchanan* "which focused on property and contact rights, was reinterpreted as an equal protection case."). For a decision reimagining *Buchanan*, *see* Buckler v. Roder, 56 F. Supp. 3d 1371, 1374 (N.D. Ga. 2014) (opining that "there was an obvious equal protection component to [the] ruling" in *Buchanan*).

[7]Herbin-Triant, *supra* note 3, at 533 (listing cities enacting residential segregation ordinances).

[8]A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 126 (1996).

[9]Buchanan v. Warley, 245 U.S. 60, 74 (1917).

[10]*Id.* at 79.

[11]*See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 24 (1956) (asserting that law in the nineteenth century did not simply favor the status quo, and famously concluding: "Dynamic rather

Two observations with respect to *Buchanan* are in order. First, Day's emphasis on the right to acquire property was not novel. As we shall see, the right to acquire property had a long pedigree. In fact, the Supreme Court of Georgia anticipated *Buchanan* in a 1915 decision when the court invalidated an Atlanta ordinance imposing residential segregation on due process grounds, reasoning that the effect of the ordinance "was to destroy the right of the individual to acquire, enjoy, and dispose of his property."[12]

Second, the outcome in *Buchanan* was not well received in all quarters. For instance, many law reviews were quite hostile. Influenced by the Progressive movement with its fondness for planning and land use controls, a number of reviews expressed concern that individual property rights should prevail over majoritarian wishes.[13] The spread of land use controls in the 1920s was encouraged by the Supreme Court decision in *Village of Euclid v. Ambler Realty Company* upholding comprehensive zoning,[14] which set the stage for a reconsideration of residential segregation.[15] In 1925, the Supreme Court of Louisiana purported to distinguish *Buchanan* when it upheld a New Orleans residential segregation ordinance. Revealingly, the court compared segregation to restrictions on business in residential districts, concluding that the ordinance "[was] only another kind of zoning . . . ."[16] A concurring judge went further, warning that if the doctrine in *Buchanan* was followed,

> then that case marks a long step backwards in the march of civilization; not so much because it interferes with the segregation of the races (which will take

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than static property, property in motion or at risk rather than property secure and at rest, engaged our principal interest.").

[12]Carey v. City of Atlanta, 84 S.E. 456, 460 (Ga. 1915). Two years later, however, the Court upheld a slightly revised statute applying prospectively over the objection that it still violated the right to acquire property. Harden v. City of Atlanta, 93 S.E. 401, 403 (Ga. 1917).

[13]James W. Ely, Jr., *Reflections on* Buchanan v. Warley, *Property Rights, and Race*, 51 VAND. L. REV. 953, 960 (1998).

[14]Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).

[15]*See* F.D.G. Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, 16 VA. L. REV. 689, 696–99 (1930) (discussing racial zoning, and questioning how *Buchanan* fit with then recent decisions affirming broad local discretion in land use regulation). *See also* Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege? The Pre-*Euclid *Debate over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 368–69 (1994) (pointing out that early zoning ordinances were driven by a desire of wealthy neighborhoods to protect property values by excluding minorities).

[16]Tyler v. Harmon (*Harmon I*), 104 So. 200, 207 (La. 1925).

> care of itself), but more especially because it will serve in future as a precedent against still *other* restrictions on the use of property, which in time, may become necessary in the public interest; and it ought therefore to be *overruled* before the rolling pebble becomes an avalanche.[17]

In its enthusiasm for land use controls, the Louisiana court gave no attention to the right to acquire property. The Supreme Court, of course, summarily reversed this decision.[18] As late as 1930, attorneys for Richmond argued that the Supreme Court's endorsement of comprehensive zoning called into question the continuing validity of *Buchanan.* Nonetheless, this contention was also flatly rejected.[19]

By strongly affirming the right to acquire property in the face of community sentiment, the Supreme Court in *Buchanan* spoke to a larger issue – who benefits from a principled property rights regime. Over the course of American history, the constitutional protection of property has sometimes been dismissed as a matter of concern only to the wealthy. Prominent Progressives lambasted the Supreme Court as a champion of the rich at the expense of workers.[20] For example, one scholar has asserted that by focusing on "the protection of property and economic liberty" the Supreme Court in the late nineteenth century "became a bulwark for the freedoms that mattered most to people at the top of the heap."[21] The outcome in *Buchanan* flatly contradicts this simplistic view. It warrants emphasis that the beneficiaries of *Buchanan* were middle-class blacks hoping to escape poor housing conditions and move into more desirable neighborhoods. The decision eliminated a legal barrier to achieving that goal. Consequently, *Buchanan* was not a victory for the wealthy but for those who aspired

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[17]*Id.* at 208 (St. Paul, J. concurring). *See also* Tyler v. Harmon (*Harmon II*), 107 So. 704 (1926) (adhering to prior decision).

[18]Harmon v. Tyler (*Harmon III*), 273 U.S. 668 (1927) (per curium).

[19]City of Richmond v. Deans, 37 F.2d 712, 713 (4th Cir. 1930), *aff'd* 281 U.S. 704 (1930).

[20]*See* Robert M. LaFollette, *Introduction* to GILBERT E. ROE, OUR JUDICIAL OLIGARCHY vii (1912) ("And because this tremendous [judicial] power has been so generally exercised on the side of the wealthy and the powerful few, the courts have become at last the strongest bulwark of special privilege.").

[21]KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 179 (1989). *See also* Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389 (2014) (arguing that since 1970 decisions by the Supreme Court have contributed to economic inequality).

to obtain property.[22] In fact, as discussed more fully below, a robust property-rights jurisprudence often operates to benefit outsiders or fledgling entrepreneurs. By the same token, economic regulations frequently benefit entrenched special interests. Notwithstanding a vast literature on property rights, scholars have given surprisingly little attention to the right to acquire property. The purpose of this article is to redress this neglect by exploring the historical background and contemporary significance of the constitutional right of acquisition.

EVOLUTION OF THE RIGHT TO ACQUIRE PROPERTY

In the Revolutionary Era the notion of the "pursuit of happiness" was closely linked with the right to obtain property.[23] Several early state constitutions clearly spelled out this association. For example, the Pennsylvania Constitution of 1776 proclaimed: "That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."[24] As one historian has explained, these early state constitutions manifested "a desire to guarantee not only freedom of expression and of religious exercise but also the freedom to acquire property."[25] In the same vein, James Madison in 1792 asserted that government should not deny to 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."[26] During the antebellum period many new states, including Arkansas, California, Illinois, Indiana, Maine, and Ohio, adopted constitutional language guaranteeing the right to acquire property. Today a majority of state constitutions contain explicit right-to-acquire provisions.[27]

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[22]The reasoning in *Buchanan* was not confined to land use issues. It protected aspiring barbers as well. In 1926 Atlanta enacted an ordinance prohibiting black barbers from serving white women and white children under the age of 14. Chaires v. City of Atlanta, 139 S.E. 559, 559 (Ga. 1927). In *Chaires*, the Supreme Court of Georgia invalidated this ordinance as it pertained to providing barber services for white children. Citing *Buchanan*, it concluded that the law denied the "right to carry on a lawful business" in violation of the Fourteenth Amendment. *Id.* at 563–66.

[23]WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (1980).

[24]PA. CONST. of 1776, art. I–II (1776).

[25]ADAMS, *supra* note 23, at 194.

[26]14 JAMES MADISON, *Property*, in THE PAPERS OF JAMES MADISON 266–68 (Charles F. Hobson and Robert A. Rutland eds., 1983).

[27]Peter J. Galie, *State Courts and Economic Rights*, 496 ANNALS OF THE AMERICAN

Before the Civil War, state courts occasionally addressed the right to acquire property. In 1840 the Supreme Court of Arkansas, invoking the express language in the state constitution, declared: "The right of citizens to acquire, possess, and protect property cannot be questioned . . . ."[28] The court added that "every individual may lawfully acquire and possess any species or description of property . . ."[29] and went on to invalidate a tax levied on the privilege of keeping billiard tables payable before the citizens possessed such tables. Viewing this levy as a restriction on the right to acquire property, the court warned that the legislature was not free to impose similar charges on the acquisition of other types of property.

Throughout the Nineteenth Century, prominent commentators endorsed the right to acquire as an attribute of property ownership. In his *Commentaries on American Law* James Kent observed: "The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property."[30] Kent added: "The sense of property is graciously implanted in the human breast, for the purpose of rousing us from sloth, and stimulating us to action; and so long as the right of acquisition is exercised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected."[31] In 1868, Thomas M. Cooley, in his landmark *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, strongly endorsed the right to acquire property. Cooley proclaimed: "The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of *liberty* in particulars of primary importance to his or their 'pursuit of happiness.'"[32]

Likewise, federal court decisions began to stress the constitutional status of the right to acquire property. For example, in *Corfield v. Coryell* (1823) Justice Bushrod Washington was called upon to determine what were the "Privileges and Immunities of Citizens in the several States" as guaranteed by Article IV, section 2 of the Constitution.[33] Defining privileges and immunities in terms of the rights of

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ACADEMY OF POLITICAL AND SOCIAL SCIENCE 76, 83 (1988).

[28]Stevens & Woods v. State, 2 Ark. 291, 298–99 (1840).

[29]*Id.* at 300.

[30]2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (1827).

[31]*Id.* at 257.

[32]THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 393 (1868, *reprint* 2002).

[33]U.S. CONST. art. IV, § 2, cl. 1. Article IV, Section 2 of the Constitution provides in

"the citizens of all free governments," Justice Washington concluded that such privileges included "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."[34] Notably, Justice Washington's enumeration of privileges was largely drawn from the declaration of rights in state constitutions of the Revolutionary Era. Justice Washington's reading of the privileges and immunities clause, however, has long been regarded as authoritative. Nonetheless, scholars have debated whether Justice Washington construed the clause to affirm certain substantive rights enjoyed by all citizens of free governments, or simply barred discrimination on the basis of state citizenship.

The right to acquire property received an added boost with the passage of the Civil Rights Act of 1866 (the "1866 Act"). Enacted in response to the black codes in southern states following the end of the Civil War, the 1866 Act declared that all persons "shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens."[35] Lawmakers saw the right to property as essential for former slaves to participate in American society.[36] As such, the Fourteenth Amendment was intended in part to eliminate any question about the constitutionality of the 1866 Act.[37] "No one who sat in Congress or in the state legislatures that dealt with the Fourteenth Amendment," one historian concluded, "doubted that section one was designed to put to rest any doubt about the power of the federal government to protect basic common law rights of property and contract."[38]

Adopting the Fourteenth Amendment in 1868 significantly altered the constitutional landscape. To illustrate, during the late Nineteenth Century and early Twentieth Century, the right to acquire property found shelter under this provision. In 1885, Justice Stephen J. Field, writing for the Supreme Court in *Barbier v. Connolly*, de-

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part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.*

[34]Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230).

[35]Civil Rights Act of 1866, ch. 11, § 1, 14 Stat. 27 (1866).

[36]HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 94 (1991) ("In 1866 Congress selected contracts and property as the civil rights worthy of protection because, within its classical world view of the world, the right to make contracts and the right to own property were the keys to economic success.").

[37]*See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 163 (1988).

[38]*Id.*

clared that the Fourteenth Amendment established "that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property."[39] However, recognition of a right to acquire property raised the question of how a person was to obtain such property. There must be some means of acquisition in order to make such a right meaningful. As a practical matter, the right to acquire found expression in two related doctrines which evolved as part of Fourteenth Amendment jurisprudence. The first was hostility to state-conferred monopoly, a sentiment that can be traced to the Revolutionary Era. As Field explained in his famous dissenting opinion in the *Slaughterhouse Cases* in 1873, "[a]ll monopolies in any known trade or manufacture" encroach upon "the liberty of citizens to acquire property and pursue happiness."[40] The second was acknowledgement of a right to follow lawful callings. In 1884, Justice Joseph P. Bradley emphasized that "[t]he right to follow any of the common occupations of life is an inalienable right" grounded on the pursuit of happiness."[41] Similar to Field, Bradley maintained that grants of monopoly abridged this right and deprived the parties of property and liberty without due process.[42]

Four years later the Supreme Court cautiously embraced a constitutional right to follow ordinary callings in *Powell v. Pennsylvania*.[43] Writing for the Court, Justice John Marshall Harlan observed:

> 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 guarantied [sic] by the [F]ourteenth [A]mendment. The court assents to this general proposition as embodying a sound principle of constitutional law.[44]

In *Allgeyer v. Louisiana* in 1897 Justice Rufus W. Peckham, writing for a unanimous Supreme Court, went a step further, linking the right

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[39]Barbier v. Connolly, 113 U.S. 27, 31 (1885).

[40]Slaughterhouse Cases, 83 U.S. 36, 101 (1873) (Field, J., dissenting).

[41]Butchers' Union Slaughterhouse and Livestock Co. v. Crescent City Livestock Landing and Slaughterhouse Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring).

[42]*Id.* at 763–64.

[43]Powell v. Pennsylvania, 127 U.S. 678, 684 (1888).

[44]*Id.* at 684.

to acquire and the right to pursue lawful vocations with the right to make contracts.[45] Justice Peckham explained that "[i]n the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto."[46] A year later, the Supreme Court reaffirmed this principle stating

> [a]s the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same [due process] provision."[47]

By the early Twentieth Century, the right to pursue ordinary trades seemed well established as a constitutional baseline. Invalidating a state law curtailing the employment of aliens in 1915, the Supreme Court in *Truax v. Raich* declared that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."[48]

State courts also played a pivotal role in fashioning a due process right to pursue ordinary avocations. In the leading case of *In re Jacobs*, decided in 1885, the New York Court of Appeals defined liberty as not only freedom from restraint but as encompassing the right of a person "to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."[49] Applying the foregoing principle, the court struck down a state law prohibiting the manufacture of cigars in tenement houses in New York City as a deprivation of liberty without due process of law.[50] The court found unpersuasive the public health

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[45]Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

[46]*Id.* at 591. *See* James W. Ely, Jr., *Rufus W. Peckham and Economic Liberty*, 62 VAND. L. REV. 591, 606–38 (2009), for a discussion of Peckham's commitment to economic freedom and property rights.

[47]Holden v. Hardy, 169 U.S. 366, 391 (1898).

[48]Traux v. Raich, 239 U.S. 33, 41 (1915).

[49]*In re* Jacobs, 98 N.Y. 98, 106 (1885). *See* James W. Ely, Jr, *"To Pursue any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 938–945 (2006), for an analysis of *Jacobs*. "The right to follow a calling would find increased, but never complete, judicial acceptance, and *Jacobs* would be widely cited in the late nineteenth century." *Id.* at 943.

[50]*In re Jacobs*, 98 N.Y. at 112–15.

rationale employed to justify the statute.[51] Three years later the same court reiterated that liberty included "the right of one to use his facilities in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."[52]

The Supreme Court of Illinois specifically fused the right to acquire property with the freedom to pursue a trade:

> The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident of the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitution as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and welfare. The state, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations; but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or hindrance from any one, all such callings or pursuits as are innocent in themselves, and not injurious to the public. These are fundamental rights of every person living under this government.[53]

After stressing the right to acquire property and follow callings, the court voided a municipal ordinance barring department stores from selling meat and food products as a deprivation of property and liberty without due process.[54]

Likewise, other state courts emphasized the right to acquire property as a constitutional norm. Pointing to the right-to-acquire language in the state constitution, the New Jersey Court of Errors and

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[51] *Id.*

[52] People v. Gillson, 17 N.E. 343, 345 (N.Y. 1888).

[53] City of Chicago v. Netcher, 55 N.E. 707, 708 (Ill. 1899).

[54] *Id.* at 108–114.

Appeals in 1906 dealt at length with this principle:

> The common law has long recognized as a part of the boasted liberty of the citizen the right of everyman to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow men, saving such as may result from the exercise of equal or superior rights on their part . . . This right is declared by our Constitution to be unalienable. The first section of the Bill of Rights sets forth that 'all men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining happiness.' As part of the right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services which amount to the purchase and sale of labor. It makes little difference whether the right that underlies contracts of the latter sort is called a personal right or a property right. It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community, which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property, once it is acquired, but left unprotected by the law in his efforts to acquire it.[55]

In the same year, the Supreme Court of California, relying on similar wording in the state constitution, struck down a statute making it a crime to sell theatre tickets at a higher price than that originally charged by the management. [56]

By the early twentieth century courts spoke less frequently of the right to acquire property.[57] The right to acquire had been, as a practi-

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[55]Brennan v. United Hatters of North America, Local No. 17, 65 A. 165, 170–71 (N.J. 1906).

[56]*Ex parte* Quarg, 84 P. 766, 766–67 (Cal. 1906).

[57]*See* Hall v. Geiger-Jones Company, 242 U.S. 539, 549 (1917) (McKenna, J.), for an

cal matter, folded into the right to pursue lawful callings, which was characterized as a liberty interest under the due process clause of the Fourteenth Amendment and its state counterparts.

LICENSING

Licensure was certainly not new in the late nineteenth century. Inns and taverns had been licensed and regulated in the colonial era.[58] Many states had also long licensed the business of peddling, a move likely designed to curtail competition with small-town merchants.[59] Still, the flow of legislation imposing license requirements on persons who wished to engage in certain trades and occupations spiked in the last decades of the nineteenth century, raising constitutional questions about the extent of freedom to pursue vocations.[60] As the Supreme Court of Washington observed in 1906:

> We cannot close our eyes to the fact that legislation of this kind is on the increase. Like begets like, and every legislative session brings forth some new act in the interest of some new trade or occupation. The doctor, the lawyer, the druggist, the dentist, the barber, the horseshoer, and the plumber have already received favorable consideration at the hands of our Legislature, and the end is not yet, for the nurse and the undertaker are knocking on the door. It will not do to say that any occupation which may remotely affect the public health is subject to this kind of legislation and control.[61]

The court expressed alarm that "it will be but a short time before a man cannot engage in honest toil to earn his daily bread without first purchasing a license or permit from some board or commission."[62]

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exception. The Court stated, "[w]e know that, in the concept of property, there are the rights of its acquisition, disposition, and enjoyment, – in a word, dominion over it." *Id.*

[58]Paton Yoder, *Tavern Regulation in Virginia: Rationale and Reality*, 87 VA. MAG. HIST. & BIO. 259, 269–72 (1979).

[59]HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860, 85–89 (1938). Farnam writes that, "[t]he main reason for the restrictive legislation was undoubtedly the influence of shopkeepers, who hoped to secure the entire trade for themselves." *Id.* at 87.

[60]Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 494–502 (1965).

[61]State *ex rel.* Richey v. Smith, 84 P. 851, 854 (Wash. 1906), *overruled in part by* City of Tacoma v. Fox, 290 P. 1010, 1012 (Wash. 1930).

[62]*Id.*

The Washington court highlighted a paradox. Even as federal and state courts were placing a seal of approval on the right to pursue callings, state legislators in the late nineteenth century enacted a host of laws governing admission into various occupations and raising entry barriers to competitors. Licensing was rarely imposed on an occupation against its wishes. On the contrary, it bears emphasis that such regulations were usually passed at the behest of organized groups rather than as the result of a popular clamor for licensing. "Occupational groups," Morton Keller aptly noted, "mounted considerable political pressure in their quest for control over entry and practice."[63] These so-called "friendly" laws were animated by several motives, including the desire for enhanced professional prestige and the elimination of "unfair" competition by limiting entry to particular trades. As Lawrence M. Friedman explained: "Occupational licensing is a technique for creating an occupational monopoly; all unlicensed practitioners are excluded both from the group and from the occupation."[64] Licensing laws were clearly in tension with the expressed judicial commitment to the right to follow common avocations and the preservation of competition.[65] Cooley highlighted this juxtaposition in 1878, observing that "a free state has no power to compel the taking out of a license as a condition precedent to the following of the ordinary pursuits of life."[66] He added: "Licenses may doubtless be required to be taken out by those employed in occupations the following of which is not a matter of right and those which are 'affected with a public interest' . . . But in the case of the ordinary and necessary avocations of the day, a license can cut no figure, and to require one to be taken, unless for the purpose of taxation, would be wholly inadmissible."[67] However, as subsequent developments demonstrated, Cooley's views did not carry the day.

Licensing was invariably defended as an exercise of the police power to protect the public health, safety and welfare.[68] Many licens-

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[63]MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 412 (1977).

[64]Friedman, *supra* note 60, at 504.

[65]KELLER, *supra* note 63, at 412 ("The licensing and certification of occupations posed in an acute form the tension between the desire to preserve a society of free competitors and the desire to secure protection from the rigors of a market economy.").

[66]Thomas M. Cooley, *Limits to State Control of Private Business*, 54 PRINCETON REV. 233, 266–67 (1878).

[67]*Id.*

[68]Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 11 (1976) (pointing out that "licensing has been eagerly sought—always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected

ing laws were challenged, but most of the laws passed constitutional muster. Courts wrestled with the determination of what were common occupations, and with whether the proffered health and safety justification was sufficiently compelling to trump the right to follow ordinary vocations. In 1904, Ernst Freund questioned "whether it is possible to discover fixed principles underlying the restrained trades, and thus establish a definite scope of constitutional liberty of pursuit of livelihood."[69] The answer proved elusive, and the range of common callings steadily contracted.

To be sure, some license requirements ran afoul of the constitutional right to pursue lawful avocations. For instance, several state courts invalidated laws requiring persons to pass an examination and pay a fee in order to obtain a license to practice horseshoeing. Finding no relationship between societal welfare and the license requirement, they reasoned that the law abridged the right to follow common callings.[70] Indeed, the Supreme Court of Illinois expressed concern about the potential reach of legislative power over employment opportunities: "If this act is valid, then the legislature of the state can regulate almost any employment of the citizen by the requirement of previous study, and previous examination, and the payment of a license fee, and the issuance of a license."[71] If courts treated horseshoeing as a prime example of a common calling, they had more difficulty with the licensing of plumbers. A few courts treated laws requiring plumbing licenses as an impairment of an ordinary vocation,[72] but the majority of courts upheld such legislation.[73] The majority reasoned that inadequate sewage systems were a health hazard, and therefore, stressed the need for skilled workers.[74]

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against competition from newcomers.").

[69]ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 533 (1904).

[70]*See, e.g.*, People v. Beattie, 89 N.Y.S. 193, 195–96 (N.Y. App. Div. 1904); *In re* Aubry, 78 P. 900, 902 (Wash. 1904).

[71]Bessette v. People, 62 N.E. 215, 219 (Ill. 1901).

[72]*See, e.g.*, Richey v. Smith, 84 P. 851, 854 (Wash. 1906); Replogue v. City of Little Rock, 267 S.W. 353, 358 (Ark. 1925).

[73]People *ex rel.* Nechamcus v. Warden, 39 N.E. 686, 689 (N.Y. 1895) (upholding requirement that master plumbers must pass an examination and receive certificate of competence); Singer v. State, 19 A. 1044, 1045 (Md. 1890) (observing that "in a large city like Baltimore, with its extensive system of drainage and sewerage, the public health depends upon the proper and efficient manner in which the plumbing work is executed"); Douglas v. People *ex rel.* Ruddy, 80 N.E. 341, 344 (Ill. 1907). *See* Friedman, *supra* note 60, at 520–23.

[74]David E. Bernstein has pointed out that plumber licensing statutes enacted for public health concerns could serve as entry barriers, and lamented that "for the most part courts refused to give more than cursory scrutiny to the motives behind plumbers' licensing

Even in situations where occupational licensing was deemed appropriate, courts considered whether the licensing requirements were so onerous and expensive as to effectively hamper entry by newcomers to certain lines of work or prevent continued practice by some existing participants.[75] "The restrictive consequence of licensure," Walter Gellhorn, reminds us, "is achieved in large part by making entry into the regulated occupation expensive in time or money or both."[76] Statutes on embalming, requiring that undertakers be licensed embalmers, illustrate the problem. In 1910, the New York Court of Appeals agreed that, in view of health concerns in handling bodies, states could require undertakers to obtain a license.[77] The court found, however, that some of the requirements to secure a license, such as the condition that an undertaker must be also licensed as an embalmer, were arbitrary and unnecessary to public health.[78] Thus, the measure was invalidated as an interference with the right to engage in a lawful business.[79] In addition, the court also stressed the monopolistic feature of these burdensome requirements. "We cannot refrain from the thought," it proclaimed, "that the act in question was conceived and promulgated in the interests of those the engaged in the undertaking business and that the relation which the business bears to the general health, morals, and welfare of the state had much less influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions."[80]

The grant of a license invariably entailed payment of a fee to defray the expense of ascertaining the qualifications of the proposed licensee. Courts had no difficulty in upholding the requirement of a reasonable fee. On occasion, however, courts looked skeptically at high license fees which were transparently designed to prohibit, not regulate, the affected business.[81] A case in point involved emigrant agent laws enacted in a number of southern states in the late nine-

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statutes or the statutes' implementation." DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 31–36 (2001).

[75]See, e.g., *Singer*, 19 A. at 1045.

[76]Gellhorn, *supra* note 68, at 12.

[77]People v. Ringe, 90 N.E. 451, 453 (N.Y. 1910).

[78]*Id.* at 454.

[79]*Id.*

[80]*Id.* at 454. *See also* Wyeth v. Thomas, 86 N.E. 925, 928 (Mass. 1909) (invalidating administrative regulation stating that one could not engage in business of undertaking without being licensed as an embalmer, as a violation of the right to pursue vocations).

[81]*See, e.g.,* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 598 (2d ed. 1886).

teenth century. Agents, often representing northern business interests, began to recruit impoverished black agricultural workers in the rural south for employment outside the region. Such efforts threatened the ability of white planters to control local labor markets and hold down labor costs. In response, some southern states enacted emigrant agent laws that required agents to pay huge fees to obtain a license, but contained no regulation as to the character of the applicant or manner of the business.[82] In 1893, the Supreme Court of North Carolina struck down a statute setting a license fee of $1000, a huge sum at the time, for an emigrant license.[83] In doing so, the court concluded that the occupation of emigrant agent was not so harmful to the public that it could be outlawed altogether, and that the fee amounted to an indirect method of prohibition.[84] The "very large license fee," the court held, violated the right to pursue lawful occupations.[85]

On the whole, however, courts readily accepted the spread of occupational licensing, despite the inevitable impact on employment opportunities. For example, courts had no difficulty sustaining laws that imposed license requirements on highly skilled and technical professionals, such as physicians,[86] dentists, [87]and veterinarians,[88] where the risk of harm to the public was high. The status of other occupations, including barbers,[89] and blacksmiths, was less clear and open to

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[82]BERNSTEIN, *supra* note 74, at 10–27 (analyzing emigrant agent laws).

[83]State v. Moore, 18 S.E. 342, 434, 347 (N.C. 1893).

[84]*Id.* at 345.

[85]*Id.* at 346.

[86]Dent v. West Virginia, 129 U.S. 114, 121–23, 128 (1889) (Field, J.) (affirming the right to follow ordinary callings, but finding that state could set qualifications for physicians).

[87]Wilkins v. State, 16 N.E. 192, 193 (Ind. 1888); State *ex rel.* Smith v. Bd. of Dental Examiners, 72 P. 110, 111–12 (Wash. 1903).

[88]*Ex parte* Barnes, 119 N.W. 662, 663 (Neb. 1909) (recognizing authority of state to prohibit practice of veterinary medicine without a license).

[89]Courts generally upheld the licensing of barbers. *See e.g.,* State v. Zeno, 81 N.W. 748, 749–50 (Minn. 1900); State v. Walker, 92 P. 775, 776 (Wash. 1907). *See also* MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933 (1990) Keller observed that:

> [E]xtensive licensing of barbers came early and spread widely, in part because of the belief the haircutting and shaving were potential hazards to public health, in part because licensing served as a form of unionization, and in part because it was a useful way to drive black barbers out of the trade.

Id. at 92; David Fellman, *A Case Study in Administrative Law – The Regulation of Barbers*, 26 WASH. U. L. REV. 213, 241 (Jan. 1941) (noting the widespread adoption of licensing laws regulating barbering, but declaring that "one may question the legitimacy of those features of the existing barber laws which are designed to restrict unduly the oppor-

debate. But in the end, these callings also were not deemed common vocations open to all. Licenses continued to expand steadily in the first decades of the twentieth century. For example, in 1917, California became the first state to require real estate brokers to be licensed.[90] In short, by the 1920s, the belief in free entry into occupations was of diminishing efficacy and received declining judicial support. The Supreme Court occasionally endorsed the right to follow a calling, but usually in dicta that did not have bearing on the case at bar.[91]

ANTI-COMPETITIVE REGULATIONS

Licensing was not the only method of restricting the right of individuals to pursue callings. Even more dramatic were regulations calculated to protect existing economic interests from competition. A leading example was the sustained legislative assault on the production of oleomargarine. Starting in the 1870's, the manufacture of inexpensive and spoilage-resistant margarine posed a dangerous threat to the dairy industry. In response, numerous state legislatures, acting at the behest of dairy farmers, enacted various laws designed to cripple the sale of margarine as a competitor for butter.[92] For instance, a New York law banned the production and sale of "any article designed to take the place of butter or cheese produced from pure unadulterated milk."[93] The New York Court of Appeals, in the 1885 case of *People v. Marx*, would not have it. Striking down the law, the court stressed that, "it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit."[94] The court asked: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food

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tunities of entering the trade, and to control price and service competition within it"). Licensing laws were also designed to limit the practice of black barbers to black customers. BERNSTEIN, *supra* note 74, at 36–41.

[90]KELLER, *supra* note 89, at 93 (noting rapid spread of licensing of real estate brokers).

[91]*See e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (McReynolds, J.) (declaring that liberty denotes the right of an individual "to engage in any of the common occupations of life").

[92]Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 88–118 (Jan. 1989) (providing an insightful treatment of the dairy lobby's campaign against oleomargarine).

[93]People v. Marx, 2 N.E. 29, 29 (N.Y. 1885).

[94]*Id.* at 33.

for the human race?" The court concluded by decrying "the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition."[95]

The dairy industry lost the initial battle, but ultimately won the war. As discussed above, the Supreme Court acknowledged the constitutional right to pursue ordinary callings and acquire property in *Powell v. Pennsylvania*. Nonetheless, the Court sustained a Pennsylvania law prohibiting the manufacture and sale of margarine as an exercise of the police power. The Court deferred to the legislature's declaration that margarine posed such a serious threat to public health and such a risk of fraud as to justify suppression of the business.[96] In so doing, the Court accepted at face value legislative findings to this effect. Under the Court's reasoning, it would appear that the right to pursue callings was largely toothless. Field dissented alone, maintaining that the police power did not extend to outlawing the manufacture of a healthy and nutritious article of food. Charging that under the majority's analysis a state legislature could forbid the sale of any type of food whenever it wished, he warned: "The doctrine asserted is nothing less than the competency of the legislature to prescribe . . . what shall be manufactured and sold within its limits, and what shall not be thus manufactured and sold."[97] Quoting at length from *Marx* concerning the right to follow lawful vocations, Field found the health rationale a pretense and rejected the notion of unbridled legislative police power over food items as unacceptable.

Over time the rationale for anti-margarine laws shifted from alleged health concerns to the equally dubious prevention of marketplace deception. New Jersey enacted a law barring the sale of margarine colored with annotto, a coloring agent that imparted a yellow color. The object of this law, according to the Supreme Court of New Jersey, "was to secure to dairymen, and to the public generally, a fuller and fairer enjoyment of their property, by excluding from the market a commodity prepared with the view of deceiving those purchasing it . . . ."[98] Despite its obvious protectionist character and the absence of any evidence that the product was unwholesome, the court upheld the validity of the law. As Keller correctly noted: "The courts generally sustained the antimargarine laws."[99]

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[95]*Id.* at 34.

[96]Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).

[97]*Id.* at 689–90.

[98]State v. Newton, 14 A. 604, 606 (N.J. 1888).

[99]KELLER, *supra* note 63, at 413.

Anti-competitive measures also extended to labor contracts. In the early Twentieth Century, a number of southern states enacted laws that imposed criminal sanctions on farm laborers who left their employment during the term of a contract. The details of such legislation varied, but the obvious purpose was to curtail the mobility of tenant farmers, largely black, and hamper their ability to change jobs or find other employers. Critics charged that this legislation amounted to a type of peonage, requiring personal service in payment of a debt.[100] The reactions of southern state courts were mixed, but the Supreme Court of Alabama in the 1904 case of *Toney v. State*, declared such a state law unconstitutional as an infringement of the right to make employment contracts.[101] A decade later the Supreme Court of Mississippi followed suit.[102]

Licensing as a form of regulation was also employed to stifle competition. The ice industry was a case in point. The emergence of home refrigeration in the 1920s gravely harmed the business of making and selling ice, and the industry entered a period of decline. In a manner reminiscent of the anti-margarine laws, legislators in a number of states responded by enacting laws to safeguard the interests of existing ice companies by imposing market entry restrictions.[103] Arkansas, for example, passed a law empowering a commission to both fix the price of ice and to deny a license to any firm "where the facilities for the manufacture, sale, and distribution of ice already existing are sufficient to meet the public needs therein."[104] As the Supreme Court of Arkansas in 1929 correctly perceived, "the virtual effect of the provisions in the statute adverted to is the creation of monopolies . . . ."[105] Emphasizing that provisions of the state constitution expressly affirmed the right to acquire property and barred monopoly grants, the court pointed out that the manufacture and sale of ice was not injurious to the public health and safety.[106] Accordingly, the court

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[100] LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 116 (2002); William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 42–47 (1976).

[101] Toney v. State, 37 So. 332, 334 (Ala. 1904). An amended Alabama law was struck down as a violation of the Thirteenth Amendment and the federal peonage law. Bailey v. Alabama, 219 U.S. 219, 245 (1911) (Hughes, C.J.).

[102] State v. Armstead, 60 So. 778, 781 (Miss. 1913).

[103] MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 195 (2012) ("[W]ell-connected producers found themselves threatened by competition and by an invention called the refrigerator, and so helped themselves to market entry and output restrictions, in conspiracy against consumers and potential competitors.").

[104] Cap. F. Bourland Ice Co. v. Franklin Util. Co., 22 S.W.2d 993, 994 (Ark. 1929).

[105] *Id.*

[106] *Id.* at 995.

determined that the ice business was a common calling in which any person might engage without having to obtain a state-granted privilege.[107] Ultimately, the court concluded that "it is apparent that the right to limit the number engaged in the manufacture and sale of ice at any given point is for the benefit of others engaged in like business and the benefit to the public would be remote and problematical."[108] This forgotten Arkansas decision anticipated the famous Supreme Court opinion in *New State Ice Company v. Liebmann*.[109]

At issue in *New State Ice* was a 1925 Oklahoma statute declaring the manufacture and sale of ice to be a business affected with a public interest and barring entry into the ice business without first obtaining a certificate from a state agency.[110] The act further provided that no license should be issued unless the applicant could prove at a hearing the necessity for such a facility.[111] The application was to be denied where the existing licensed ice companies "are sufficient to meet the public needs. . . ."[112] It was unclear how a new firm could prove that the current service was inadequate. Evidently, lawmakers gave no consideration to the prospect that a new firm might benefit consumers with a better product or improved service. The New State Ice Company sought to enjoin Liebmann from selling ice without a license in competition with itself.[113] Liebmann argued that the right to engage in a common calling was guaranteed by the due process clause, and that the act deprived him of liberty and property in violation of the Fourteenth Amendment.[114]

Writing for the majority of the Supreme Court, Justice George Sutherland vigorously upheld Liebmann's right to follow ordinary occupations.[115] Finding that the manufacture of ice was an ordinary business not charged with "a public use," Sutherland cut to the heart of the matter.[116] He pointed out that "the practical tendency of the restriction . . . is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public."[117] Sutherland warned:

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[107] *Id.*

[108] *Id.* at 997.

[109] New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

[110] *Id.* at 271.

[111] *Id.* at 271–72.

[112] *Id.* at 272.

[113] *Id.* at 271.

[114] *Id.* at 281 (Brandeis, J. dissenting).

[115] *New State Ice Co.*, 285 U.S. at 279–80.

[116] *Id.* at 277.

[117] *Id.* at 278 ("Plainly, a regulation which has the effect of denying or unreasonably cur-

> 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.[118]

Sutherland's opinion exuded the spirit of enterprise and harked back to the long tradition of pursuing lawful callings.[119] In marked contrast, the famous dissenting opinion by Justice Louis D. Brandeis moved squarely in the opposite direction.[120] Brandeis repeatedly lambasted economic competition as "destructive" and "ruinous," and endorsed a scheme of state-sponsored certificates to control entry into particular business fields as the legislature dictated.[121] Taking a broad view of the state police power, he was receptive to a new age of economic planning by government and assigned great weight to assertions of state authority put forth in the name of public welfare.[122] He gave correspondingly less weight to claims of individual rights.[123] Michael S. Greve tellingly characterized the Brandeis dissent as "let's-hear-it-for-monopoly." [124]

Even this brief sketch makes it plain that a jurisprudence grounded on the right to acquire property and to pursue lawful callings was

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tailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment.").

[118] *Id.* at 279.

[119] MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S 98 (2001) ("Sutherland's remarks echo the standard economic criticisms of occupational licensing schemes and other restrictions on entry into a trade, business, profession, or occupation."). For a discussion of Justice Sutherland's opinion in *New State Ice*, *see* HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL LAW 53–61 (1994).

[120] PHILLIPS, *supra* note 119, at 98.

[121] *New State Ice Co.*, 285 U.S. at 292, 299 (Brandies, J., dissenting).

[122] PHILLIPS, *supra* note 119, at 99–105 (analyzing the Brandeis dissent and concluding that under his approach "even the most irrational assertions of government power could be justified as experiments").

[123] *See New State Ice Co.*, 285 U.S. at 304–05 (Brandeis, J., dissenting).

[124] GREVE, *supra* note 103, at 232. Brandeis left no doubt about his receptivity to monopoly grants that would curtail the right to enter callings. In *New State Ice* Brandeis commented, "[i]t is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design." *New State Ice Co.*, 285 U.S. at 304 (Brandeis, J., dissenting).

hardly calculated to safeguard the economic status quo. Instead, it protected the ability of the weak and the fledgling competitor to pursue economic opportunity notwithstanding opposition from legislatively favored groups. Justice Field, a strong proponent of the right to pursue callings, was convinced that his approach was calculated to assist the disadvantaged. "I am on the other side," he explained to a friend in 1884, "and would give the under fellow a show in this life. It is a shame to put him off to the next world."[125] In 1913, the Supreme Court of Mississippi, striking down a law imposing criminal penalties on sharecroppers who left their employment while under contract, pointedly observed: "The citizens who would be liable to prosecution under this statute belong to the class of the humble and poor. Because they are among the weak of our people, it is no less important that they be protected in their rights and liberties."[126] After reviewing decisions striking down legislation creating entry barriers and licensing restrictions, Herbert Hovenkamp concluded: "These decisions simply cannot be characterized as a judicial decision to side with business against labor, immigrants, and the poor. On the contrary, they permitted such groups increased entry in the face of legislation design to protect established firms from competition."[127] The simplistic narrative, fashioned by the Progressives, that respect for property rights only benefited the wealthy or business interests, is contradicted by the historical record.

NEW DEAL JURISPRUDENCE

For better or worse, the Brandeis dissent in *New State Ice* pointed to the future. The political triumph of the New Deal in the 1930s profoundly altered the prevailing understanding of constitutional law. After 1937, the Supreme Court largely abandoned meaningful scrutiny of economic legislation under the due process clause of the Fourteenth Amendment. Deference to the economic judgment of legislators became the new orthodoxy. In a striking departure from the property-centered vision of the framers, who believed that property rights and individual liberty were closely linked, property rights were downgraded to a secondary place in the hierarchy of constitutional

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[125] Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AMER. HIST. 970, 979 n.54 (1975) (quoting Field to Mathew Deady, October 29, 1884, Field Papers (Oregon Historical Society)).

[126] State v. Armstead, 60 So. 778, 781 (Miss. 1913).

[127] HOVENKAMP, *supra* note 36, at 179. *See also* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J. L. & PUB. POL'Y 209, 255 (2016) ("[T]he poor were the principal beneficiaries of decisions that held entry restrictions invalid.").

values.[128] This judicially-created double standard of review was articulated in *United States v Carolene Products Co.*,[129] yet another case arising out of the dairy lobby's long and sorry campaign against competing milk products.[130] At issue was the validity of a congressional measure prohibiting the shipment in interstate commerce of skimmed milk compounded with any product other than milk fat.[131] Writing for a plurality of the Supreme Court, Justice Harlan Fiske Stone upheld the statute.[132] Harlan proclaimed:

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[133]

However, in footnote 4, Stone called for more exacting judicial scrutiny when "fundamental" political or civil rights were at issue.[134] Nothing in the text of the Constitution or pre-New Deal constitutional history indicates that economic rights were to receive less protection under the due process norm than other individual rights.[135] Nonethe-

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[128] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 139–41(3rd ed. 2008).

[129] United States v. Carolene Prod.'s Co., 304 U.S. 144 (1938) (plurality opinion).

[130] *Id.* at 145–46.

[131] *Id.*

[132] *Id.* at 154.

[133] *Id.* at 152.

[134] *Id.* at n.4; *see* KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 346–47 (2d ed. 2009) The authors conclude:

> Stone indicated that in the future the Court was going to give special attention to noneconomic freedom, so much so that it was willing to impose a double standard of review. On the matter of state economic policy, the Court would defer to the legislature; but on issues involving civil liberties and civil rights, Stone announced that the justices would apply special scrutiny to legislative actions and give a preferred position to liberties and rights.

Id. at 346–47; G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 160–63 (2000) (examining *Carolene Products* and the rise of bifurcated judicial review in constitutional cases).

[135] LEARNED HAND, THE BILL OF RIGHTS 50–51 (1958). Justice Hand writes:

less, the Supreme Court has not recognized property as a "fundamental" right requiring "strict scrutiny" review.[136] This constitutional dichotomy dominated the legal culture for decades and the federal courts gave scant attention to property rights claims.[137] If the rights of property owners are downgraded and largely ignored, it is hardly a surprise that the rights to acquire property or pursue lawful callings experienced a similar fate. In federal and many state courts, economic legislation was now reviewed and rubberstamped under a toothless "rational basis" standard. This supposed test is something of a legal fiction. Rarely has legislation ever been invalidated under this supine test. Hence, the characterization of the right at issue is almost always outcome determinative.

The right to pursue a calling reached a nadir in the 1955 case of *Williamson v. Lee Optical.*[138] At issue was an Oklahoma law that prevented an optician from fitting or duplicating eyeglass lenses into new frames without a prescription.[139] On its face, the measure appeared to be vintage special interest legislation that burdened con-

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> I cannot help thinking that it would seem a strange anomaly to those who penned the words in the Fifth to learn that they constituted severer restrictions as to Liberty than Property. . . . I can see no more persuasive reason for supposing that a legislature is *a priori* less qualified to choose between 'personal' than between economic values; and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second.

Id. at 50–51. *See also* Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003-2004 CATO SUP. CT. REV. 9, 19 ("Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding.").

[136] See PHILLIPS, *supra* note 119, at 185–92 (analyzing emergence of double standard of judicial review and contending that economic liberties might well be deemed "fundamental").

[137] The challenge in *Carolene Products* was based on the due process clause of the Fifth Amendment. It is important to recognize that the Supreme Court adopted the same highly deferential approach with respect to claims arising under other property-protective provisions of the Constitution. In the New Deal era the once-potent contract clause was robbed of much vitality by allowing legislatures to impair contracts if thought necessary for a public purpose. JAMES W. ELY, JR, THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 220–34 (2016). Similarly, the Supreme Court has given limited protection to property owners under the takings clause of the Fifth Amendment. The regulatory doctrine has been narrowly construed. *See, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933 (2017). Moreover, the "public use" limitation on the exercise of eminent domain, at least at the federal level, has been drained of any meaning, allowing lawmakers broad latitude to take private property for virtually any purpose. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); Berman v. Parker, 348 U.S. 26 (1954).

[138] Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (Douglas, J.).

[139] *Id.* at 485–86.

sumers and arbitrarily hampered an optician's business to protect ophthalmologists and optometrists from competition in fitting glasses.[140] Yet the Supreme Court brushed aside the argument that the law arbitrarily interfered with the optician's right to do business, and instead, hypothesized various rationales that might have justified the statute as a public health measure.[141] The Court did not require the state to produce any evidence that this was, in fact, the legislature's motive.[142] Judicial support for the right to follow common callings would appear to have reached the end of the trail in the federal courts. Many state courts followed suit.

In this permissive climate, occupational licensing and entry barriers proliferated. The advance of technology created new occupations deemed appropriate for regulation by license, such as dry cleaning, as well as radio and television repair services.[143] After World War II, states increasingly asserted their authority over an expanding range of occupations. For example, in some states, licenses were required to be a cosmetologist, a florist, a fisher, an interior designer, a horse massager, and a shampoo assistant.[144] Commentators expressed

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[140] *Id.* at 486–87.

[141] *Id.* at 487–88.

[142] For a critical analysis of *Lee Optical*, *see* Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History,* 49 ARIZ. ST. L. J. 355, 376–77 (2017) ("*Lee Optical* thus established the farce that is the modern federal rational basis standard for economic liberty. The *Lee Optical* Court postulated its own reasons to uphold the challenged law and refused to subject those assumptions to any scrutiny."). Randy E. Barnett has written that:

> The modern rational basis approach adopted by the Warren Court in Lee Optical represents a judicial abdication of its function to police the Constitution's limits on legislative power. It accomplished this by combining its formalist irrebuttable presumption of constitutionality with a judicially-invented distinction between economic and personal liberties found nowhere in the Constitution.

Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 860 (2012). *See also* St. Joseph Abbey v. Castille, 712 F.3d 215, 221 (5th Cir. 2013), *cert. denied,* 134 S. Ct. 423 (2013) ("Justice Douglas's opinion in *Williamson v. Lee Optical* is generally seen as the zenith of this judicial deference to state economic regulation . . . , including its willingness to accept post hoc hypotheses for economic regulation.").

[143] People v. Murphy, 110 N.W.2d 805 (Mich. 1961) (upholding municipal ordinance licensing television repair services); McLellan v. Kan. City, 379 S.W.2d 500 (Mo. 1964) (rejecting due process challenge to law requiring license to engage in business of providing television and radio services, finding it to be a valid exercise of police power).

[144] Larkin, *supra* note 127, at 216–18 (2016) (noting "[o]ccupational licensing requirements are widespread throughout our economy," and also providing a list of numerous occupations subject to licensing, and noting that many regulations bear no credible rela-

alarm at the spread of licensing, warning such restrictions hurt persons of modest means and were of questionable value in protecting the public. "Occupational regulation," one critic charged, "has served to limit consumer choice, raise consumer costs, increase practitioner income, limit practitioner mobility, deprive the poor of adequate services, and restrict job opportunities for minorities – all without a demonstrated improvement in quality or safety of the licensed activities."[145] Because states have different requirements for particular occupational licenses, the burden of licensure regimes falls especially hard on persons who frequently move from state to state, such as military spouses.

TWILIGHT FOR JURISPRUDENCE OF ECONOMIC LIBERTY

Notwithstanding the general acceptance of licensing, judicial support for the right to pursue callings never entirely disappeared from the state courts. Some courts declined to blindly defer to the professed legislative rationale for regulatory measures, and thus, asserted the authority to examine the reasonableness of the legislative judgment. For example, in 1938, the Supreme Court of Wisconsin stressed that the police power could not be exercised to prevent persons from pursuing lawful employment.[146] A year later the Supreme Court of Tennessee declared that the Constitution "guarantees to the individual personal liberty, the right to acquire, hold and dispose of property."[147] It voided a state law fixing the minimum prices for barber services as a violation of the right to engage in a common occupation.[148]

Similarly, between 1933 and 1955, several state courts drew the

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tionship to public health and safety).

[145] S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 1 (1987). *See also* Larkin, *supra* note 127, at 235–36 (observing that occupational licensing requirements "limit the number of service providers, thereby allowing the members of a given trade to avoid competition and raise prices, without supplying the corresponding service quality improvement promised to consumers."); Gellhorn, *supra* note 68, at 25 ("Only the credulous can conclude that licensure is in the main intended to protect the public rather than those who have been licensed or, perhaps in some instances, those who do the licensing."); Joseph Sanderson, *Don't Bury the Competition: The Growth of Occupational Licensing and a Toolbox for Reform*, 31 YALE J. ON REG. 455, 456 ("Widely regarded as increasing the prices consumers pay and excluding the economically disadvantaged from well-paid jobs and condemned by progressive and libertarian commentators alike, these laws nonetheless not only remain on the books, but continue to proliferate at an alarming rate.").

[146] State v. Withrow, 280 N.W. 364 (Wis. 1938) (invalidating regulation barring use of grade stallions for breeding purposes).

[147] State v. Greeson, 124 S.W.2d 253, 256 (Tenn. 1939).

[148] *Id.* at 191.

line at legislation that required a license for persons to engage in commercial photography. In the leading case of *State v. Ballance*, in 1949, the Supreme Court of North Carolina voided a statute prohibiting the practice of photography for compensation unless the photographer passed an examination by a board composed of professional photographers and paid an examination fee.[149] Strongly affirming that constitutional guarantees of liberty encompass the right to pursue vocations, the court insisted the legislature could not unreasonably curtail this right.[150] It found no relationship between commercial photography and public health, safety, and morals.[151] Moreover, the court failed to perceive any unique skill that justified licensing photographers as distinct from a variety of other occupations.[152] The court strikingly added that limiting the practice of photography "runs counter to the economic philosophy generally accepted in this country that ordinarily the public is best served by the free competition of free men in a free market."[153] In this regard, the court noted that the Constitution of North Carolina declared: "Monopolies are contrary to the genius of a free State and ought not to be allowed."[154] Reaching the same conclusion, the Supreme Court of Montana also emphasized the anti-monopoly theme. It stated that a commercial photography license theme "is not in the interests of the general welfare but is solely for the benefit of those in the legislative authorized monopoly."[155]

Along the same line, a few state courts invalidated laws requiring that, in order to engage in the business of watch repairing, a person must first pass an examination and obtain a license from a board. Courts noted the statutes tended toward creating a monopoly, and, in the words of the Supreme Court of Oklahoma, gave the licensing board authority "which might deny some citizens their inherent right to earn their livelihood in a private field of work, thus depriving them of a valuable property right without due process of law."[156]

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[149] State v. Ballance, 51 S.E.2d 731 (N.C. 1949), *overruling* State v. Lawrence, 197 S.E. 586 (N.C. 1938), *cert. denied*, 305 U.S. 638 (1938).

[150] *Id.* at 770.

[151] *Id.* at 769–71.

[152] *Id.* at 771.

[153] *Id.* For a positive assessment of *Ballance*, see Dellinger, *supra* note 135, at 14–16.

[154] *Ballance*, 51 S.E.2d at 772.

[155] State v. Gleason, 277 P.2d 530, 533 (Mont. 1954).

[156] State *ex rel.* Whetsel v. Wood, 248 P.2d 612, 615 (Okla. 1952). *See also* Livesay v. Tenn. Bd. of Examiners in Watchmaking, 322 S.W.2d 209 (Tenn. 1959) (invalidating statute requiring licensing of persons engaged in business of repairing watches as denying right to enter private field of work). *But see* Watchmaking Examining Bd. v. Husar, 182 N.W.2d 257 (Wis. 1971) (upholding license scheme on grounds that legislature sought to protect public from incompetence).

Occasionally, anti-competitive measures ran afoul of constitutional limitations. As noted above, regulations governing the sale of milk products produced substantial litigation. Several state courts invalidated local laws forbidding the sale of milk in a community unless the milk was processed in a local plant. In finding no relationship between such a law and the purported objective of public health and safety, a New York appellate court pointedly observed: "The inference is inescapable that the purpose of such an ordinance, in modern times, is not to protect the public health but to set up a barrier against competition from sources outside the municipality."[157] The court ruled that the law was arbitrary and unreasonable, and accordingly, remanded the case for the lower court to consider whether the necessary municipal permits should be issued.[158] Finding a similar ordinance unconstitutional, the Supreme Court of Georgia lectured:

> human dignity and individual freedom demand that one engaged in a lawful business injurious to no one must not be arbitrarily prevented from the legitimate prosecution of his business by city ordinances which set up trade barriers solely for the purpose of protecting a resident against proper competition. If free enterprise is to mean more than mere words, it must not become the victim of arbitrary and discriminatory legislation.[159]

Other regulations sought to bar certain dairy products from the market. At issue in *Defiance Milk Products Company v. Du Mond*, was a New York law prohibiting the sale of evaporated skimmed milk unless it was in a container of no less than 10 pounds.[160] There was no dispute the milk was a wholesome product.[161] Thus, the state defended the statute on the unlikely grounds that there was a danger of confusion and deception to the public in the sale of evaporated skimmed milk in small cans.[162] A divided New York Court of Appeals was not convinced.[163] The court held that the law was so arbitrary and unreasonable as to violate due process.[164] The majority

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[157] Tenny v. Sainsbury, 184 N.Y.S.2d 185, 191 (4th Dept. 1959).
[158] *Id.* at 191–92.
[159] Moultrie Milk Shed v. City of Cairo, 57 S.E.2d 199, 202 (Ga. 1950).
[160] Defiance Milk Products Company v. Du Mond, 132 N.E.2d 829, 830 (N.Y. 1956).
[161] *Id.*
[162] *Id.* at 831.
[163] *Id.*
[164] *Id.* at 830.

ruled that the minimum capacity specified was too large for retail sales, and the measure effectively prevented sales for household use.[165] Further, the majority emphasized that the property rights of individuals included the right to sell non-harmful products.[166] In an especially revealing dissenting opinion, three judges stressed the broad scope of the police power, and urged judicial deference to legislative determinations pursuant to the "rational basis" test.[167] These dissenting judges maintained that the legislature might have perceived there was a danger of deception or confusion to the public.[168]

However, these handful of decisions vindicating economic freedom were swimming against the tide. The dissenting opinion in *Defiance Milk* proved a better guide to the future. As we have seen, post-New Deal jurisprudence dictated an expansive reading of the police power and near-complete deference to legislative judgement in economic matters. It held that legislation was presumed constitutional, and therefore, insisted that the breadth of the police power was a matter for legislative, not judicial, decision. Indeed, the police power increasingly functioned as a sort of talisman that could trump the constitutional guarantees of property and contract. Licensure and entry barriers flourished. Conversely, judicial affirmation of the right to acquire property and to follow ordinary callings withered. Nor did most courts evidence any sustained concern about the obvious monopolistic features of such anti-competitive regimes.

AN UNCERTAIN RENAISSANCE

Despite decades of general neglect, the right to pursue callings could not be easily banished from constitutional law. There are signs that in recent years both federal and state courts have become more concerned with securing the right to engage in a vocation or follow a business opportunity without arbitrary restraints. During the 1980s, the Fifth Circuit Court of Appeals insisted that the opportunity to pursue an occupation was a constitutionally protected liberty interest.[169] In 1999, the Supreme Court extended a tepid recognition of this principle.[170] "In a line of earlier cases," it observed, "this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose

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[165] *Id.*

[166] *Defiance*, 132 N.E.2d at 830.

[167] *Id.* at 832–36.

[168] *Id.*

[169] Cowan v. Corley, 814 F.2d 223, 227 (5th Cir. 1987).

[170] *See* Conn v. Gabbert, 526 U.S. 286, 291–92 (1999) (Rehnquist, C.J.).

one's field of private employment, but a right which is nevertheless subject to reasonable government regulation."[171]

More significantly, some courts began looking more skeptically at laws restricting occupational choices and imposing barriers on particular businesses. As the health and safety justification for such regulations grew ever more attenuated, courts struggled with the question of whether outright economic protection of certain interests against competition was a legitimate state purpose. Of course, as we have seen, courts long tended to accept at face value almost any health and safely argument–however dubious–and likewise overlook the obvious protectionist aspects of licenses and entry barriers. Recall that in *Lee Optical*, the Supreme Court hypothesized a questionable public health rationale, but did not consider whether economic protectionism standing alone would satisfy the "rational basis" test.[172] In 1994, a federal district court in Texas struck a blow for economic liberty by invalidating a Houston anti-jitney ordinance and rejecting economic protectionism as a legitimate state goal.[173] At issue was a 1924 municipal law providing that no jitney with a capacity of less than 15 passengers could operate on city streets.[174] The effect of the ordinance was to protect streetcar companies from competition by putting jitneys out of business.[175] The city sought to defend the law on the grounds of current traffic safety concerns.[176] However, the court was unpersuaded by the safety argument and maintained that the ordinance was "economic protectionism in its most glaring form."[177] Finding the law had no relationship to public health, safety, or welfare, the court concluded the ordinance was harmful because it deprived the public of a needed form of public transportation.[178]

In the same vein, a pair of circuit court decisions took aim at the use of licensure requirements to safeguard a cartel in the funeral industry.[179] In *Craigmiles v. Giles*, the Sixth Circuit Court of Appeals struck down a Tennessee law banning the sale of caskets by persons not licensed as funeral directors.[180] To obtain a license, an applicant

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[171] *Id.*

[172] *See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–88 (1955).

[173] Santos v. City of Houston, 852 F. Supp. 601, 608–09 (S.D. Texas 1994).

[174] *Id.* at 603.

[175] *Id.* at 603, 606, 608.

[176] *Id.* at 606–08.

[177] *Id.* at 608.

[178] *Id.*

[179] Craigmiles v. Giles, 312 F.3d 220 (6th Cir 2002); St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013), *cert. denied* 134 S. Ct. 423 (2013).

[180] *Craigmiles*, 312 F.3d at 222.

was required to complete two years of training and pass an examination. The court determined these requirements amounted to "a significant barrier to entering the Tennessee casket market."[181] This law was challenged by persons who sold caskets but provided no other funeral services.[182] The court held the license mandate was not rationally related to public health or consumer protection, reasoning that the requirement "impose[d] a significant barrier to competition in the casket market" and harmed consumers.[183] Criticizing the legislature's "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers", the court concluded the measure could not even survive "rational basis" review.[184]

A decade later, the Fifth Circuit Court of Appeals ruled that a Louisiana statute granting state-licensed funeral directors the exclusive right to sell caskets violated the due process rights of non-profit charities to sell caskets.[185] The court insisted that the measure was not rationally related to a legitimate governmental interest in promoting public health and safety, and flatly denied that "mere economic protection of a particular industry" was a legitimate public purpose that could sustain the restriction.[186] In conclusion, the court stated: "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."[187]

This line of cases contemplated some degree of judicial inquiry into the state's professed rationale for economic regulation, and emphatically rejected the notion that anti-competitive protection conferred on a particular industry constituted a legitimate state interest. Therefore, the cases represent a partial crack in the post-New Deal orthodoxy that economic legislation was not to receive meaningful due process review. Unsurprisingly, some federal courts were quick to disagree and insist upon a deferential posture toward legislative authority over economic matters.

For instance, at issue in *Powers v. Harris*, was the validity of an Oklahoma law providing that only licensed funeral directors could

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[181] *Id.* at 224–25.
[182] *Id.* at 222–23.
[183] *Id.* at 225–28.
[184] *Id.* at 229.
[185] St. Joseph Abbey v. Castille, 712 F.3d 215, 217, 219 (5th Cir. 2013), *cert. denied* 134 S. Ct. 423 (2013).
[186] *Id.* at 222, 226.
[187] *Id.* at 226.

sell caskets.[188] Brushing aside an argument that the challengers had a right to pursue lawful callings, the Tenth Circuit Court of Appeals found that legislative conferral of exclusive privilege of sale upon the funeral industry served a legitimate state purpose and satisfied "rational basis" review.[189] The court saw no constitutional bar to states enacting anti-competitive measures to aid favored groups.[190] The court perceived the issue in political terms, rather than legal terms, lecturing that "the definition of the public good changes with the political winds. There is simply no constitutional or Platonic form against which we can (or could) judge the wisdom of economic regulation."[191] The court then concluded with the time-honored advice that the complainants should resort to the polls for relief.[192]

In 2015, the Second Circuit Court of Appeals adopted this analysis, finding no due process objection to a Connecticut requirement that only licensed dentists could perform certain teeth-whitening procedures.[193] Critics charged that the regulation amounted to state protection of the monopoly position of dentists.[194] Dismissing this contention as irrelevant, the court reasoned that states had wide latitude to favor some economic groups over others.[195] Further, it gave no attention to the right to pursue lawful callings and relegated concern over economic protectionism to the political arena. A concurring judge expressed doubt that pure economic protectionism was a legitimate state interest for purposes of "rational basis" review, and perceptively warned that the majority opinion "essentially renders rational basis review a nullity in the context of economic regulation."[196]

Even the most absurd anti-competitive regulations could find shelter under the banner of economic protectionism. For example, a federal district court upheld a Louisiana requirement, unique to that state, that retail florists must pass a licensure examination to sell

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[188] Powers v. Harris, 379 F.3d 1208, 1211 (10th Cir. 2004).

[189] *Id.* at 1214–15, 1222.

[190] *Id.* at 1218–22.

[191] *Id.* at 1218. A concurring judge expressed doubt about the majority's "almost per se rule upholding intrastate protectionist legislation", and observed that restrictions on casket sales seem to harm rather than protect consumer interests. *Id.* at 1226–27.

[192] *Id.* at 1225.

[193] Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 283–85 (2d Cir. 2015), *cert. denied* 136 S. Ct. 1160 (2016).

[194] *Id.* at 286–88.

[195] *Id.*

[196] *Id.* at 289–90. *See* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 153–56 (2010) (criticizing the notion that laws conferring economic privileges for a preferred group regardless of impact on the public is a legitimate state interest).

flowers.[197] Although recognizing that the right to pursue callings is a constitutionally protected interest, the court emphasized that the state could impose reasonable regulations.[198] Apparently accepting the notion that consumers were too stupid to select flowers on their own, the court concluded that the licensing examination was "rationally related to the state's desire that floral arrangements will be assembled properly in a manner least likely to cause injury to a consumer and will be prepared in a proper, cost efficient manner."[199] Notwithstanding this judicial rhetoric, any connection between occupational restrictions on florists and public welfare is highly tenuous. The opinion is best understood as an expression of blind judicial deference to economic regulations.

The validity of applying the licensing requirements for cosmetologists to persons practicing African style hair braiding has divided federal courts. Two federal district courts have concluded that such application failed "rational basis" review, and found a violation of the due process right to pursue a livelihood.[200] They reasoned that the state-mandated training and testing requirements were largely irrelevant to African hair braiding, and that the regulatory scheme bore no rational relationship to the public health and safety.[201] In the same vein, a federal district court determined that application of the state facility and equipment requirements for barber schools to an African braiding school did not advance public health and safety interests and were so irrational as to violate due process.[202] On the other hand, the Eighth Circuit Court of Appeals upheld application of state cosmetology training and testing requirements to African style hair braiders. Stressing the heavy deference that federal courts must show to government economic regulations under the rational basis standard, the court even hypothesized possible reasons for the licensing regime. It brushed aside the argument that the license requirement imposed a costly training program of little relevance to hair braiders.[203] As this ruling makes clear, the "rational basis" test is frequently understood as precluding any inquiry into the factual background or actual working of economic regulations, thereby facilitating irrational and even

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[197] Meadows v. Odom, 360 F. Supp. 2d 811, 822–23, 825 (M.D. La. 2005), *vacated as moot*, 198 Fed. App'x 348 (5th Cir. 2006).

[198] *Id.* at 819–21.

[199] *Id.* at 824.

[200] Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1118–19 (S.D. Cal. 1999); Clayton v. Steinagel, 885 F. Supp. 2d 1212 (D. Utah 2012).

[201] *Id.*

[202] Brantley v. Kuntz, 98 F. Supp. 3d 884 (W.D. Tex. 2015).

[203] Niang v. Carroll, 879 F.3d 870, 873 (8th Cir. 2018).

harmful legislation.

As this discussion indicates, the record of the federal courts in protecting the right to follow a common occupation has been decidedly mixed in recent years, and is likely to remain so until the Supreme Court weighs in on the question. However, there have been important developments at the state level. For example, in *Patel v. Texas Department of Licensing and Regulation*, the Supreme Court of Texas took a major step toward the revitalization of occupational freedom.[204] The state had long regulated the practice of cosmetology.[205] To obtain a basic license an applicant had to complete 750 hours of instruction in a training program and pass a test.[206] This requirement was challenged as a violation of the "due course of law" clause of the Texas Constitution by individuals engaged in commercial eyebrow threading.[207] Eyebrow threading is practiced primarily within the South Asian and Middle Eastern communities.[208] The Texas Supreme Court interpreted the "due course of law" provision to confer somewhat greater protection for individuals challenging economic regulation than the comparable federal "due process" norm.[209] Specifically, it ruled that in as-applied challenges to economic legislation the party must demonstrate either (1) that the statute could not meet the "rational basis" test, or (2) that "the statute's . . . real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest."[210] The court explained that under this approach the inquiry "will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties."[211] Applying this standard, it determined that the requirement of 750 hours of training, large numbers of which were unrelated to eyebrow threading, coupled with the expense and lost employment opportunity, was so burdensome as to run afoul of the "due course of law" language of the state constitution as applied to the threaders.[212]

Even more remarkable was the concurring opinion by Don R.

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[204] Patel v. Texas Dep't of Licensing and Regulation, 469 S.W.3d 69 (Tex. 2015).

[205] *Id.*

[206] *Id.* at 73.

[207] Article 1, § 19 of the Texas Constitution states: "No citizen of the State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land."

[208] *Patel*, 469 S.W.3d at 73.

[209] *Id.* at 83.

[210] *Id.* at 87.

[211] *Id.*

[212] *Id.* at 90.

Willett, joined by two other justices. Willett authored a strong affirmation of economic liberty as a central tenet of American constitutionalism, sharply criticizing the double standard of judicial review which relegates economic rights to a lesser echelon of solicitude. Ridiculing the "rational basis" test applied in the federal courts as really no test at all,[213] he maintained that the Texas Constitution provides more searching review of government infringement of economic liberty than the minimal federal test.[214]

Turning to the issue of occupational regulation, Willett cut to the heart of the licensing controversy: "Must courts rubber-stamp even the most nonsensical encroachments on occupational freedom?"[215] He answered the question emphatically in the negative. Noting the proliferation of licensing since World War II, Willett expressed concern that occupational licensing was often more about bestowing special privileges on favored groups than about safeguarding the public.[216] Pointing out that licensure schemes predominately hampered persons of modest means, he argued that there was a serious disconnect between various licensing rules and the public interest.[217]

The dissenting opinion by three justices was largely a rehash of the post-New Deal orthodoxy of judicial deference to legislative decisions on economic matters and broke no new ground.[218] But one point raised by the dissent warrants further consideration. The dissenters repeatedly charged that the majority and concurring opinions opened the door for a return to the supposed evils of *New York v. Lochner*.[219] Indeed, the dissenting opinion warned that the "*Lochner* monster" has been "rediscovered and unleashed by the Court."[220] The famous *Lochner* decision, of course, is the subject of a vast literature which cannot be unpacked here.[221] Suffice it to say that the caricature

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[213] *Id.* at 98 (Willett, J., concurring).

[214] *Patel*, 469 S.W.3d at 110–12.

[215] *Id.* at 93.

[216] *Id.* at 123.

[217] *Id.* at 103–09. On December 13, 2017 the United States Senate confirmed President Donald Trump's nomination of Judge Willett to a seat on the Fifth Circuit Court of Appeals.

[218] *Id.* at 126–43.

[219] Lochner v. New York, 198 U.S. 45 (1905). In *Lochner*, a divided Supreme Court struck down a New York law that restricted work in bakeries to ten hours a day or sixty hours a week. Writing for the majority, Justice Peckham found that the measure violated the liberty of contract as protected by the Fourteenth Amendment. *Id.*

[220] *Patel*, 469 S.W.3d at 138. *See* Bernstein, *supra* note 6, at 302 ("The ghost of *Lochner* hangs over due process challenges to laws that restrict entry to occupations.").

[221] *See, e.g.*, PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK (1990).

of *Lochner* fashioned by the Progressives has been largely destroyed by revisionist historians.[222] The notion of a draconian *Lochner* era is a myth.[223] In fact, the Supreme Court never sought to implement a laissez-faire regime and invalidated relatively few regulatory measures on due process grounds. The *Lochner* decision, however, is still trotted out as a sort of scarecrow whenever any court defends economic rights. In reality, it was hardly the Halloween monster of constitutional legend.

Similarly, there are also signs that some state courts have begun to take a hard look at other forms of anti-competitive regulations and entry barriers to business. Liquor laws have given rise to complaints about economic protectionism. In *Louis Finocchiaro, Inc v. Nebraska Liquor Control Commission*, the Supreme Court of Nebraska struck down a price-fixing scheme which prevented volume discounts by wholesalers in order to protect small retailers from competition.[224] It reasoned that when a statute "under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual."[225] In 2017, the Supreme Court of South Carolina declared unconstitutional a statute limiting an operator to three retail liquor licenses.[226] The avowed purpose of the restriction was to protect existing liquor store owners from competition. Reasoning that such limitation did not promote the health, safety or morals of the public, the court concluded that economic protectionism exceeded the state's police powers.[227] The dissent urged judicial deference to legislative judgment and levied the predictable charge that the majority was summoning *Lochner's* ghost.[228]

THE PATH AHEAD

Where do we go from here? Certainly, it would be hazardous to

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[222] *See* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011). *See also* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 338–40 (2014) (discussing freedom of contract doctrine and maintaining that *Lochner* was correctly decided).

[223] James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U.J. L. & LIBERTY 370, 391–92 (2005) (questioning the existence of a supposed *Lochner* era).

[224] Louis Finocchiaro, Inc. v. Nebraska Liquor Control Comm'n, 217 Neb. 487 (1984).

[225] *Id.* at 491.

[226] Retail Services & Systems, Inc. v. South Carolina Dep't of Revenue, 419 S.C. 469 (2017).

[227] *Id.* at 471–76.

[228] *Id.* at 484, n.21.

predict a major revival of the right to pursue ordinary callings free of onerous restrictions based on a handful of cases, however welcome. The pull of the post-New Deal orthodoxy, relegating economic rights to a sort of constitutional limbo, remains strong. Indeed, a supposedly conservative Supreme Court has done relatively little to revive the rights of property owners in the face of pervasive government.[229] A significant strengthening of economic rights would require a sea change in thinking that would recapture the property-centered constitutionalism of the framers. Courts would need to reconsider the policy of affording near-conclusive deference to economic legislation, and to make some inquiry into the actual effect of regulatory measures.[230] At the same time, courts would need to recognize occupational freedom as a fundamental right deserving of a high level of scrutiny.[231]

As discussed above, the right to follow lawful vocations has found some recent support in both judicial opinions and scholarly literature. Yet meaningful judicial scrutiny of occupational licensing remains spotty. An incremental increase in judicial protection of occupational freedom seems the most likely prospect at the present. A fledgling turn in this direction may gain traction from a recent initiative by the Federal Trade Commission ("FTC"). In March 2017, the FTC formed an Economic Liberty Task Force to focus on excessive occupational licensing and other barriers to economic opportunity.[232] By detailing the growth of licensing and pointing out that licensing regimes often burden consumers and stifle opportunities for disadvantaged individuals, the Task Force may help to shape a popular and judicial climate favorable to reform.

It is especially noteworthy that the right to acquire property has been affirmed by several state courts, even if in dicta. The Supreme

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[229] STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 271 (2011) (observing that by the end of the twentieth century "property rights clearly received more protection from government regulation than they had a few decades before, but exactly how much more was a matter for debate"); James W. Ely Jr, *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO L. REV. 39, 39 (2005) (explaining, "[t]he [Supreme] Court has not demonstrated a sustained commitment to meaningful enforcement of individual property rights.").

[230] Louis Finocchiaro, Inc. v. Nebraska Liquor Control Comm'n, 217 Neb. 487, 489–90 (1984). ("There must be some clear and real connection between the assumed purpose of the law and its actual provisions.").

[231] Avelar & Diggs, *supra* note 142, at 432 (stating, "[t]he right to earn an honest living, free of unreasonable government interference, is an individual right just as important as any other.").

[232] *Economic Liberty: Opening Doors to Opportunity*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/policy/advocacy/economic-liberty (last visited Feb. 5, 2018).

Court of Nebraska declared in 1984:

> The constitutional guarantees of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter.[233]

More recently, in *City of Norwood v. Horney* the Supreme Court of Ohio observed: "The rights related to property, i.e., to acquire, use, enjoy and dispose of property, are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty."[234] The court cited *Buchanan* to support this proposition.[235] Thus, the right to acquire property retains some validity.

In December 1829, James Madison addressed the Virginia constitutional convention. He insisted:

> [i]t is sufficiently obvious, that persons now and property are the two great subjects on which Governments are to act; and that the rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.[236]

Notably, Madison linked the right to acquire property with the "rights of persons." More than 100 years later the renowned attorney John W. Davis echoed Madison. "History," Davis declared, "furnishes no instance where the right of man to acquire and hold property has been taken away without the complete destruction of liberty in all its

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[233] *Finocchiaro*, 217 Neb. at 490.

[234] City of Norwood v. Horney, 110 Ohio St. 3d 353, 361–62 (Ohio 2006).

[235] *Id.*

[236] 9 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE 360–61 (1910), available at http://oll.libertyfund.org/titles/madison-the-writings-vol-9-1819-1836.

forms."[237] Davis correctly perceived that private property provides the key pillar for the enjoyment of political freedom. We disregard the insights of Madison and Davis at our peril.[238]

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[237] As quoted in WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 347 (1973).

[238] *See* RICHARD PIPES, PROPERTY AND FREEDOM 283–92 (1999) (analyzing the connection between property rights and political liberty, and concluding that "[p]roperty is an indispensable ingredient of both prosperity and freedom.").