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The Return to Lochnerism?: The Revivial of Economic Liberties from David to Goliath

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THE RETURN TO *LOCHNERISM*? THE REVIVAL OF ECONOMIC LIBERTIES FROM DAVID TO GOLIATH*

INTRODUCTION

"To work means to eat. It also means to live . . . . The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man."[1]

The tumultuous jurisprudence enveloping the concept of economic liberties strikes to the core of individuals' survival, in the context Justice William Douglas suggested, as well as to the heart of any corporation's financial stability. Rather than finding themselves struggling against the forces of nature to secure economic status, these entities often must pit their economic survival against state regulations seeking to limit or prohibit their rights. Those seeking refuge find little comfort in the constitutional provisions apparently drafted to protect against such infringements. These provisions have been spun into a quagmire of convoluted jurisprudence so entangled that some jurists have suggested their elimination.[2]

Three general provisions masquerade as guidance in defining economic rights. The Fourteenth Amendment provides both the Privileges or Immunities Clause and the Due Process Clause,[3] while the Fifth Amendment establishes the Takings Clause.[4] However, history has been unkind to the development of these constitutional provi-

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* I received the idea for this Comment from an American Bar Association Journal article noting recent constitutional developments toward increased protection of economic liberties. *See* Steve France, *Dusty Doctrines*, 87 A.B.A. J. 46 (2001).

1. Barsky v. Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). *See* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (quoting Justice Douglas's dissenting opinion).

2. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (stating Judge Robert Bork's suggestion that the Privileges or Immunities Clause should be treated as though "obscured by an ink blot," because no agreement has ever been reached on the provision's meaning).

3. U.S. CONST. amend. XIV, § 1 (providing that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

4. U.S. CONST. amend. V (stating, in relevant part, "nor shall private property be taken for public use, without just compensation").

sions, and the resulting precedent has been confusing and contradictory. The Privileges or Immunities Clause was effectively nullified almost from its beginning.[5] In contrast, substance was read into the Due Process Clause, producing individual and corporate protection against economic regulation for a number of years before the Court eliminated this rationale.[6] Additionally, the Court has subjected the Takings Clause to a cycle of upheavals and reconfigurations, resulting in a confusing array of precedent and no strong footing for redress of regulatory takings.

Fortunately, recent case law has reflected the Court's reconsideration of its previous hastiness in the area of economic rights during the preceding century. While *Saenz v. Roe*[7] restored the possibility of practical weight to the Privileges or Immunities Clause for the first time in 130 years, lower courts have been reconsidering substantive due process rationales, as reflected in *Craigmiles v. Giles*.[8] In addition, regulatory takings claims have been at the forefront of jurisprudence in actions for corporate protection from economic regulations, as evidenced by the recent *Phillip Morris, Inc. v. Reilly* decision.[9]

To resolve further inconsistencies raised by these recent developments in economic rights, this Comment analyzes the Court's contradictory historical analysis and investigates recent developments suggesting yet another shift in the law. Part II will provide background on the Court's historical development of the Fourteenth Amendment's Privileges or Immunities Clause and the Due Process Clause as well as the Fifth Amendment Takings Clause.[10] In addition, an in-depth analysis of the *Saenz* decision and the trends suggested by *Craigmiles* and *Phillip Morris* will be conducted.[11] Part III will examine implications of the *Saenz*, *Craigmiles*, and *Phillip Morris* decisions, both within the specific legal framework in which the cases were decided as well as the interrelation between the economic rights areas.[12] This analysis will also establish the strain placed on the Due Process Clause because of the virtual eradication of the Privileges or Immunities Clause and highlight how the *Saenz* decision may help al-

5. Slaughter-House Cases 83 U.S. (16 Wall.) 36 (1873) (holding that the Privileges or Immunities Clause does not protect state citizens against their own state's actions).

6. *See infra* notes 71-128 and accompanying text.

7. 526 U.S. 489 (1999).

8. 110 F. Supp. 2d 658 (E.D. Tenn. 2000); *aff'd*, 2002 U.S. App. LEXIS 24637 (6th Cir. 2002).

9. 267 F.3d 45 (1st Cir. 2001) (opinion withdrawn); *rehearing en banc* 2002 U.S. App. LEXIS (1st Cir. 2002).

10. *See infra* notes 15-158 and accompanying text.

11. *See infra* notes 159-304 and accompanying text.

12. *See infra* notes 305-677 and accompanying text.

leviate that burden. Furthermore, Part III will examine use of the Takings Clause as an alternative for the nullified Fourteenth Amendment. Part IV will investigate plausible remedies to restore weight to economic rights while avoiding the *Lochner* era "evils" that caused the judiciary to avoid entering this area for years.[13] Part V will conclude that increased reliance on the Privileges or Immunities Clause and the Takings Clause is necessary to restore protective strength and credibility to the economic liberties of individuals and corporations.[14]

II. BACKGROUND

Of the three clauses relied upon to protect economic liberties, the Privileges or Immunities Clause suffered the swiftest demise, effecting its virtual eradication from the outset.[15] The Supreme Court virtually wrote the clause out of the Fourteenth Amendment in the *Slaughter-House Cases*[16] only seven years after its enactment. Despite strong dissent,[17] the majority opinion effectively limited the applicability of the clause to a few rights of national citizenship.[18] Faced with the obliteration of protection of their privileges and immunities, individuals sought establishment of their economic liberties in the Due Process Clause. Courts soon followed suit.

The subsequent area of substantive due process law created by the Court has been wholly inconsistent and contradictory. During the rise of economic due process and in its heyday, the Court struck hundreds of state regulations upon the premise that the Due Process Clause carried substantive implications.[19] However, affording content to the Due Process Clause created a breadth of values not found in the text of the Constitution.[20] Thus, it was a matter of time before objections

13. *See infra* notes 678-711 and accompanying text.

14. *See infra* note 568 and accompanying text.

15. As used in this paper, economic liberties refer mainly to business and property rights of individuals and businesses that are affected by governmental economic regulations. For example, price regulations, labor relations, and business conditions are basic economic rights that are often in dispute. GERALD GUNTHER ET AL., CONSTITUTIONAL LAW 465 (13th ed. 1997). One classic example is the *Lochner v. New York* bakery owners' rights to employ workers for more than ten hours a day or sixty hours a week. Lochner v. New York, 198 U.S. 45 (1905).

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

17. *Id.* (Field, J., dissenting) (countering that the Fourteenth Amendment does protect U.S. citizens against deprivation by a state and arguing that the Amendment would be "vain and idle" if it included protection of only those rights adopted before enactment).

18. *Id.*

19. *See generally* Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

20. *Allgeyer* exemplifies some of the values created. In a unanimous decision, the Court created the right deemed "liberty of contract" by stating that the liberty referred to in the Fourteenth Amendment included:

to the interventionist Court grew within both the legislative and executive branches. Faced with a national economic depression and the legislature's subsequent need to regulate, the Court soon reversed itself in *Nebbia v. New York*.[21] Rarely had the Court completely departed from its prior reasoning or vocalized its retreat so openly. Subsequently, the Court has not invalidated any economic regulation on substantive due process grounds since 1937.

Where, then, is one to turn to substantiate one's economic rights? The Court's decisions have all but nullified the Fourteenth Amendment's applicability to protection of economic rights.[22] However, the Takings Clause of the Fifth Amendment had become entwined with the Fourteenth Amendment Due Process Clause early in its history.[23] Therefore, those seeking justification of their economic rights could only rely on the Takings Clause in a limited context.[24] One scholar has suggested that the most *Lochner*-esque provisions can be found in Takings Clause analyses.[25] However, during the fifty years following the *Lochner* reversal, the Court also limited the Takings Clause for many of the same reasons it abandoned *Lochnerism*.[26] Today, the gap caused by this early jurisprudence remains.

Fortunately, recent case law has reflected the Court's reconsideration of its hastiness in the area of economic rights during the preceding century. In 1999, the Supreme Court relied on the Fourteenth Amendment Privileges or Immunities Clause for the first time in 130 years in *Saenz v. Roe*.[27] The Court held that a California statute au-

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

Allgeyer, 165 U.S. at 589.

21. 291 U.S. 502 (1934). *See also* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); McCloskey, *supra* note 1 (opining that many believe *West Coast Hotel* to be the most influential case in overturning economic due process).

22. *See W. Coast Hotel*, 300 U.S. 379 (upholding minimum wage laws for women and noting that the Constitution does not mention the freedom of contract); Nebbia v. New York, 291 U.S. 502 (1934) (upholding minimum price fixes on sales of milk and opining that a state may implement any economic policy it deems in the interest of public welfare).

23. Chicago v. Chicago, 166 U.S. 226 (1897). *See also* Mo. Pac. Ry. v. Nebraska, 164 U.S. 403 (1896).

24. The Takings Clause's effectiveness was limited in early jurisprudence because of the Marshall Court's decision in *Barron v. Baltimore*, 32 U.S. 243 (1833), which held that the Bill of Rights restricted only the national government rather than the states' powers.

25. Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873 (1987).

26. *Id.* at 890.

27. 526 U.S. 489 (1999), *aff'g* Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998), *aff'g* 966 F. Supp. 977 (E.D. Cal. 1997).

thorizing a durational residency requirement for new welfare recipients violated their right to the same privileges or immunities held by long-term California residents.[28]

In addition, lower courts appear eager to participate in the reconstruction of this area of law.[29] The United States District Court for the Eastern District of Tennessee recently struck a state act on grounds that it violated substantive due process in depriving individuals of their liberty interest in the right to pursue their chosen occupation.[30] The United States Court of Appeals for the Sixth Circuit affirmed on December 6, 2002.[31]

Large corporations also seemed to be benefiting from this revived interest in economic rights through increasingly liberal applications of the Takings Clause. Phillip Morris was recently granted summary judgment in its regulatory takings suit challenging the constitutionality of a Massachusetts statute after the United States Court of Appeals for the First Circuit affirmed the district court's preliminary injunction and remanded.[32] This application has very recently been questioned, however, and the First Circuit subsequently reversed the district court's grant of permanent declaratory and injunctive relief, but then withdrew that opinion and granted the plaintiff's petition for rehearing en banc.[33] The First Circuit issued its decision affirming the district court's grant of summary judgment and injunctive relief on December 2, 2002.[34] An in-depth understanding of the historical development as well as the recent jurisprudence surrounding the three clauses is necessary to provide a full understanding of the law's metamorphosis in the area of economic liberties.

A. The Early Demise of Privileges or Immunities

Enacted in 1866, the Fourteenth Amendment states, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[35] Much

28. *Saenz*, 526 U.S. at 489.

29. *See* Nelson v. Geringer, 295 F.3d 1082 (10th Cir. 2002) (holding that membership in the Wyoming National Guard is a privilege under the Privileges or Immunities Clause and therefore ordering the reinstatement of officers dismissed for not meeting residency requirements); Craigmiles v. Giles, 110 F. Supp. 2d 658 (E.D. Tenn. 2000) (holding that a state regulation requiring casket sellers to have a funeral directors license violated substantive due process).

30. *Craigmiles*, 110 F. Supp. 2d 658.

31. Craigmiles v. Giles, 2002 U.S. App. LEXIS 24637 (6th Cir. 2002).

32. Phillip Morris Inc. v. Reilly, 159 F.3d 670 (1st Cir. 1998), *aff'g* 957 F. Supp. 327 (D. Mass. 1997), *remanded*, 113 F. Supp. 2d 129 (D. Mass. 2000).

33. Phillip Morris, Inc. v. Reilly, 267 F.3d 45 (1st Cir. 2001).

34. Phillip Morris, Inc. v. Reilly, 2002 U.S. App. LEXIS 24403 (1st Cir. 2002).

35. U.S. CONST. amend. XIV, § 1.

to the dismay and confusion of jurists, this is the extent of any practical instruction given by the Framers.[36] "Privileges or immunities" were left undefined and no instructions were given to render the phrase meaningful.[37] Scholars have even suggested that the language of the clause was insignificant to the Framers themselves.[38] This lack of clarity caused unrest among the Senate. At the time the Senate took a final vote on the proposed Fourteenth Amendment, one senator moved to discard the Privileges or Immunities Clause because of its unclear nature.[39] His motion was rejected and the clause remained in the passed amendment. However, an analysis of the subsequent jurisprudence gives the impression that the clause *was* removed from the amendment.

1. The Slaughter-House Cases

Due to Congress's failure to clarify the ambiguity surrounding the Privileges or Immunities Clause, the Supreme Court was left with the substantial burden of analyzing the clause with little legislative guidance. The result was what many consider to be a premature decision by the Court in the *Slaughter-House Cases*.[40] These cases involved challenges to the exclusive rights to slaughter livestock the Louisiana legislature gave to corporations.[41] Butchers left out of these corporations argued that this was a monopoly and an unconstitutional deprivation of their privilege to pursue a livelihood.[42]

In a 5-4 decision, the Court rejected the challengers' argument and held that the Fourteenth Amendment was not intended to exercise increased control over states by the national government.[43] Therefore, the Court reasoned that it was constitutionally permissible for Louisiana to give slaughter houses a twenty-five year monopoly, effec-

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36. *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (The Free Press 1990); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 13 (Duke Univ. Press 1986) (theorizing that the meanings of both the Privileges or Immunities Clause and the Due Process Clause were not of utmost importance to the Framers of the Fourteenth Amendment).

37. *See* BORK, *supra* note 36, at 39 (generally discussing the lack of substantive meaning given to the clause).

38. *Id.* (quoting 6 Charles Fairman, *Reconstruction and Reunion: 1864-88*, *in* HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1, at 1270 (1971)) (stating that the indefiniteness of the clause's meaning was appealing to the clause's proposer, Representative Bingham of Ohio). *See also* Harrison, *supra* note 2, at 1394.

39. *See* Harrison, *supra* note 2, at 1387.

40. 83 U.S. (16 Wall.) 36 (1873) (Field, J., dissenting).

41. *Id.* at 38.

42. *Id.*

43. *Id.* at 48.

tively putting the plaintiffs' competing facilities out of business.[44] Thus, the Court virtually eradicated the clause by determining that it was not a tool to protect state citizens from their own state's actions. While many scholars criticize the *Slaughter-House Cases* as excessively limiting, one argues that the Court properly narrowed a dangerous amendment that would have otherwise allowed the Court to use its own values as guidelines in construing public policy.[45]

Regardless of one's views on the propriety of the decision, it was undoubtedly a large blow to citizens' protection of their economic rights. Not surprisingly, the *Slaughter-House Cases* met with strong dissent. Justice Stephen J. Field, joined by Justices Salmon P. Chase, Noah H. Swayne, and Joseph P. Bradley, countered that the Fourteenth Amendment does protect citizens of the United States against deprivation of common rights by a state.[46] The dissent argued that the amendment would be a "vain and idle enactment" if it included only protection of those rights adopted before its enactment.[47] The majority's interpretation of privileges or immunities as a reference to rights protected elsewhere in the Constitution caused the dissent's fears to be realized.[48]

The Court read the clause to not include the rights that belong to all citizens of free government to pursue lawful employment, as Justice Field urged.[49] Justice Bradley also wrote separately in dissent and opined that a monopoly such as the one Louisiana had created deprived its citizens of their lawful employment privileges and property liberties.[50]

Many modern scholars agree with the dissenters and mourn the death of the Privileges or Immunities Clause as the one Framers intended to have the most legal force when they enacted the Fourteenth Amendment.[51] The fact that no legislative history demonstrates that privileges or immunities were intended to be meaningless supports this argument.[52] Little or no legislative history exists on the clause. The legislative record that does exist supports the proposition that the

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44. *Id.*

45. *See* BORK, *supra* note 36, at 37-38 (generally opining that an activist judge cannot stop himself from implementing his own values when construing a statute or the Constitution).

46. *Slaughter-House Cases*, 83 U.S. at 64.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 22 (Harvard Univ. Press 1980).

52. *Id.*

clause was intended to be afforded weight.[53] In presenting the Fourteenth Amendment to the Senate, Senator Jacob M. Howard stated, "privileges and immunities . . . cannot be fully defined in their entire extent and precise nature."[54] Rather, he believed personal rights protected by the Constitution should be included in the privileges and immunities granted to citizens.[55]

Furthermore, some scholars find it dispositive that Article IV of the original Constitution barred states from acting against citizens' fundamental rights.[56] However, in light of the sparse *explicit* legislative history, the Court in the *Slaughter-House Cases* attempted to determine its original intent.[57] Some scholars also support the theory that the political events during the period of enactment meant more to the Framers than the actual language of the clause.[58] Therefore, the words must be considered in historical context in order to ascertain their meaning. In applying this theory, it is noteworthy that an issue of utmost importance to the Fourteenth Amendment Framers was political power.[59] The main concern at the time of enactment was under what conditions the rebellious southern states would return to the Union.[60] This context would indeed suggest that the Bill of Rights, as well as the Fourteenth Amendment, was applicable to the states. Whether the states were bound by the Bill of Rights was *not* at issue in the thirty-ninth Congress, although whether the Privileges or Immunities Clause applies to the states has since become controversial.[61]

Nonetheless, the *Slaughter-House Cases* ultimately prevailed, and the effect has been lasting. A superficial but important result of this has been that the Court has only relied upon the Privileges or Immu-

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53. *Id.* at 23. Furthermore, the Privileges and Immunities Clause in Article IV, Section two of the Constitution lends meaning to the Fourteenth Amendment Privileges or Immunities Clause. Many scholars, as well as the Fourteenth Amendment Framers, have relied on the *Corfield v. Coryell* analysis of what the Article IV counterpart encompasses as privileges and immunities. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

54. *Id.* at 26.

55. *Id.*

56. *See* CURTIS, *supra* note 36, at 8; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 430 (Bingham, 1866); 1263 (Broomall, 1866); 1833, 1835-36 (Laurence, 1866); 38th Cong., 1st Sess. 1202 (Wilson, 1864).

57. CHARLES MILLER, THE SUPREME COURT AND THE USES OF HISTORY 50 (Harvard Univ. Press 1969) (discussing the problem the Court faces in applying original intent because of the age and respect given the Constitution).

58. CURTIS, *supra* note 36, at 12 (discussing that the language of the clause has little plain meaning when stripped of its historical context).

59. *Id.* at 13.

60. *Id.*

61. *See* BORK, *supra* note 36, at 90-91.

nities Clause in two opinions in the 130 years since its nullification.[62] In *Colgate v. Harvey*, the Court held that the rights of United States citizens to engage in business, transact any lawful business, or make a lawful loan of money in any state other than that in which the citizen lives are privileges under the Fourteenth Amendment.[63] The Court further ruled that the right of a citizen of one state to contract in another state may be a liberty protected by the Due Process Clause and a privilege protected by the Privileges or Immunities Clause.[64] Therefore, a citizen may invoke either clause.[65] However, this grant was short-lived and the restoration of privileges or immunities was eradicated five years later,[66] contemporaneous to the Court's retreat from economic due process rationales.[67] The Court reburied the clause for fifty-nine years.[68]

Upon obstructing any practical value intended to apply to the Privileges or Immunities Clause, the Court found itself in a quandary. No substantial tool existed with which the Court could protect economic rights. In response, a large number of citizens whose suits failed in state courts after *Slaughter-House* sought review under a substantive due process rationale.[69] The possibility that the Constitution could extend beyond its explicit terms was inviting enough that Justice Samuel Miller, in the majority in *Slaughter-House*, used a substantive due process approach to protect economic rights one year after that decision.[70]

B. Affording the Due Process Clause Substantive Weight: Economic Due Process

With the Court's eradication of the Privileges or Immunities Clause from jurisprudence came the need for a viable alternative. The prob-

62. *See* Colgate v. Harvey, 296 U.S. 404 (1935), *overruled by* Madden v. Kentucky, 309 U.S. 83 (1940); *see also* Saenz v. Roe, 525 U.S. 489 (1999) ("unearthing" the Privileges or Immunities Clause for the first time in 130 years).

63. 296 U.S. 404 (1935).

64. *Id.*

65. *Id.* at 433.

66. *See* Madden v. Kentucky, 309 U.S. 83 (1940) (holding that the right to pursue a trade, business, or calling is not a national privilege and, therefore, is not protected by the Fourteenth Amendment).

67. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage laws for women in a seminal case eliminating substantive due process rationale for economic rights); Nebbia v. New York, 291 U.S. 502 (1934) (reversing the Court's *Lochner* era decisions by using mere rational basis in upholding New York's regulation of milk prices).

68. *See supra* note 62 and accompanying text.

69. *See* BORK, *supra* note 36, at 40.

70. *Id.*

lem was that no established theory existed for the protection of economic liberties. As a result, the Court developed a new legal theory.

1. The Rise of Substantive Due Process

"Judicial lawmaking has accelerated spectacularly in this century."[71] One scholar asserts that judicial power to strike economic regulation with little legal justification results from this practice.[72]

The Fourteenth Amendment states, in relevant part, "[N]or shall any State deprive any person of life, liberty or property, without due process of law."[73] Although traditionally viewed as a procedural requirement,[74] the Court expressed substantive interest in the provision shortly after eliminating the effect of the Privileges or Immunities Clause.[75] One scholar has attributed the elimination of that clause's effectiveness to this trend, as well as to the economic circumstances in the country at the time.[76] It is likely that the economy resulting from post-Civil War industrialization led to more legislative regulation.[77] In response, the Court upheld a number of state regulations, but foreshadowed its imminent review of economic legislation within those opinions.[78]

The Court adhered to its warning when it finally relied explicitly on substantive due process in *Allgeyer v. Louisiana*.[79] In striking a state regulation that allowed people to obtain insurance for Louisiana property only from Louisiana insurance companies, the Court relied on the freedom of contract.[80] The liberty given persons by the Fourteenth

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71. *Id.* at 15.

72. *Id.*

73. U.S. CONST. amend. XIV, § 1.

74. *But see* EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT (La. St. Univ. Press 1948) (arguing that due process reaches beyond its procedural aspects).

75. *See* Munn v. Illinois, 94 U.S. 113 (1877) (rejecting attack on state regulation of grain elevator rates because public welfare justified it, but warning that the judiciary would determine reasonableness in private contracts where public interest is not at issue). *Cf.* R.R. Comm'n Cases, 116 U.S. 307 (1886) (sustaining state regulation of railroad rates but warning that states' regulatory powers are not limitless). *See also* Mugler v. Kansas, 123 U.S. 623 (1887) (sustaining state alcohol ban but indicating that legislation is valid only if actually related to public health interests); Smyth v. Ames, 169 U.S. 466 (1898) (holding that state's rate regulations of railroad were so low as to deprive the railroad of its property without due process of the law).

76. *See* MICHAEL PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 161 (Oxford Univ. Press 1994) (stating that the Court has traditionally invoked the Due Process Clause to support decisions that have more foundation in the Privileges or Immunities Clause).

77. GUNTHER ET AL., *supra* note 15, at 458.

78. *Id.*

79. 165 U.S. 578 (1897).

80. *Id.*

Amendment, the Court reasoned, protected the right to work where one desires and to enter contracts to accomplish that goal.[81]

a. *Lochnerism*

The Court upheld *Allgeyer* in its landmark decision, *Lochner v. New York*.[82] The *Lochner* Court struck a New York statute prohibiting employment of bakers for more than ten hours a day or sixty hours a week.[83] The Court relied on the newfound "liberty to contract" between employers and employees in reasoning that the statute was unconstitutional because it interfered with this right.[84] While the state ends of public health were deemed important, the means by which they were accomplished were judged to only remotely relate to public health.[85] Furthermore, the Court voiced its concern with the breadth of the regulation, stating that if this statute were found valid, any right of employment could be regulated with the effect that doctors, scientists, athletes, and artists "could be forbidden to fatigue their brains and bodies by prolonged hours of exercise . . . ."[86] Four Justices dissented in *Lochner*, but even three of those accepted that a liberty to contract could be found in the Fourteenth Amendment.[87] In his famous dissent, even Justice Oliver Wendell Holmes accepted substantive due process. He merely disagreed as to *which* rights were fundamental.[88]

In contrast to the Court's concerns that states would pass an abundance of economic legislation, states soon found it difficult to uphold any economic regulation against the force of what had become economic due process. For the next three decades, the Court struck down numerous state economic regulations, virtually on a *per se* basis.[89] Jurisprudence would never be the same.

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81. *Id.* at 592.

82. 198 U.S. 45 (1905).

83. *Id.* at 49.

84. *Id.*

85. Speculation has arisen that New York's real purpose in enacting the statute was to protect workers' welfare and that the Court did not approve of such labor law because of its potential for interference with a free market economy.

86. *Lochner*, 198 U.S. at 60.

87. *See* CURTIS, *supra* note 36, at 45.

88. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

89. *See* Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926) (invalidating state prohibition on the use of shoddy mattress materials because the protection of health does not justify this large of a remedy); Coppage v. Kansas, 236 U.S. 1 (1915) (deciding that a state law requiring employees not to join unions as a condition of employment violated substantive due process rights); *see also* Adair v. United States, 208 U.S. 161 (1908) (holding that a federal law barring "yellow-dog contracts" was unconstitutional because a person has a right to sell his labor on his own terms).

The impact of *Lochner* and its protection of economic rights were monumentally broad. Indeed, the decision has been called the "quintessence of judicial usurpation of power."[90] After the decision, the Court invalidated approximately two hundred state laws.[91] Affording substantive content to due process created a breadth of values not found in the text of the Constitution.[92] This practice did not pass without opposition, and soon the Court and the legislature reached a peak in their battle over the Court's only remaining Fourteenth Amendment tool to invalidate state economic regulation.

2. *The Decline of Economic Due Process*

By the 1930s, changes in the economy and the legislative and executive branches necessitated increased regulation.[93] The Great Depression was at its height and with the shift in political power, voters elected an administration that sought to alter the Court's practices in order to achieve its goals.[94] Previously, most economic regulations occurred at the state level, where substantive due process rationales were the only means to restrict them.[95] Due to the shift in the economy, Congress was now passing many national economic regulations that the Court could strike by finding that such legislation was not within Congress's power under Article I, Section 8 of the Constitution.[96] The Court's use of this additional tool was a severe roadblock to President Franklin D. Roosevelt's "New Deal."[97] The infamous "court-packing" plan followed. Roosevelt's plan was to appoint an additional judge for each federal judge that did not resign upon turning seventy years old. He disguised this as a way of helping the Court with its docket.[98] Later, Roosevelt urged the plan in a more straightforward manner, stating that a change was necessary to "save the Constitution from the Court and the Court from itself."[99] The result-

90. *See* CURTIS, *supra* note 36, at 44.

91. *See supra* note 89 and accompanying text.

92. *See* BORK, *supra* note 36, at 16-26 (generally discussing the implementation of judicial values into the Constitution).

93. *Id.* at 49.

94. *Id.* (discussing the shift in political power and its large impact on the Court's decisions).

95. *Id.* at 51.

96. U.S. CONST. art. 1, § 8.

97. *See* BORK, *supra* note 36, at 52 (citing Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)) (invalidating the National Industrial Recovery Act of 1932 passed as part of the New Deal and giving the President power to regulate various industries).

98. *Id.* at 54 (discussing how President Roosevelt's real motives were apparent since six Justices were over seventy years old, and the bill would allow Roosevelt to appoint six additional justices to support his plan).

99. *Id.* at 54. *But see* ELY, *supra* note 51, at 46 (discussing that the Court's resulting "switch" was not due to Roosevelt's announcement of his plan).

ing "switch in time that saved nine"[100] reached Roosevelt's desired objectives.

The Court's subsequent retreat from its *Lochner* era treatment of economic regulations culminated in *Nebbia v. New York*.[101] In upholding New York's fix on milk prices, the Court reasoned that the regulations did not violate individuals' rights to due process because price fixes were in the public's interest.[102] This was directly contrary to the Court's reasoning in *Lochner*, strictly scrutinizing whether restricting bakers' hours had a substantial relationship to New York's interest in public health.[103] Rational basis review was used in the deferential *Nebbia* opinion as opposed to the apparent strict scrutiny used during the three previous decades.[104]

Regardless of the rationale, which will be discussed momentarily, the effect was that the Court upheld numerous state regulations almost summarily. The popularized idea that economic due process jurisprudence should be reversed became so prevalent that the Court abandoned stare decisis.[105] The Court confirmed its retreat from the due process protection of economic liberties through numerous decisions.[106]

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100. *See* BORK, *supra* note 36, at 55 (discussing that it may have been a combination of Roosevelt's plan as well as the death and retirement of justices that lead to the Court's "switch").

101. 291 U.S. 502 (1934).

102. *Id.* (reasoning that the New York statute transferred money from consumers to milk producers, and this was in the interest of public welfare).

103. *Cf. Lochner*, 198 U.S. 45.

104. *See* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (holding a requirement that ice manufacturers act as public utilities to be invalid); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (striking a law that mandated a minimum wage to be paid to women); *Lochner*, 198 U.S. 45 (purporting to apply a reasonableness standard of review but actually treating liberty of contract as a fundamental right deserving of strict scrutiny); *see also* GUNTHER ET AL., *supra* note 15, at 469-70 (discussing that one of the *Lochner* "evils" may be that the Court actually applied strict scrutiny to what it deemed fundamental rights, despite purporting to apply lesser standards of review at the beginning of the period).

105. *See* BORK, *supra* note 36, at 155 (arguing that although the Court was correct in stopping its deformation of the Constitution, it was incorrect to attempt to alter all its previous mistakes).

106. *See* Ferguson v. Skrupa, 372 U.S. 726 (1963) (ruling that a Kansas prohibition of the practice of debt adjusters except by lawyers is constitutional); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (upholding constitutionality of state regulation limiting opticians' production of old lenses into new frames because the law does not have to be consistent with its goals in every way); Lincoln Fed. Labor Union v. N.W. Iron & Metal Co., 335 U.S. 525 (1949) (supporting return to pre-*Lochner* rationale that states may legislate what they "deem to be injurious practices of their internal affairs"); Olsen v. Nebraska, 313 U.S. 236 (1941) (deciding that states may fix maximum employment agency fees and reasoning that public policy should not be read into the Constitution); United States v. Carolene Prods., 304 U.S. 144 (1938) (validating the constitutionality of a federal prohibition of filled milk shipments under the belief that the statute worked, although no record existed); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (up-

3. *Abandonment of Economic Due Process and Discrediting of the* Lochner *Era "Evils"*

The Court has never returned to its protection of economic liberties on substantive due process grounds.[107] The rejection of economic due process reasoning and the many scholarly characterizations of it as "evil" raise a host of questions.[108] Many theories in law reviews and treatises have attempted to answer these difficult questions.[109] First, the rationale underlying the Court's disdain for economic due process must be explored. Furthermore, whether the Framers intended to read substance into the Due Process Clause must be determined. Finally, the Court's complete reversal raises the question whether it is wiser to leave the hole left by the Court's abandonment unfilled.

As discussed earlier,[110] the basis of economic due process necessarily rested on judicial value judgments. In fact, one scholar has suggested that understanding the actual Constitution may be difficult because of the nation's developmental reliance on the Court's actions.[111] It may be the practice of judicial review itself, rather than the values read into the Constitution, that some view unfavorably.[112] However, the Court regularly reads values into the Constitution in all areas of its review. It may be the difficult area of economics or a belief that the Court read *inappropriate* values into the Constitution that led to the belief of *Lochner* evility.[113] The problem that results when the Court invalidates a legislative act as unconstitutional is that it effectively overrules a legislative judgment in a way that cannot be altered.[114] The resulting evil is that the Court, which is neither elected nor politically responsible, maintains the power of governing those who *are* elected with its own values.[115] However, the Court's duty is to uphold the Constitution.[116] This duty necessitates construing vague provisions such as the Due Process Clause.[117] The change of the

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holding state minimum wage law for women because protecting women's health is in the public interest).

107. *See* BORK, *supra* note 36.

108. *See* PERRY, *supra* note 76, at 164 (discussing *Lochner*'s reputation as "one of the great examples of negative constitutional decision-making").

109. *See, e.g.*, BORK, *supra* note 36; McCloskey, *supra* note 1; PERRY, *supra* note 76.

110. *See supra* note 71 and accompanying text.

111. *See* PERRY, *supra* note 76, at 165.

112. ELY, *supra* note 51, at 15 (noting that substantive due process is still used in areas outside of economic regulation).

113. *See* GUNTHER ET AL., *supra* note 15, at 468-70.

114. *See* ELY, *supra* note 51, at 4.

115. *Id.* at 5.

116. *Id.* at 12.

117. *Id.*

Court's values with a shift in its members may not have been reason enough to disregard the entire area of economic rights as evil and inappropriate.

Furthermore, the Framers of the Fourteenth Amendment may have intended to read substance into the Due Process Clause.[118] The Framers were aware of at least one pre-Civil War decision precluding a certain substantive result.[119] This indicates that the *Lochner* era decisions may not have been wholly incorrect in giving the Due Process Clause a substantive interpretation. Rather, it may have been the broad scope of substance that the Court has since sought to eliminate.[120] However, restricting and modifying due process does not remove its substantive aspect altogether.[121]

Another question raised by the Court's complete reversal is whether it is wiser to leave the gaping wound left by the Court's abandonment of economic due process than it is to apply inadequate bandages. Although this will be explored in-depth in Part III,[122] it is important to note popular legal opinion closer to the time of the Court's actions. The field of economic due process is unique because it is difficult to recall another area where the Court acted so swiftly and completely to eliminate a constitutional doctrine once thought to hold much importance.[123] In the beginning of the Court's retreat, it did not appear that the Court would thoroughly shift extremes. Rather, the Court chose to use rational basis review of economic regulation but apply it so deferentially that it had virtually no "bite."[124] However, in subsequent decisions, the Court rejected substantive due process outright in the economic realm.[125] Perhaps the closest the Court came to explaining this rejection is found in *American Federation of Labor v. American Sash & Door Co.*[126] The concurring opinion stated that the judiciary's propensity is to "misconceive the public

118. *Id.* at 15.

119. *See id.* at 15-16 (citing Wynehamer v. People, 13 N.Y. 378 (1856), invalidating a prohibition law under state due process guarantee).

120. The broad substance the Court has read into the Due Process Clause has varied from the liberty of contract in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), to the right to receive information about birth control in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

121. *See* ELY, *supra* note 51, at 20.

122. *See infra* notes 465-489 and accompanying text.

123. McCloskey, *supra* note 1.

124. *Id.* at 42 (opining that the Court first avoided discarding substantive due process completely because it would have forced the Justices to explain their reasoning, something they were not prepared to do).

125. *See W. Coast Hotel*, 300 U.S. 379 (directly overruling the *Lochner*-era decision of *Adkins*, 261 U.S. 525, by upholding a minimum wage law for women).

126. 335 U.S. 538, 544 (1949).

good," and therefore, policy-making lies properly with the people and their representatives.[127] However, the Court continues to give large substantive weight to the Due Process Clause in its analysis of personal liberties.[128] Therefore, the evils of value implementation pertaining to economic liberties are contradictory and confusing. The Court clearly has not left public policy to the legislature in other areas, and it therefore appears that the *Lochner* evils can be understood only in the extreme context in which they were made.

C. *The Takings Clause as an Incomplete Alternative*

With the demise of both the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment, the Court was forced to once again look elsewhere in order to protect economic liberties. One such area was the Takings Clause of the Fifth Amendment.

"There is no distinct line separating liberty and property."[129] As early as 1792, James Madison equated property with economic liberties.[130] It may be this strong correlation that has tempted the Court to rely on regulatory takings rationales to justify protection of economic rights.[131] However, in the last half century, the Court has not used the provision in a remedial capacity to protect economic interests.[132] A regulatory taking involves virtually the same factual scenario as an economic due process scenario. Both involve a government action that purportedly regulates or prohibits one's economic liberty so thoroughly as to effectually deprive one of it.[133] In a takings context, the regulation must amount to a taking of one's property rather than merely a deprivation.[134] This sounds straightforward enough. Upon further analysis, however, it becomes apparent that the takings juris-

127. *Id.* at 556 (Frankfurter, J., concurring).

128. *See* McCloskey, *supra* note 1, at 45 (discussing the doubtful distinction between economic and personal rights, and that although judicial preferences have changed, people may still find the former as important as the latter).

129. ROGER CLEGG ET AL., REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 2 (Nat'l Legal Center for the Public Interest 1994).

130. *Id.* (quoting JAMES MADISON, THE PAPERS OF JAMES MADISON 201 (Hobson et al. eds., 1979)) (referring to property as: "In its larger and juster meaning, it embraces every thing [sic] to which a man may attach a value and have a right; . . . . He has property very dear to him in the safety and liberty of his person. *He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.*") (emphasis added).

131. *Id.*

132. *See* CLEGG ET AL., *supra* note 129, at 2 (discussing the Court's "insensitivity" to economic rights).

133. *Id.*

134. *Id.* (stating that "taken" implies less protection than "deprivation," because the former means that one loses the right while another gains it, while a deprivation may be effected although the right was never had and so protects a broader category of rights).

prudence has become nearly as large a challenge for the legal system as the Fourteenth Amendment clauses.[135] In large part, this effect is due to the very elimination of those latter clauses. Because other avenues for protecting economic rights have been eliminated, the Takings Clause has become virtually the only area where citizens may alleviate governmental interference.[136]

However, a judiciary faced with a Fifth Amendment takings analysis has only the provision's generalized text and contradictory precedent to guide it. The Fifth Amendment states, in relevant part, "[N]or shall private property be taken for public use, without just compensation."[137] Early in the history of the clause, the Supreme Court expressed in dicta that it favored such protection against "takings."[138] As with the Privileges or Immunities Clause, this enthusiasm was short-lived. In *Barron v. Baltimore*,[139] the Marshall Court weakened the Takings Clause as applied to the states, but not as applied to the federal government.[140] The Court reasoned that the Fifth Amendment did not restrain the city from altering the flow of streams despite the consequence of ruining the petitioner's ability to use his wharf.[141] In the Court's view, this did not constitute a taking for public use without just compensation. Fortunately, this decision did not weaken the Takings Clause as substantially as the *Slaughter-House Cases* weakened the Privileges or Immunities Clause.

Rather, judicial recognition of regulatory takings is historically established. In *United States v. Lynah*,[142] the Court held that the government's construction of dams that flooded lands and destroyed its value was a taking despite the lack of appropriating title. Subsequent cases extended the *Lynah* holding and firmly established the regulatory taking rationale.[143] However, the scope of this right was not resolved.

The actual language of the clause provides little clarification. For instance, it is difficult to determine what "taken for public use" refers

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135. *Id.* at 3.

136. *Id.*

137. U.S. CONST. amend. V.

138. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

139. 32 U.S. (7 Pet.) 243 (1833).

140. *Id.* However, after the Fourteenth Amendment was enacted, the Court held that the Takings Clause was incorporated and applied to the states through the Due Process Clause of the Fourteenth Amendment.

141. *Id.* at 251.

142. 188 U.S. 445, 470 (1903).

143. *See* United States v. Cress, 243 U.S. 316 (1917) (expanding *Lynah* to invalidate governmental installation of a lock and dam system which caused flooding and prevented the plausibility of a mill operation).

to, because the public cannot use something that does not exist.[144] Therefore, if what the government has taken through regulation is a right to use property, then a property *right* must have existed.[145] The property right is then analogous to economic rights that the Court subsequently determined did not exist within the Constitution.[146] However, the Takings Clause cannot be viewed as a replacement for other protections of economic rights because not all economic regulations may fit into a takings construct.[147]

Furthermore, evidence exists that the Court's retreat from close scrutiny of economic regulations extended beyond the boundaries of substantive due process. During the Court's reversal of the *Lochner* period, takings challenges to regulatory schemes also failed.[148] The undue weight placed on the Takings Clause because of the elimination of the aforementioned economic protections is analyzed further in Part III. However, it is useful to briefly describe the components of a regulatory takings analysis.

The Supreme Court has used an ad hoc approach to determine whether a government regulation amounts to a taking.[149] The main factors of this analysis are: (1) the economic effect of the regulation; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) the character of the government action.[150] The first factor refers to the economic impact on the claimant. If the plaintiff has suffered no value diminution, then she has no claim but is entitled to compensation for a taking which has even a slight negative impact on her property's value.[151] The second factor refers to the extent that the regulation has interfered with the

144. *See* CLEGG ET AL., *supra* note 129, at 11.

145. *Id.*

146. Lochner v. New York, 198 U.S. 45 (1905) (establishing the Court's retreat from any substantive protection to economic rights).

147. For example, it is unlikely that a state regulation ruling that all televisions be manufactured with silver borders would be viewed as a taking even though companies' sales may suffer because consumers want black borders, because the regulation was not for public use. However, under early economic due process, this would fall under the *Allgeyer* directive that citizens be allowed to earn money through any lawful business. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897).

148. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding a state statute extending the period of redemption from foreclosure and the sale of real property in the same year that *Nebbia* severely restricted protection under economic due process claims); Sunstein, *supra* note 25, at 890.

149. *See* CLEGG ET AL., *supra* note 129, at 7 (proposing refinements to the ad hoc inquiries to effect a rule rather than a balancing test).

150. *See* Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

151. *See* CLEGG ET AL., *supra* note 129, at 19.

plaintiff's "investment-backed expectation."[152] This relates to the question of what a taking encompasses in contrast to a deprivation.[153] Finally, the character of the government action examines whether the taking was for public use.[154]

As with any ad hoc analysis, the danger that the clause may become a "mask for judicial predilections" exists.[155] However, it is difficult to narrow the broad text of the clause. The proposed text first stated, "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[156] The adopted text is broader, but the Framers provided no explanation for why the clause was changed.[157] Proposed approaches for determining when regulation is appropriate are equally subjective. For example, the noxious use approach directs that if the court finds the nature of the use "noxious, wrongful, harmful or prejudicial to the health, safety or morals of the public," then the government regulation is justifiable.[158] Therefore, value implementation becomes necessary in construing the Takings Clause, as it is in the Privileges or Immunities and Due Process Clauses.

D. A Trend Toward Revival of Economic Liberties

Despite the bleak treatment of economic rights in the past, recent jurisprudence suggests a revived interest in the area on all federal judicial levels. Current opinions have relied on the Privileges or Immunities Clause, substantive due process, and regulatory takings rationales.

1. Reconsideration of Privileges or Immunities: Saenz v. Roe

At the district court level, *Roe v. Anderson* involved a plaintiff seeking preliminary injunctive relief against imposition of a California statute.[159] Brenda Roe was a resident of Oklahoma until 1997, when her husband lost his job and the couple relocated to California in search of employment. Roe was six months pregnant at the time and could

152. Am. Fed'n of Labor v. Am. Sash and Door Co. 335 U.S. 538 (1949).

153. *See generally* CLEGG ET AL., *supra* note 129.

154. *Id.* at 32. *See also* Mugler v. Kansas, 123 U.S. 623 (1887) (upholding state prohibition law in first regulatory takings case); Munn v. Illinois, 94 U.S. 113 (1877) (upholding regulation of grain storage prices because property subjected to public use is subject to price regulation).

155. *See* ELY, *supra* note 51, at 8.

156. *Id.*

157. *See* CLEGG ET AL., *supra* note 129, at 15.

158. Lawrence Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 172 (1974).

159. Roe v. Anderson, 966 F. Supp. 977 (E.D. Cal. 1997).

not be left unattended; therefore, her husband could not work.[160] The California statute imposed a one-year durational residency requirement on welfare recipients.[161] As a practical matter, this meant California would only give Roe the benefit amount she was entitled to in Oklahoma rather than California, which was $307 as opposed to $565.[162] In parallel litigation, the Court of Appeals vacated the Secretary of Health and Human Services (Secretary) waiver. Therefore, the statute ceased to apply absent Secretary approval.[163]

While *Roe v. Anderson* was pending, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[164] This act gave the states discretion to design federally supported welfare programs. In effect, PRWORA authorized states to use durational residency requirements such as the one in California.[165] Thus, the requirement was reinstated, and the plaintiff brought the present action to challenge its constitutionality under 42 U.S.C. Section 1983, asserting that it violated her constitutional right to travel.[166] The district court granted Roe's preliminary injunction, noting that the plaintiff had shown the possibility of irreparable injury since she could not afford housing and other basic necessities under the lower, Oklahoma-based amount.[167] Privileges or immunities were not mentioned in the opinion, as it would be presumptive for a lower court to apply the buried clause in light of Supreme Court precedent nullifying it.

The State of California appealed the preliminary injunction to the United States Court of Appeals for the Ninth Circuit, which affirmed.[168] The court held that the PRWORA and the California statute to which it granted authority violated equal protection provisions and threatened the plaintiff with deprivation of basic necessities in violation of Section 1983.[169] The Supreme Court then granted certiorari to resolve the constitutionality of the PRWORA.[170] The *Saenz*[171] decision and its exhumation of privileges or immunities followed.

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160. *Id.*

161. CAL. WELF. & INST. CODE § 11450.03 (2001).

162. *Anderson*, 966 F. Supp. at 980.

163. *Id.* at 979.

164. Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 601 (1996).

165. 42 U.S.C. § 604 (1996).

166. *Anderson*, 966 F. Supp. at 977.

167. *Id.* at 985.

168. Anderson v. Roe, 134 F.3d 1400 (9th Cir. 1998).

169. *Id.*

170. Anderson v. Roe, 524 U.S. 982 (1998).

171. Saenz v. Roe, 526 U.S. 489 (1999), *aff'g* 134 F. 3d 1400 (9th Cir. 1998).

The Court relied on the Privileges or Immunities Clause for only the second time since the *Slaughter-House Cases*.[172] In holding that the Privileges or Immunities Clause protected citizens' rights to be treated like other state citizens in the state to which they move, the Court relied on the unenumerated right to travel. In justifying its use of this dead doctrine, the Court actually relied on *Slaughter-House* dicta explaining the privilege of citizens to become a citizen of any state by bona fide residence within that state and to enjoy the same rights as other citizens of that state.[173] The Court reviewed PRWORA's alleged infringement on Roe's liberty with strict scrutiny. In doing so, the Court rejected the state's argument that the statute be upheld based on rational basis and its legitimate state interest in saving ten million dollars per year.[174]

The *Saenz* decision also referenced pre-*Slaughter-House* decisions relying on privileges or immunities.[175] In addition, the Court recognized the important role that privileges or immunities have in affording visiting citizens equality of privileges within states they enter.[176] The Court then went a step further in exhuming the clause by referencing Justice Field's dissenting opinion in *Slaughter-House* for the premise that a citizen choosing to become a citizen of a different state is not "bound to cringe to a superior as a means of enjoying the rights and privileges given other citizens."[177] The Court concluded that PRWORA could not justify the constitutionality of the California statute because Congress may not grant states the power to violate the Fourteenth Amendment and thereby citizens' privileges or immunities.[178]

Chief Justice William H. Rehnquist, joined by Justice Clarence Thomas, noted in his dissent that the Court effectually "breathed new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment" with the *Saenz* ruling.[179] Chief Justice Rehnquist established that he did not favor disregarding privileges or immunities entirely, but rather that this decision did not require the Court's reliance on the clause. In his view, the majority held that a state cannot classify citizens by length of residence without offending

172. *See supra* note 62 and accompanying text.

173. *Saenz*, 526 U.S. at 495.

174. *Id.*

175. *See* Corfield v. Coryell, 4 Wash. C.C. 371 (C.C.E.D. Pa. 1823).

176. *Saenz*, 526 U.S. at 499.

177. *Id.* at 513. (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (Field, J., dissenting)).

178. *Id.*

179. *Id.* at 511 (Rehnquist, J., dissenting).

their privileges or immunities.[180] Therefore, the majority was asserting its interest in protecting the respondent's right to enjoy all the privileges of California citizens by classifying it as the right to travel. Chief Justice Rehnquist opined that the durational residency requirement challenged was a rational exercise of the state's power to ensure that residents enjoy services meant for them only.[181]

Justice Thomas wrote a separate dissent, opining that the majority gave a meaning to privileges or immunities that the enactors of the Fourteenth Amendment did not intend.[182] In doing so, he was careful to distinguish the Privileges or Immunities Clause from the Equal Protection and Due Process Clauses of the Fourteenth Amendment. He noted that these latter clauses had reached a "near talismanic status" in jurisprudence *because* the Privileges or Immunities Clause was nullified.[183] Justice Thomas's dissenting opinion reiterated the view that privileges or immunities are limited to United States citizens and do not extend protection to state citizens against legislation of their own state.[184] Furthermore, the dissent instructed the majority to examine history to construe the phrases' meanings and concluded that this interpretation limited the clause to protection of only the *fundamental rights* that United States citizens hold.[185] However, in a large leap toward the restoration of privileges or immunities, the dissent stated that it was also open to "reevaluate its meaning in an appropriate case."[186] Justice Thomas opined that the virtual eradication of the Privileges or Immunities Clause partially caused the current disarray of Fourteenth Amendment jurisprudence.[187]

It did not take long for lower courts to follow the Court's explicit interest in reviving economic liberties. However, in the face of only one positive decision regarding privileges or immunities in 130 years, the step taken was a smaller, but influential, reinstitution of economic substantive due process.

Justice Thomas's statement in *Saenz* regarding the disarray of the Fourteenth Amendment in modern constitutional jurisprudence is

180. *Id.*

181. *Id.* at 520.

182. *Saenz*, 526 U.S. at 521.

183. *Id.*

184. *Id.* at 522.

185. *Id.* at 527.

186. *Id.* at 528.

187. *Id.* at 527-28.

well-documented.[188] Furthermore, the belief that the eradication of the Privileges or Immunities Clause played a large role in subsequent confusion is supported by case law and scholarly analysis.[189] Although economic due process after *Lochner* lay idle for decades, it has never been as completely eliminated as was privileges or immunities. There has been a slow trend toward reviving the application of substantive due process to protect economic rights.

2. *Moderate* Lochnerism: Craigmiles v. Giles

The plaintiffs in *Craigmiles v. Giles* sought to sell caskets in retail in Tennessee.[190] However, the plaintiffs were ordered to refrain from selling because of the Tennessee Funeral Directors and Embalmers Act (FDEA).[191] The FDEA directs that only individuals holding a funeral directors license may sell funeral merchandise in the state.[192] The complainants did not have such a license; however, one plaintiff had invested approximately thirty thousand dollars in his business and operated it for four months before the defendant, the Executive Director of the Tennessee Funeral Board and Burial Services, ordered him to stop all sales.[193]

The requirements for earning a funeral directors license are demanding. Two options exist, both requiring a substantial investment of time and money. Persons may complete a study course at an approved school for funeral directors and undergo a year-long apprenticeship, or participate in a two-year apprenticeship.[194] The only approved school is located in Nashville and the course lasts for twelve to sixteen months at a cost of ten to twelve thousand dollars.[195] Furthermore, participants in the programs are required to take an examination in which only a small number of questions refer to casket construction.[196] Nonetheless, the plaintiffs were considered to be en-

188. *Saenz*, 526 U.S. at 528. *See also* BORK, *supra* note 36, at 37 (discussing how the Due Process Clause's applicability to the states leads to increased opportunity for implementing judicial values into the Constitution).

189. *Id.* (recognizing that Justice Miller, joining the majority in the *Slaughter-House Cases*, could not resist inferring value into the Constitution one year later in *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1874)); ELY, *supra* note 51, at 18 (stating that the Privileges or Immunities Clause possibly holds substantive weight that the Due Process clause lacks, but noting the resurrection of substantive due process).

190. 110 F. Supp. 2d 658 (E.D. Tenn. 2000).

191. *Id.* at 659.

192. Tennessee Funeral Directors and Embalmers Act, TENN. CODE ANN. §§ 62-5-101 – 62-5-611 (2001).

193. *Craigmiles*, 110 F. Supp. 2d at 660.

194. *Id.*

195. *Id.*

196. *Id.* at 661.

gaging in funeral directing under the FDEA by selling caskets and therefore had to meet the FDEA's requirements.[197] The plaintiffs claimed that the FDEA violated the Fourteenth Amendment. In response, Tennessee advanced state interests of protecting funeral consumers and protecting the health, safety, and welfare of the public.[198]

The district court in *Craigmiles* invalidated the FDEA on substantive due process grounds in holding that it deprived plaintiffs of their "liberty interests in the right to pursue their chosen occupation."[199] The court determined that the appropriate inquiry when faced with economic regulation is a rational basis standard of review.[200] While finding that protecting funeral consumers and public health are legitimate government interests, the court held that the licensure requirement was not rationally related to achieving these goals.[201] The court noted that a casket is merely "a container for human remains" and that no evidence existed that "anyone has ever been harmed by a leaky casket."[202] Furthermore, the court found that consumers would be better served and their interests protected by having options for purchasing caskets.[203] The court held that none of the asserted government interests was served by limiting the number of casket sellers in the state.[204]

The court's attempt to *moderately* apply substantive due process to economic regulation was apparent. To accomplish this feat, the court cited *Lochner* era cases, establishing a liberty interest in the right to pursue an occupation[205] and subsequent cases limiting this right.[206] The court even went so far as to cite *Lochner* for the proposition that a legitimate government interest alone does not justify upholding a law.[207]

In a brief explanation, the court also held that the FDEA violated the Equal Protection Clause.[208] The court noted, however, that it was beyond its role to "breathe new life into the Privileges or Immunities

197. *Id.*
198. *Id.* at 662.
199. *Craigmiles*, 110 F. Supp. 2d at 661.
200. *Id.* at 662.
201. *Id.*
202. *Id.*
203. *Id.* at 664.
204. *Id.*
205. *Craigmiles*, 110 F. Supp. 2d at 661 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
206. Nebbia v. New York, 291 U.S. 502 (1933) (holding that the right to pursue a profession may be conditioned).
207. *Id.* at 662 (citing Lochner v. New York, 198 U.S. 45 (1905)).
208. *Craigmiles*, 110 F. Supp. 2d at 665 (relying on substantive due process reasoning in finding that the state lacks a rational basis for hindering casket sales).

Clause," although it expressed an interest in doing so.[209] This prong of the decision cited numerous examples reconsidering the role of the Privileges or Immunities Clause and took notice of the *Saenz* decision grounded in that clause.[210] The court further opined that the *Slaughter-House* dissenters might have found that the plaintiffs in the present case had been deprived of their privileges or immunities.[211] Therefore, while the court stressed the fact that the result it reached was based on substantive due process, it acknowledged its willingness to reevaluate the Privileges or Immunities Clause and its role in the Fourteenth Amendment.[212]

In a strong but cautious step toward the protection of economic rights, the Sixth Circuit affirmed the district court's ruling shortly before publication of this Comment.[213] The court noted that the FDEA could not pass even the minimal scrutiny used in challenges against economic regulation. Thus, the FDEA was not rationally related to preserving public health but was rather geared toward eliminating competition against funeral directors.[214] The court was careful to limit enjoinment of the FDEA only as it applies to funeral items sold by retailers.[215] Furthermore, the court noted the rarity of striking legislation on rational basis grounds, but held it to be proper in this case because the licensure requirement bore no relationship to the state's safety interests.[216] The state offered many justifications for the FDEA on appeal, none of which the court found legitimate.

First, the court rejected the state's argument that the FDEA would help contain the spread of diseases, because the licensure requirement did not govern the quality of caskets used.[217] Rather, the court reasoned that the FDEA may negatively affect the quality of caskets used, because the higher prices charged by funeral directors forces the public to buy cheaper caskets.[218] Second, the state's argument that funeral directors' education enables them to dispense advice about which caskets are most protective fails because directors can offer this

209. *Id.*

210. *Id.* at 667.

211. *Id.* at 666.

212. *Id.* at 667.

213. *Craigmiles*, 2002 U.S. App. LEXIS 24637 (6th Cir. 2002).

214. *Id.* at 10 (recognizing that funeral directors often raise the retail price of caskets 250 to 600 percent and that retailers such as the plaintiffs sell at lower prices).

215. *Id.* at 13.

216. *Id.* at 6 (stating that "[e]ven foolish and misdirected provisions are generally valid if subject only to rational basis review").

217. *Id.* at 12.

218. *Id.* at 14-15.

advice whether the licensure requirement exists or not.[219] Third, the court held that the licensure provision of the FDEA was not rationally related to consumer protection because consumers may be protected against fraud by retailers through civil and criminal sanctions or by making the FDEA provisions protecting against fraud directly applicable to retailers.[220] The licensure requirement is not necessary to protect consumers. Fourth, the FDEA does not protect consumers by making the Federal Trade Commission's (FTC) rule applicable to retailers.[221] This rule requires itemized prices for both funeral merchandise and services so that funeral homes do not make consumers buy unnecessary services through packaged prices.[222] The court held that this purpose is irrelevant when applied to retailers rather than directors, because competition by retailers will actually reduce casket prices and because retailers only sell goods, so the risk of "packaging" goods and services does not exist.[223] Fifth, the court rejected the state's argument that the licensure requirement protects consumers buying goods prior to death because the plaintiffs in the present case did not engage in such "pre-need" sales.[224] Finally, the state's argument that the FDEA protects consumers psychologically because of the grief training involved in licensure fails because consumers who buy caskets from retailers will still use directors for funeral services, and thus receive the benefit of grief training at that time.[225]

After finding that the FDEA licensure requirement bore no rational relationship to the state's asserted interests, the court recognized that invalidating economic regulation on substantive due process grounds is rare in modern jurisprudence.[226] Specifically, the court stressed that its decision was "not a return to *Lochner*" and that it was not forcing its "view of a well-functioning market on the people of Tennessee."[227]

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219. *Craigmiles*, 2002 U.S. App. LEXIS 24637 at 15.

220. *Id.* at 16-17.

221. *Id.* at 19.

222. *Id.*

223. *Id.* at 20-21.

224. *Id.* at 22 (noting that if plaintiffs subsequently sold caskets before death, the FDEA would apply to them).

225. *Craigmiles*, 2002 U.S. App. LEXIS 24637 at 22-23.

226. *Id.* at 24.

227. *Id.*

3. *The Uncertainty of Regulatory Takings for the Protection of Economic Giants:* Phillip Morris, Inc. v. Reilly

The initial focus of this section was on the revival of regulatory takings as an avenue for large corporations to protect their economic interests. However, as of November 16, 2001, that constitutional component of redress was once again called into question. In a flurry of decisions, the United States Court of Appeals for the First Circuit granted a plaintiff corporation's preliminary injunction enjoining a state regulation that likely effected a taking,[228] then effectively reversed itself after remand[229] and has subsequently withdrawn the reversal after granting the plaintiff's motion for rehearing en banc. The case was reargued on January 7, 2002. Shortly before publication, on December 2, 2002, the First Circuit issued its new opinion granting injunctive relief to the plaintiff manufacturers.

a. *Phillip Morris I*[230]

The district court of Massachusetts in *Phillip Morris Inc. v. Harshbarger* ruled on a preliminary injunction sought by four cigarette manufacturers to enjoin the enactment of a Massachussetts statute requiring the companies to report tobacco ingredients.[231] The statute, Massachusetts Tobacco Ingredients & Nicotine Yield Act (307B) required tobacco manufacturers to produce a detailed list of the ingredients of tobacco products sold in the state.[232] Furthermore, the statute and its implementing regulations reserved the right to make the information public.[233]

The plaintiff cigarette manufacturers moved for a preliminary injunction while they pursued the merits of their unconstitutionality claim on Due Process, Takings, and Commerce Clause grounds.[234] Specifically, the plaintiffs argued that the reporting requirement would reveal trade secrets to competitors, thereby destroying the secrets' economic value, thus resulting in a regulatory taking without just compensation.[235] In granting the plaintiffs' motion, the district court recognized the states' broad regulatory power over business in

228. Phillip Morris, Inc. v. Harshbarger, 159 F.3d 670 (1st Cir. 1998) (hereinafter *Phillip Morris II*).

229. Phillip Morris, Inc. v. Reilly, 267 F.3d 45 (1st Cir. 2001).

230. Phillip Morris, Inc. v. Harshbarger, 122 F.3d 58 (1st Cir. 1997) (hereinafter *Phillip Morris I*).

231. *Id.*

232. MASS. GEN. LAWS ch. 94, § 307B (1996).

233. *Id.*

234. *Phillip Morris I*, 122 F.3d 58 (1st Cir. 1997).

235. *Id.*

the public interest. The court reiterated that not all regulations decreasing the economic value of property rights entitled owners to compensation.[236] However, the court held that the broad state police power is not limitless. In addition, the economic impact and interference with the plaintiffs' investment-backed expectation weighed in the plaintiffs' favor for the likelihood of success on the merits. Therefore, the injunction was granted.[237] The First Circuit initially addressed the case by affirming that the statute was not preempted by federal law in *Phillip Morris I*.[238]

b. *Phillip Morris II*

The First Circuit then affirmed the preliminary injunction in *Phillip Morris II*.[239] The court relied on the regulatory takings argument, determining that it was unnecessary to reach the issue of a physical taking.[240] Therefore, the analysis depended on an ad hoc determination.[241] Massachusetts conceded that the information requirement would disclose valuable trade secrets, but argued that this was justified due to the state's interest in police power over public health.[242] The state further argued that the plaintiffs were compensated by being allowed to continue business in Massachusetts in return for a 307B disclosure.[243] The First Circuit rejected the soundness of the latter argument noting that "permission to engage in routine activities" is not sufficient compensation under existing authority.[244] The court held that the plaintiffs had shown the requisite likelihood of success on the merits for a preliminary injunction and noted that Massachusetts's arguments would probably "bear no fruit," although it was not a matter to be decided at that juncture.[245]

After the First Circuit's affirmation of the preliminary injunction, the plaintiff manufacturers moved for summary judgment in district court, requesting permanent declaratory and injunctive relief to prohibit the ingredient disclosing provision of 307B.[246] The district court

236. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

237. *Id.*

238. 122 F.3d 58 (1st Cir. 1997) (holding that the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-41 (2001), does not preempt Massachusetts General Law § 307B).

239. 159 F.3d 670 (1st Cir. 1998).

240. *Id.*

241. *See supra* notes 149-154 and accompanying text.

242. *Phillip Morris II*, 159 F.3d at 673.

243. *Id.* at 676 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), requiring that the government "grant a benefit of real value" to compensate a taking).

244. *Id.* at 677.

245. *Id.* at 678.

246. Phillip Morris, Inc. v. Reilly, 113 F. Supp. 2d 129 (D. Mass. 2000).

recognized that trade secrets are viewed as property interests by Massachusetts.[247] Furthermore, the Fifth Amendment Takings Clause is applicable to states through the Fourteenth Amendment. However, the court reasoned that states generally have broad police power and plaintiffs must yield to this power where exercised appropriately.[248] This power is not absolute, however, and the taking of even intangible property, such as the trade secrets here, may constitute a regulatory taking.[249] After undergoing an ad hoc analysis of the character of the governmental action, the economic impact on plaintiffs, and the interference with the cigarette manufacturers' investment-backed expectations, the court concluded that 307B violated the Takings Clause.[250] Therefore, the plaintiffs were granted summary judgment, and the state was enjoined from enforcing the ingredient disclosure portion of the statute.[251]

c. *Phillip Morris III*

Massachusetts appealed to the First Circuit, seeking a reversal of the district court's grant of summary judgment, in *Phillip Morris III*.[252] In complete contrast to its opinion in *Phillip Morris II*, the court held that 307B did not effect a constitutional taking without just compensation.[253] Specifically, the *Phillip Morris III* court held that requiring disclosure of trade secrets was an appropriate exercise of state police power, and because Massachusetts had not assured plaintiffs confidentiality, the manufacturers had no reasonable, investment-backed expectation like that held dispositive under regulatory takings authority.[254] In addition, the *Phillip Morris III* court held that there was no *per se* taking because the government was not forcing the manufacturers to bear a public burden.[255] Rather, the court held that the reasonable, investment-backed expectation of the plaintiffs was the dispositive factor and concluded that since Massachusetts had not ensured confidentiality, the plaintiffs had notice that disclosure of trade

247. *Id.* at 142.

248. *Id.* at 143.

249. *Id.* at 142.

250. *Id.* at 145 (holding that the trade secrets amounted to property and that the state's taking of such through disclosure requirements provided no compensation and therefore violated the Takings Clause).

251. *Id.* at 145.

252. Phillip Morris, Inc. v. Reilly, 267 F.3d 45 (1st Cir. 2001) (hereinafter *Phillip Morris III*). This opinion has been withdrawn from bound volume pursuant to rehearing *en banc*.

253. *Id.*

254. *Id.* at 43 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)).

255. *Id.*

secrets would be required.[256] The most complete retreat from its prior decision is found in the court's reasoning that the manufacturers' continued business privilege of marketing and selling tobacco in Massachusetts *was* just compensation for the required disclosures.[257] The First Circuit found that Massachusetts's general statutory trade secret protections do not afford the plaintiffs with a reasonable, investment-backed expectation in the confidentiality of disclosures, and 307B does not exempt trade secrets from disclosure.[258] Furthermore, the court noted that the manufacturers' confidentiality right may be subordinate to the state's valid exercise of police power to protect public health.[259]

The *Phillip Morris III* decision met with strong dissent. The dissenting opinion focused on the inconsistency between the court's opinion in *Phillip Morris II* and the present decision.[260] The dissenting judge opined that, by allowing Massachusetts to exert its police power to effect this taking, the court sacrificed "bedrock principle[s] of individual property rights in order to uphold a creative, but at best marginally effective, response to a public health problem."[261] The dissenting opinion also criticized the majority for allowing states to "ransack trade secrets of virtually any business" without offering compensation.[262] Although it recognized that this was a difficult case to decide, the dissenting opinion established that complexity is no excuse for bad law.

The dissent opined that *Phillip Morris II* encompassed the correct understanding of the Takings Clause and related case authority. Under this construction, the government must compensate for the use of trade secrets by bestowing a real value on the plaintiff.[263] The dissent argued that the majority made three errors in *Phillip Morris III*. First, the court failed to recognize the extent of the manufacturers' property interest in their trade secrets. Massachussetts holds trade secrets to be property interests, and therefore, they are property for

256. *Id.*

257. *Id.* (discussing that the protection of the Trade Secrets Act, 18 U.S.C. § 1905 (2000), does not confer an explicit promise of confidentiality that a party may rely on for a reasonable, investment-backed expectation). *See supra* note 183 and accompanying text.

258. *Phillip Morris III*, 267 F.3d 45. The court contrasts Section 307B with the federal Trade Secrets Act and Texas's ingredient reporting statute, provisions that do give trade secrets protection.

259. *Id.* at 36 (citing Corn Prod. Refining Co. v. Eddy, 249 U.S. 427 (1919)).

260. *Id.* at 62.

261. *Id.* at 61.

262. *Id.*

263. *Phillip Morris II*, 159 F.3d at 676.

Takings Clause purposes.[264] The majority conceded that 307B will likely result in making trade secrets public knowledge, which will substantially decrease, if not eliminate, the economic value of the manufacturers' property interests.[265] Despite this, the decision treats trade secrets as "quasi-interests," effectively holding that the property interest exists only until the state decides to regulate the underlying product in which the secret lies.[266] Under this view, since tobacco may be regulated, the trade secrets surrounding its components may be regulated as well. The dissent opined that the majority created a judicial exception to takings in situations where the trade secret is part of a regulated product. The problem with this analysis is that almost every sector is regulated. It appears as though the majority was simply integrating its own values about tobacco companies into the opinion.[267]

The dissent considered the majority's second mistake to be the restriction of *per se* takings analysis to real property.[268] A *per se* taking may exist when the government applies a "permanent physical occupation" *or* creates a rule that "deprives the property of all economically viable use."[269] Surely, 307B falls into the latter category. A trade secret loses economic value once it is made public. Despite this clear rule, the majority limited a *per se* analysis to the regulation of land effecting a taking.[270] However, the court's third mistake is more important for the purpose of this Comment.

The third mistake, according to the dissent, was that the majority applied a failed *Ruckelshaus v. Monsanto*, or regulatory takings, analysis.[271] The court in *Phillip Morris II* rejected the state's argument that the privilege of allowing the manufacturers to continue to do business in the state was just compensation.[272] Under *Monsanto*, offering a plaintiff no additional benefit over what it already had did not rise to the level of compensation for a taking.[273] Rather than relying on the

264. *Phillip Morris III*, 267 F.3d at 63.

265. *Id.* at 64.

266. *Id.* at 65.

267. *Id.* at 61 (noting that while the dissenting judge is not a proponent of tobacco, personal views should not affect the constitutional requirement of compensation for takings).

268. *Id.* at 67.

269. *Id.* at 65 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

270. *Phillip Morris III*, 267 F.3d at 69-71 (arguing that revealing a trade secret is like a permanent land occupation because in both situations, the government is not taking "one strand of a bundle of property rights" but rather the whole strand).

271. 467 U.S. 986 (1984).

272. *Phillip Morris III*, 267 F.3d at 76. *See also Phillip Morris II*, 159 F.3d at 676-77.

273. *Phillip Morris III*, 267 F.3d at 76 (citing *Ruckelshaus*, 467 U.S. 986). *See also Phillip Morris II*, in which this very circuit stated that continuing to do business "does not offer the Manufacturer anything more than what they already have, it does not afford due compensation for a taking of valuable property rights." *Phillip Morris II*, 159 F.3d at 678.

proper Environmental Protection Agency (EPA) statutory period in *Monsanto*, which the court followed in *Phillip Morris II*, the court here relied on a period in which the *Monsanto* plaintiffs had acquiesced to disclosure by continuing to provide the government with its trade secrets.[274] The *Monsanto* Court merely held that a party has no reasonable, investment-backed expectation when the government gives no assurances of confidentiality and the company discloses trade secrets anyway.[275] The dissent did not find this reasoning analogous to the present case because the tobacco manufacturers never explicitly nor implicitly acquiesced to 307B. To the contrary, they fought the constitutionality of the statute since its inception.[276] The dissent concluded by opining its favor of the Second Circuit rationale using property acquisition to measure the time period for determining investment-backed expectation, rather than enactment of a challenged statute.[277]

d. *Phillip Morris IV*

After the First Circuit's startling break from its *Phillip Morris II* decision in *Phillip Morris III*, the plaintiffs sought a petition for rehearing en banc. On November 16, 2001, the court granted the petition and subsequently withdrew its *Phillip Morris III* opinion.[278] On January 7, 2002, the case was reargued. Shortly before publication of this Comment, the First Circuit issued its en banc opinion.[279] In *Phillip Morris IV*, the court held that the 307B ingredient disclosure provision violated the Takings Clause, and thus affirmed the district court's grant of summary judgment and injunctive relief for the plaintiffs.[280] The court reached this conclusion through a multi-part analysis.

The court first noted that Massachusetts's law does treat trade secrets as valid property interests.[281] Because the ingredients were protected property, the court next underwent a takings analysis. The court noted the factual, ad hoc analysis used for regulatory takings, but also recognized that one *per se* rule for this type of taking exists. When a regulation denies an owner of all economic value, this is a *per*

274. *Id.* at 78.

275. *Monsanto*, 467 U.S. at 1009.

276. *See supra* notes 231-238 and accompanying text.

277. *See* Meriden Trust & Safe Deposit Co. v. FDIC, 62 F.3d 449 (2d Cir. 1995).

278. Phillip Morris, Inc. v. Reilly, 267 F.3d 45 (1st Cir. 2001). This opinion has been withdrawn from bound volume pursuant to court order.

279. Although the new opinion assumes the role of *Phillip Morris III*, it is referred to as *Phillip Morris IV* in this Comment to distinguish it from the withdrawn opinion.

280. *Phillip Morris IV*, 2002 U.S. App. LEXIS 24403.

281. *Id.* at 15.

se taking.[282] The court recognized that the Supreme Court has never ruled that trade secrets or other intellectual property cannot be physically taken and so it would appear that the *per se* rule may apply in these situations.[283] However, because the *per se* rule had only been applied where real rather than personal property was at issue, the court held that it should be considered, but not dispositive to the present case.[284] Therefore, the court examined the case under the controlling regulatory takings rationale of *Monsanto*, considering the plaintiffs' reasonable, investment-backed expectations, the economic impact of 307B ingredient disclosure, and the character of the government action.[285] The court analogized 307B to the three EPA time periods under *Monsanto*: (1) where no right to confidentiality existed in 1947; (2) where the government guarantee of confidentiality gave plaintiffs a reasonable, investment-backed expectation in 1972; and (3) under the 1978 amendments which established that the government could disclose trade secrets and therefore nullified plaintiffs' reasonable, investment-backed expectations if they disclosed with knowledge of this rule.[286]

The *Phillip Morris IV* court held that 307B was distinct from both the first and third *Monsanto* periods where no guarantee of confidentiality existed.[287] In addition, the court reasoned that the second *Monsanto* scheme was similar to the present situation, but not dispositive because in *Monsanto*, there was a direct guarantee of confidentiality as opposed to here, where Massachusetts's law only generally protects trade secrets.[288] Therefore, the court considered an earlier twentieth century case considering whether a taking was effected when plaintiffs were required to disclose ingredients.[289] Under this authority, the court noted that plaintiffs may be required to disclose "fair information" to consumers.[290] However, the court noted that fair information may include less than all of the ingredients required

282. *Id.* at 25 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)).

283. *Id.* at 26, n.7.

284. *Id.* at 27 (disagreeing with the concurring opinion, which held that *Monsanto* created a per se rule that the government cannot require disclosure without violating the Takings Clause where a trade secret owner establishes a reasonable investment-backed expectation of confidentiality).

285. *Id.* at 32 (citing Ruckelshaus v. Monsanto, 467 U.S. 986 (1984)).

286. *Phillip Morris IV*, 2002 U.S. App. LEXIS 24403 at *32-36.

287. *Id.* at 36.

288. *Id.* at 37-38.

289. *Id.* at 40 (citing *Corn Products II*, 249 U.S. at 431-32).

290. *Id.* at 41.

under 307B.[291] Based on this reasoning, and because Massachusetts generally protects trade secrets, the court held that the cigarette manufacturers did have a reasonable, investment-backed expectation of confidentiality.[292]

The court next considered the economic impact of 307B on the plaintiffs' trade secrets and tersely concluded that because plaintiffs had spent billions of dollars to create brand-specific formulas and 307B disclosure would make reverse engineering more possible, the economic impact was "potentially tremendous."[293] Finally, the court considered the character of the regulation and found this to be the dispositive factor. The plaintiffs argued that 307B was a *per se* taking because it ruined their ability to exclude competitiors from their trade secrets and therefore destroyed the value of their secret formulas.[294] The court agreed with this analysis, because 307B requires disclosure that the state is not required to keep secret and under *Monsanto*, this nullified the plaintiffs' property rights.[295] The 307B provisions that disclosure will only occur if the state determines that it "could benefit" public health and if the attorney general finds no unconstitutional taking are inadequate because the burden on the government is too low.[296] Rather, the court opined that the state could effect its interest in public health just as well by requiring *confidential* disclosure of ingredients.[297] Therefore, because 307B destroys the plaintiffs' trade secrets and the standard of "could benefit" public health does not justify the "potentially tremendous" loss, 307B constituted a taking without just compensation.[298]

The court also considered the doctrine of unconstitutional conditions because of the 307B provision that companies did not have to disclose ingredients if they halted business in Massachusetts. In contrast to *Phillip Morris III*, which held that the right to continue business in the state was just compensation for a taking, the *Phillip Morris IV* court noted that persons cannot be forced to forego their constitutional rights, such as the right to just compensation, in exchange for a government benefit that has minimal connection to the property at

291. *Id.* at 42 (opining that disclosure of only harmful additives rather than all would best serve the state's interest in protecting health).

292. *Phillip Morris IV*, 2002 U.S. App. LEXIS 24403 at *43-44.

293. *Id.* at 44-45.

294. *Id.* at 45.

295. *Id.* at 47.

296. *Id.* at 47-48.

297. *Id.* at 54.

298. *Phillip Morris IV*, 2002 U.S. App. LEXIS 24403 at *56.

issue.[299] Here, the court held that allowing plaintiffs to continue conducting business in the state was not a valuable benefit on which their rights could be conditioned.[300] Therefore, the state was enjoined from enforcing the ingredient-disclosure provision of 307B, and the plaintiffs were granted summary judgment.

The concurring judge, who dissented from the withdrawn *Phillip Morris III* decision, agreed with the result that the lead opinion reached but disagreed with the analysis. Rather, the concurring opinion argued that *Monsanto* had established a *per se* rule regarding trade secret takings that a taking occurs if the government uses a trade secret in which a plaintiff has a reasonable, investment-backed expectation of confidentiality without offering compensation.[301] Because the plaintiffs had such an expectation as evidenced by their non-disclosure and the government offered no real compensation, 307B violates the Takings Clause.[302]

The dissent argued that because the present dispute was a facial challenge to 307B, plaintiffs must satisfy the high standard of showing that it would not be constitutional under any circumstances.[303] The dissent opined that 307B does not automatically require that all ingredients be disclosed, which would be unconstitutional. Where less than all ingredients are required to be disclosed, 307B may be constitutional and therefore, constitutionality must be analyzed based on the application of 307B to individual circumstances.[304]

III. ANALYSIS

As demonstrated, the area of economic rights has become a quagmire of jurisprudence. While those seeking redress for an infringement of their personal liberties may do so under various theories, the proponent of economic liberties faces a much more difficult task. The ruling of the Court in *Saenz* and the lower courts' eagerness to restore weight to these rights may remove some of these hurdles.[305] However, to ensure that the mistakes of earlier jurisprudence are not repeated, an in-depth analysis of the current problems and their comparison to earlier ones is required. First, the proper role of the Privileges or Immunities Clause and how the *Saenz* decision affects

299. *Id.* at 57 (citing Dolan v. City of Tigard, 52 U.S. 374, 385 (1994)).
300. *Id.* at 61.
301. *Id.* at 64.
302. *Id.* at 68.
303. *Id.* at 79.
304. *Phillip Morris IV*, 2002 U.S. App. LEXIS 24403 at *80-83.
305. *See Saenz*, 526 U.S. 489; *Craigmiles*, 110 F. Supp. 2d 658.

the application of that clause to economic liberties will be analyzed.[306] Second, an analysis of the strain placed on the Due Process Clause by the historical eradication of privileges or immunities will show that economic due process was a necessary evil of that elimination.[307] The question whether economic due process should remain dormant, or may be applied moderately, is a necessary corollary to this examination.[308] Various alternatives will be explored to accomplish this task. Finally, the strength of the Takings Clause will be explored in light of the elusive *Phillip Morris* decisions.[309]

A. The Proper Role of Privileges or Immunities

Suggesting the natural expiration of the Constitution every nineteen years, Thomas Jefferson wrote to Madison, "'that the earth belongs in usufruct to the living;' that the dead have neither powers nor rights over it."[310] Nonetheless, it is the dead who left the Privileges or Immunities Clause in a dormant state. To this day, the reason why the *Slaughter-House* Court chose to condemn the clause, despite its potential for substance, is ambiguous.[311] No amount of speculation since 1873 has resolved that question nor is it likely that any scholar will ever find the answer. It is more important to understand what the clause means for litigants today than to review why it was abandoned years ago.

Justice Field's dissent in *Slaughter-House* has proved prophetic.[312] Indeed, the Privileges or Immunities Clause was rendered a "vain and idle enactment" for 130 years, until the Supreme Court's *Saenz* decision.[313] However, legislative history does not infer that the clause was meant to be ineffective. Rather, privileges or immunities standing alone do not restrain state legislatures, and the goal of the Fourteenth Amendment may likely have been to effect this restraint and force states to respect fundamental rights.[314] One scholar has suggested that the most reasonable interpretation of the clause is as a "delegation to future constitutional decision-makers" to protect implicit con-

306. *See infra* notes 310-453 and accompanying text.

307. *See infra* notes 454-489 and accompanying text.

308. *See infra* notes 490-560 and accompanying text.

309. *See infra* notes 561-671 and accompanying text.

310. ELY, *supra* note 51, at 11 (discussing that the judiciary should enforce the Constitution rather than value inferences).

311. *Id.* at 18 (noting the complication of statutory construction resulting from the lack of records regarding the Fourteenth Amendment debates).

312. *See supra* notes 40-68 and accompanying text.

313. *See Slaughter-House Cases* 83 U.S. (16 Wall.) 36 (1873). *But see Saenz*, 526 U.S. 489.

314. *See* ELY, *supra* note 51, at 26.

stitutional rights never enumerated.[315] Existing legislative history indicates that the Framers of the Fourteenth Amendment repeatedly referred to *Corfield v. Coryell*,[316] which held that fundamental privileges found in the Article IV Privileges and Immunities Clause fall under the general categories of "[p]rotection by the government, 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 for the whole."[317] The second category clearly encompasses economic rights. Certainly, the *Saenz* plaintiff sought to enjoy life and liberty through the acquisition of necessary welfare benefits.

Although restricted for years, speculation has abounded for the last two decades that the Privileges or Immunities Clause would be restored. One scholar noted that the clause is experiencing an "academic renaissance."[318] Another has proposed an approach to reconstruct the clause.[319] Such reconstruction would require determining whether a challenged law affects a privilege or immunity and, if so, whether that impact violates equality principles.[320] The author distinguishes his argument from the popular characterization of the clause as offering substantive protection, and argues that it was intended to be an equality-based protection.[321] Under this approach, the intent of the Privileges or Immunities Clause was to require states to confer the same privileges or immunities to everyone, regardless of what those privileges were.[322] The argument concludes that the Equal Protection Clause has been overburdened with performing the proper functions of the Privileges or Immunities Clause, as the next section argues also occurred with the Due Process Clause.[323]

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315. *Id.* at 29.

316. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

317. ELY, *supra* note 51, at 28-29 (discussing how the Framers of the Fourteenth Amendment repeatedly referenced the *Corfield v. Coryell*, 6 F. Cas 546 (C.C.E.D. Pa. 1823) (No.3,230), interpretation of Article IV in attempting to define privileges and immunities in the Fourteenth Amendment counterpart).

318. CURTIS, *supra* note 36, at 8 (stating that "if recent scholarship is any indication, there is reason to hope that the clause may once again enjoy the central role in the protection of civil liberties envisioned for it by its Framers").

319. Harrison, *supra* note 2, at 1386.

320. *Id.*

321. *Id.* at 1387.

322. *Id.* at 1388.

323. *Id.* at 1394. In theory, this argument could also provide an explanation for why the *Saenz* Court did not rely on the Equal Protection Clause, as the lower courts did, and which would have been within the bounds of established law.

One scholar contends that academics of the clause have taken one of three varying positions concerning the proper scope of the Privileges or Immunities Clause, derived from originalist analyses.[324] The first "camp" is by far the broadest, arguing that a widespread definition is as plausible as the original understanding of privileges or immunities as a limited one.[325] The second theory takes the more compromising position that privileges or immunities are best understood as references to fundamental rights only,[326] and the third well-known argument takes the extremist ground that the provision is "obliterated past deciphering" as though by an inkblot.[327] Kenyon Bunch's recent argument analyzes the three theories using his own test for determining originalist meaning and concludes that the clause is best left as a partial inkblot.[328] This Comment concludes that the more moderate, fundamental rights approach is the most suitable for revival of the clause. The importance of these arguments is evident in the fact that the Court purports to look to the original meaning of the Constitution in its decision, such as in *Saenz*.

1. Justifications for an Expansive Reading of the Privileges or Immunities Clause

Among the strongest supporters of this approach are scholars Michael Perry and John Harrison.[329] The main premise of this view is that the modern Court's activist decisions, which others believe to be value implementations, *can* be squared with original intent.[330] Important to the success of this theory is Perry's belief that originalism does not preclude judges from choosing one viewpoint just because it may lend more support to an activist decision.[331] Under this analysis, privileges or immunities protect a broad category of freedoms on which reliance could justify almost any activist decision.[332] Perry purports

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324. *See* Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause: Michael Perry's Justification for Judicial Activism or Robert Bork's Constitutional Inkblot?*, 10 SETON HALL CONST. L.J. 321, 324 (2000) (analyzing the three general divisions of thought on the scope of privileges or immunities and concluding that the clause is better viewed as a partial inkblot).

325. *Id.* at 324.

326. *Id.* (discussing and citing RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (Univ. of Okla. Press 1989)).

327. *Id.* at 325 (citing BORK, *supra* note 36, at 166).

328. *Id.* at 412 (arguing that completely nullifying the clause may be erroneous because legislative records reveal that a "constitution-amending majority" of Framers intended the clause to envelop at least the protections given in the Civil Rights Act of 1866 and the Bill of Rights).

329. *See* PERRY, *supra* note 76; Harrison, *supra* note 2.

330. *See* Bunch, *supra* note 324, at 322.

331. *Id.* at 323 (citing PERRY, *supra* note 76, at 54-69).

332. *Id.* at 324.

that the Framers' *dominant view* was just as likely to have been a broad interpretation of privileges or immunities as a more limited one.[333] Another scholar has opined that analyzing the Framers' intent is not impossible, despite the many originalist intentions that existed.[334]

Perry recognizes that, despite his belief that the Framers intended to encompass a broad range of rights under privileges or immunities, the Court has instead relied on substantive due process or equal protection to support these rights.[335] Although he argues that this reliance on other Fourteenth Amendment clauses is mistaken from a broad originalist perspective, he concludes that the problem does not undermine the decision's legitimacy. Rather, he finds it important only that *some* clause supports the decision, rather than the *right* clause.[336] If all that is required is that some clause supports a holding, then almost all activist judicial decisions can find support. This is because, under Perry's understanding, the Privileges or Immunities Clause was meant to protect all privileges or immunities granted under state and federal law as well as the "freedom of citizens to do, or to refrain from doing, as he or she wants, in the 'pursuit' (as the Declaration says) of his or her 'happiness.'"[337]

Privileges or immunities would certainly encompass economic liberties under this view. Furthermore, this reading invites "future decision-makers," hence the modern Court, to decide what privileges or immunities persons have.[338] This directive, if taken literally, would certainly lead to judicial value implementation in an equally broad, if not broader, sense than the *Lochner* era decisions. As this Comment will expand upon later, this would indeed be a slippery slope from which the demise of privileges or immunities at the very beginning of the clause's substance could be predicted.[339]

The further importance of this broad view is that it supports the notion that the Bill of Rights' freedoms, protected against abridgment by the federal government, were meant to apply to the states through

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333. *Id.*

334. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 247-51 (1988) (arguing that adjudication through construction of original intent is possible despite multiple intentions, because the breadth does not indicate contradiction, but rather reflects the multitude of Framers involved).

335. *See* PERRY, *supra* note 76, at 136.

336. *Id.* at 137.

337. *Id.* at 127.

338. *Id.* at 192-204.

339. *See infra* notes 629–630 and accompanying text.

the Privileges or Immunities Clause.[340] This, of course, is in direct contrast to the holding of the *Slaughter-House* decision, which was finally called into question by the *Saenz* Court. This recent development, as analyzed later, implicates that the Court, although not ready to overturn *Slaughter-House*, is finally moving in that direction. The fact that the Privileges or Immunities Clause was meant to incorporate the Bill of Rights against state abridgment is supported by the argument that one of the most important issues to the Framers of the clause was political power.[341] This is indeed supported by the fact that the Fourteenth Amendment enactors considered the circumstances under which readmittance of southern states to the Union would be allowed.[342] In fact, ratification of the Fourteenth Amendment was a prerequisite to readmitting those states into the Union.[343]

Perry also argues that scholars are in agreement that the Framers intended to protect all privileges or immunities granted under state law.[344] These include fundamental rights to life and liberty as well as property and contract rights.[345] Under this framework, a state abridges such a right by passing a law that would be unconstitutional if it were federal.[346] Therefore, analysis of what privileges or immunities were protected under the original Constitution's counterpart to the clause, Article IV, is helpful.

Most scholars, as well as the Framers of the Fourteenth Amendment, have looked to *Corfield v. Coryell*[347] for guidance in construing that provision. Part of the opinion focuses on privileges or immunities that all citizens of free governments hold. These include "protection by government, 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

340. *See* Bunch, *supra* note 324 (citing CURTIS, *supra* note 36). *But see* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949) (opining that the Privileges or Immunities Clause did not effect the Bill of Rights' application to the states). Incorporation was subsequently accomplished through the Due Process Clause instead.

341. *See* CURTIS, *supra* note 36, at 13.

342. *Id.* at 14.

343. *See* Bunch, *supra* note 324, at 362 (noting that the Framers did not include voting rights to African-Americans in the discussion of privileges or immunities because southern states would not have ratified this inclusion).

344. *See* PERRY, *supra* note 76, at 124.

345. *Id.* at 124.

346. *Id.* at 127.

347. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

whole."[348] This construction is broad indeed, and economic liberties would surely be considered privileges or immunities if this were the view that the Fourteenth Amendment Framers held. However, a later reference to fundamental rights in the opinion suggests, as does Bunch's "second group" of Fourteenth Amendment scholars, that the scope of privileges or immunities was limited to protection of *fundamental rights*. However, before we reach this argument, we must explore another aspect of the expansive perspective.

In attempting reconstruction of the Privileges or Immunities Clause, Harrison identified two factors that must be considered.[349] First, one must determine whether the law affects a privilege or immunity. Second, whether that effect violates equality principles must be determined.[350] The core of this theory rests on differentiating between substantive and equality-based protections.[351] Harrison argues that the clause was intended to act as an equality-based limitation on the government.[352] In that regard, privileges or immunities do not determine the constitutionality of the challenged state law's substance, but rather, require that it be the same for all citizens.[353] Therefore, if a state law changes the content as it applies to everyone, there is no abridgment. On the other hand, an abridgment exists if a state law limits only one group's rights.[354] Because the Privileges or Immunities Clause has traditionally focused on the substance of the law, the Equal Protection Clause has been left to bear the burden of its role.[355] As this Comment will examine, the *Saenz* decision seems to comport with this view by relying on the dead Privileges or Immunities Clause for a traditional equal protection job.[356]

348. *Id.* at 551-52. Perry relies on this broad portion of the opinion to support his expansive view. *See* PERRY, *supra* note 76, at 125.

349. *See* Harrison, *supra* note 2, at 1385.

350. *Id.* at 1386.

351. *Id.* at 1387.

352. *Id.* at 1388.

353. *Id.*

354. *Id.*

355. *See* Harrison, *supra* note 2, at 1391.

356. *See* Stacey L. Winick, Comment, *A New Chapter in Constitutional Law:* Saenz v. Roe *and the Revival of the Fourteenth Amendment's Privileges or Immunities Clause*, 28 HOFSTRA L. REV. 573 (1999) (analyzing why the *Saenz* Court chose to rely on Privileges or Immunities for an Equal Protection issue).

2. *The Moderate "Fundamental Rights" Approach to Privileges or Immunities*

Perry asserts that most scholars agree that the clause was meant to protect privileges or immunities granted under state law.[357] However, a large group of Fourteenth Amendment scholars view the Framers' intent as protecting only a small set of fundamental rights.[358] From an originalist perspective, this view proposes that it is more reasonable to accept a limited meaning of privileges or immunities when the historical analysis is uncertain, as it certainly is under the present clause.[359] Scholars Raoul Berger and Earl Maltz are two leading contenders of this viewpoint.[360]

Berger argues that the Civil Rights Act of 1866 represents the outer limit of the Framers' intended protection of privileges or immunities.[361] Support for this theory is found in the Fourteenth Amendment debates, which relied largely on *Corfield v. Coryell*[362] and its analysis of the Article IV Privileges and Immunities Clause for guidance. Contrary to Perry's assertion, scholars following this line of thought conclude that Article IV privileges and immunities were given narrow protection by the *Corfield* Court.[363] Only fundamental rights were protected rather than all rights associated with state citizenship.[364] Evidence exists that this fundamental rights view was present in the Fourteenth Amendment debates.[365] In his introduction of the Amendment to the Senate, Senator Howard stated its purpose as precluding state laws that violated *fundamental rights* of citizens.[366] Fundamental rights at the time of enactment are believed to have been understood as civil rights not created by government but those natural to men.[367] In contrast, non-fundamental rights were those created by government and therefore left to state governments to freely regulate.[368] Scholars point to the exclusion of political rights from protec-

357. *See* PERRY, *supra* note 76, at 124.

358. *See* EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-69 (Univ. Press of Kan. 1990); BERGER, *supra* note 326.

359. *See* Bunch, *supra* note 324, at 329-30.

360. *Id.* at 324.

361. *See* Berger, *supra* note 158, at 169.

362. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

363. *See generally* MALTZ, *supra* note 358.

364. *See* Bunch, *supra* note 324, at 343.

365. *Id.* at 346.

366. *Id.* at 345 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)).

367. *Id.* at 347.

368. *Id.* However, a problem with distinguishing based on fundamental rights versus natural law is that people's beliefs about what is natural vary.

tion as evidence that Framers supported a limitation on fundamental rights.[369]

Debates about racial desegregation in Congress following the Fourteenth Amendment illustrate the protective distinction between fundamental rights and other rights.[370] These indicate congressional beliefs that attending school was a legislative right and therefore not fundamental.[371] Consequently, school desegregation, or the right to attend any school, was not a privilege or immunity deserving protection.[372] Conversely, the right to travel was viewed as a fundamental right and, therefore, laws could not abridge the privilege of travel on a racial basis.[373] This latter fundamental right argument certainly finds a modicum of support in the recent *Saenz* decision, also finding the right to travel to be fundamental.[374] The limited construction of what privileges or immunities were meant to protect also substantially weakens the argument that the clause was intended to protect all rights given by state law, because this category is much broader than the former. However, this analysis is not completely harmful to economic liberties. At least two scholars believe that even if privileges or immunities are limited to the fundamental rights found in the Civil Rights Act, the "right to work at one's occupation of choice" is found within this category. Thus, this right is protected as a privilege or immunity.[375] For this reason, and to avoid potential cries of illegitimacy if the Court turned to the expansive protection of privileges or immunities, this Comment concludes that this approach is best for the Court to adhere to in its early stages of reviving the clause.

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369. *Id.* at 348 (citing CONG. GLOBE, 39th Cong., 2d Sess. 185 (1866)) (establishing that enactors did not think privileges or immunities included voting or other non-fundamental rights because they derived from law, not nature). *But see* WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPAL TO JUDICIAL DOCTRINE 125 (1988) (arguing the plausibility that political rights were afforded protection by the Privileges or Immunities Clause).

370. *See* Bunch, *supra* note 324, at 368.

371. *Id.* at 371.

372. *Id.* (citing CONG. GLOBE, 42d Cong., 2d Sess., app. 3-4 (1872)). Of course, it is likely that the right to attend school would be considered a natural right today.

373. *Id.* at 371.

374. *Saenz*, 526 U.S. at 498.

375. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 102 (Bobbs-Merrill Co., Inc. 1962). *See also* Bunch, *supra* note 324, at 391 (stating that it is possible that a "constitution-amending majority" recognized an upper category beyond the Civil Rights Act's enumerated rights in which this economic liberty may be included). This is also an example of how a privileges or immunities argument is better suited for economic liberty issues than a substantive due process rationale if applied to the *Craigmiles* issue of the plaintiffs' right to sell caskets as their chosen occupation).

3. *Privileges or Immunities as an "Inkblot"*

The most disastrous line of thought toward restoration of economic liberties based on privileges or immunities is Judge Robert Bork's analysis.[376] The overall premise of Bork's argument is that the Privileges or Immunities Clause has never been understood, and therefore, the provision should be treated as though an inkblot has eliminated the possibility of ever understanding it.[377] Bork's disdain for the Court's attempts to decipher the meaning of privileges or immunities lies in the inevitable judicial value judgments that would result.[378] His analysis surveys the reasons for striking economic regulations and abortion laws and finds them similar in that no constitutional reason was given for either.[379]

In Bork's opinion, the *Slaughter-House* Court rightfully limited a provision of the Fourteenth Amendment that would otherwise have left the Court "at large in the field of public policy without any guidelines other than the views of its members."[380] In his view, the Fourteenth Amendment was only intended to protect the newly freed slaves. Extending the protection to other privileges or immunities would therefore leave only the Court's application of its personal views.[381] In this respect, even the fundamental rights analysis discussed above is too expansive for Bork's liking. He notes the contrasting view of the fundamental rights understanding as one allowing courts to strike down any law not valued at the time.[382] Therefore, the Court's subsequent move from *Slaughter-House* judicial moderation to the "evils" of judicial value-making through substantive due process in *Lochner* is contemptible.[383]

4. *Bunch's Originalist Intent of the "Constitution-Amending Majority" of Framers as Support for a Partial Inkblot*

In construing the above three camps of scholarly opinion about what privileges or immunities protect, the fourth analysis takes issue

376. *See* BORK, *supra* note 36, at 15.

377. *Id.* at 166.

378. *Id.* at 16 (opining that an activist judge cannot help himself from doing what he believes is best in construing a statute).

379. *Id.* at 17.

380. *Id.* at 37.

381. *Id.* at 38.

382. *See* BORK, *supra* note 36, at 39 (citing DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 197 (Univ. of Chi. Press 1985)).

383. *Id.* at 44.

with at least one aspect of each of them.[384] This analysis tests the above theories based on whether the number of enactors holding a narrow view of the privileges or immunities definition was large enough that a constitution-amending majority could not have been reached without their support.[385] Bunch concludes, under this test, that the rights a "constitution-amending majority" of Framers would have considered privileges or immunities was much more limited than the expansive definition proposed by Perry and others.[386] The author notes that under this result, the modern Court's activist decisions cannot be justified.[387] Therefore, the *Saenz* Court's inclusion of privileges or immunities may be too broad if attempting to adhere to originalism, which the Court is mandated to do to retain its legitimacy.[388]

It was soon apparent to Bunch under his developed test that Perry's approach is much too broad. This is because the only protection a constitution-amending majority of the Framers agreed on was that privileges or immunities included the freedoms found in the Civil Rights Act of 1866.[389] Instead, he believes that the most restrictive comprehension of privileges or immunities was more likely to be the original intent than a broader understanding.[390]

In applying the test to the fundamental rights realm, Bunch recognizes that a fundamental rights view was widespread in the enacting Congress.[391] However, the scope of fundamental rights must be understood in the Framers' historical context rather than that which has developed through modern jurisprudence.[392] Admittedly, this scope was narrower. Privileges or immunities did not refer to all natural rights or the rights of state citizenship.[393] Even if a constitution-amending majority supported a fundamental rights definition of privi-

384. *See* Bunch, *supra* note 324, at 326 (stating generally that the "dominant view" approach taken by all three scholars is erroneous, because all that is needed to eliminate a broader definition and support a narrower view is to illustrate that the number of Framers with the narrower view was large enough such that there would be no constitution-amending majority without their support).

385. *Id.* at 326-27.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 333.

390. *See* Bunch, *supra* note 324, at 338 (citing Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 266-69 (1988).

391. *Id.* at 368.

392. *Id.* at 373.

393. *Id.* at 371 (citing CONG. GLOBE, 42d Cong., 2d Sess., app. 3-4 (1872)).

leges or immunities, the scope of fundamental rights was more limited than what we understand today.[394]

Bunch concludes that Perry's broad view is erroneous because the number of Framers believing that privileges or immunities were restricted to fundamental rights is so great as to undermine the possibility of Perry's expansion.[395] However, it is plausible, but uncertain, whether that number even included a constitution-amending majority.[396] The only definitive evidence shows that a constitution-amending majority believed that the Privileges or Immunities Clause protected freedoms granted by the Civil Rights Act of 1866 and perhaps some Bill of Rights freedoms.[397] Therefore, Bork's analogy of the provision to a complete inkblot is too restrictive in Bunch's view, because some protection was intended. However, he easily sees the clause as a "partial inkblot" because the enactors' views of fundamental rights were numerous and unclear.

5. *Which Originalist Approach Did the* Saenz *Court Follow?*

There can no longer be doubt that the Privileges or Immunities Clause is enjoying a "renaissance," both academic[398] and judicial in nature.[399] However, both the breadth of this renaissance and whether it comports with the original intent is disputed.[400] The *Saenz* Court illustrates the underlying necessity for the rebirth of the clause through its very reliance on it. This is because the Court could have easily and uncontroversially relied upon the equal protection analysis it has been using for years in right to travel cases such as *Saenz*.[401] Therefore, it is important to determine why the Court broke with precedent and the implications for this under an expansive understanding of privileges or immunities.

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394. *Id.*

395. *Id.* at 411.

396. *See* Bunch, *supra* note 324, at 411.

397. *Id.* at 412.

398. *See* CURTIS, *supra* note 36, at 8 (noting that "if recent scholarship is any indication, there is reason to hope that the Privileges or Immunities Clause may yet enjoy the central role the Framers envisioned for it").

399. *Saenz*, 526 U.S. 489.

400. *See* BORK, *supra* note 36, at 39 (opining that the *Slaughter-House Cases* were properly decided for the sake of judicial moderation and that *Lochnerism* problems will arise from invoking the Privileges or Immunities Clause).

401. *See* Zobel v. Williams, 457 U.S. 55, 60 (1982) (holding that a state distinction based on length of residency violated equal protection); Shapiro v. Thompson, 394 U.S. 618, 622 (1969) (holding that restricting welfare benefits of new state citizens violated equal protection principles against individuals for exercising their right to travel).

a. A Substitute for Equal Protection

As reviewed above, at least one scholar believes that the Privileges or Immunities Clause was meant to be an equality-based protection rather than a substantive protection.[402] Under this analysis, the point of the clause is to require every state to give the *same* privileges or immunities to all.[403] Obviously, the California statute at issue in *Saenz* violates this by limiting welfare benefits to new residents to the amount they received in their state of prior residence. This is an expansive reading of privileges or immunities and one that substitutes the previously dead clause for the Equal Protection Clause. However, this is exactly the path the *Saenz* Court appeared to take in breaking with the Court's precedent.

The Court could easily have relied on thirty years of decisions using equal protection to invalidate durational residency requirements such as that encompassed in the California statute.[404] However, in its never-ending duty to legitimize its decisions, the Court needed an analysis other than equal protection to give the right to travel the constitutional basis it was lacking.[405] In *Shapiro v. Thompson*,[406] the Court opined that it was unnecessary to delegate a constitutional home to the right to travel because it was a basic concept of the country that citizens have this freedom. However, in *Saenz*, as opposed to the *Shapiro* line of cases, the Court found that the real dispute was over the right to settle rather than the right to travel through the states.[407] Therefore, the rights encompassed within the right to travel, namely, to enter and leave the state and to be treated as a visitor while there, were settled.[408] However, the right to be treated like other citizens, if staying, was not settled.[409] The Court found the additional protection it sought for this right in the Fourteenth Amendment Privileges or Immunities Clause, noting that this was modeled after the Privileges and Immunities Clause of Article IV.[410]

Why did the Court not simply rely on this latter clause? Justice Sandra Day O'Connor previously offered this solution in her concur-

402. *See* Harrison, *supra* note 2, at 1388.

403. *Id.*

404. *See* Winick, *supra* note 356, at 581.

405. *Id.* at 585.

406. 394 U.S. 618 (1969).

407. *See* Winick, *supra* note 356, at 586.

408. *Id.*

409. *Saenz*, 526 U.S. at 492.

410. *Id.*

ring opinion in *Zobel v. Williams*.[411] Instead of following O'Connor's approach or its own precedent, the Court chose to revive the Fourteenth Amendment provision. In doing so, the Court noted that notwithstanding the controversy over the inclusion of privileges or immunities, the clause was thought to protect the right to migrate.[412] However, the majority found support for this premise from *Slaughter-House*, the very case that eliminated the clause.[413] Therefore, the Court effectively resurrected the Fourteenth Amendment provision without overruling the *Slaughter-House Cases* and used the "words of the Slaughter-House Court to bring back the clause that it had killed."[414]

The Court's activist resurrection of the clause was received with widespread support. Both conservatives and liberals seemed to support the decision, though for different reasons.[415] Conservatives supported reviving the clause because it leads to enhanced possibilities for economic liberties as this Comment proposes.[416] Liberals applauded the plausibility of future protection for fundamental rights.[417] However, the victory will be short-lived and the clause will not reach its potential for protection if the *Slaughter-House Cases* are not definitively overruled.[418]

Under Harrison's theory that privileges or immunities are equality-based, the rights included in the clause do not provide direction on substance but require that it simply affect all citizens the same.[419] Therefore, a state violates a privilege or immunity when taking that right from one group, but is well within its power to change the substance of the right for everyone.[420] It is the Privileges or Immunities Clause that constitutionalized the Civil Rights Act of 1866, rather than the Equal Protection Clause.[421] Harrison supports this theory through

411. 457 U.S. 55, 73-74 (1982) (O'Connor, J., concurring) (opining in concurrence that the right to travel should rest on Article IV, Section 2 because it was important to establish a certain basis for the right).

412. *Saenz*, 526 U.S. at 496.

413. *Id.* (citing the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)).

414. *See* Winick, *supra* note 356, at 594.

415. *Id.* at 598.

416. *Id.* (citing Clint Bolick, *Back from the Grave: The Supreme Court Exhumes the Fourteenth Amendment's Privileges or Immunities' Clause*, LEGAL TIMES, May 24, 1999, at 19).

417. *Id.* (citing Joan Biskupic, *New-Resident Limits on Welfare Rejected: Court Stresses Equality; Md. Law Affected*, WASH. POST, May 18, 1999, at A1) (quoting Harvard law Professor Laurence H. Tribe for the premise that the decision may give fundamental rights a more secure constitutional basis).

418. *Id.* at 599.

419. *See* Harrison, *supra* note 2, at 1388.

420. *Id.*

421. *Id.* at 1390.

the language of the clauses, determining that equal protection includes all people, rather than protecting just citizens, as privileges or immunities do.[422] Furthermore, equal protection's goal is primarily "the protection of equal laws," focusing on administering law in an equal way.[423]

b. Privileges or Immunities Protection for Fundamental Rights and *Saenz*

The *Saenz* Court held that the fundamental rights protected by privileges or immunities include the right of citizens to pass through or reside in another state.[424] In so holding, the Court relied on *Corfield v. Coryell*,[425] as did the Framers of the Fourteenth Amendment in construing privileges or immunities. This reliance lends judicial support to the scholars who believe that the clause was intended to protect fundamental rights. The Court recognized that the Fourteenth Amendment overruled the limited protection of the Article IV counterpart to rights under state law.[426] This is important to recognize, because under Article IV, freed blacks were not considered citizens of all states due to the infamous *Dred Scott v. Sandford* decision.[427] Therefore, the Fourteenth Amendment gave the broader protection of granting privileges or immunities for *all citizens*.[428] This lent weight to fundamental rights, commonly understood at the enactors' time to include rights of contract,[429] and therefore important for the protection of economic liberties. The controversy lies in whether the Court understands fundamental rights to be the outer limit of privileges or immunities. It appears it may not, since the Court extended protection to state-created rights.[430]

The right to welfare is not a fundamental, but rather a state-created right. Therefore, under the fundamental rights theory, it would not be a protected privilege or immunity.[431] However, the *Saenz* Court was concerned with the right of citizens to settle in a state and receive all

422. *Id.*

423. *Id.*

424. *Saenz*, 526 U.S. 489.

425. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) (construing the Privileges and Immunities Clause of Article IV, Section 2 to protect fundamental rights).

426. *Saenz*, 526 U.S. at 503.

427. *See* Winick, *supra* note 356, at 592 (citing Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)).

428. *Id.* at 593.

429. *See* Harrison, *supra* note 2, at 1391.

430. *Saenz*, 526 U.S. 489.

431. *See* MALTZ, *supra* note 358, at 335-39.

the benefits to which long-term residents were privy.[432] Therefore, the argument could be made that Perry's expansive definition of including state rights in privileges or immunities was relied upon.[433] In fact, this was the *Saenz* dissent's very disagreement with the decision. The dissenting opinion, while not completely opposed to resuscitating privileges or immunities, noted that the proper originalist perspective points to protection of fundamental rights only, rather than every state law benefit.[434] While this expansive view would offer broader protection to economic liberties, the dangers of illegitimacy due to value implementation included in this broad approach will be analyzed in Part IV.[435] It is important to limit the newly bestowed protective realm of privileges or immunities to fundamental rights in order to adhere to the original intent and to avoid illegitimacy that may threaten revival of the clause so soon after its invocation. The Privileges or Immunities Clause has already been killed once immediately after its birth.[436] The Court should take care to avoid a similar fate for it upon its revival.

c. No Longer an "Inkblot"

Although a few scholars may mourn the tenuous reversal of the Privileges or Immunities Clause as a nullity, they may not deny that the law is changing. Judge Bork concurs with the *Slaughter-House* Court that bestowing more weight to the Privileges or Immunities Clause would make the Court "a perpetual censor on all legislation of the States."[437] His objections are based mainly on the inappropriateness of judicial review of state legislation that he theorizes would result from privileges or immunities as it did under substantive due process theory.[438] One problem with this argument is that the *Slaughter-House* Court itself dealt in value imposition by removing rights from the Constitution.[439] There is no support for why this is any less dangerous than imposing rights into the Constitution, as the modern Court often does.[440] Support for this is found in the post-Fourteenth Amendment enacting Congress, stating that "every word of written

432. *Saenz*, 526 U.S. at 506-07.

433. *See* PERRY, *supra* note 76, at 125.

434. *Saenz*, 526 U.S. at 522 (Thomas, J., dissenting).

435. *See infra* notes 686-687 and accompanying text.

436. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

437. *See* BORK, *supra* note 36, at 38.

438. *Id.* at 40.

439. *See* Winick, *supra* note 356, at 599 (citing CONG. GLOBE, 42d Cong., 1st Sess. 9 (1871)).

440. *Id. See* also Roe v. Wade, 410 U.S. 113 (1973) (finding that the right of privacy was encompassed in the Fourteenth Amendment liberty rights); Zablocki v. Redhail, 434 U.S. 374 (1978) (finding the fundamental right to marry under the Equal Protection and Due Process

law should be given effect when possible."[441] The *Saenz* Court seems to have lent credence to this argument in relying on the *Slaughter-House* dissent as well as its majority.

Under the constitution-amending majority theory supporting partial inkblot treatment of the Privileges or Immunities Clause, the *Saenz* decision was wrong. The number of enactors believing the clause was limited to fundamental rights precludes the broad inclusion of state-created rights of welfare as privileges or immunities in *Saenz*.[442] However, this is not fatal to privileges or immunities protection of economic liberties because the right to work at one's chosen occupation may be viewed as an upper limit of fundamental rights.[443] Furthermore, if *Saenz* actually involved the right to settle in a state and receive benefits of state citizenship rather than welfare, then it was arguably decided correctly because the former right is fundamental.

6. Saenz's *Inconsistency with* Slaughter-House *and the Path Taken*

The path less taken is not always the better one. While superficially inconsistent with *Slaughter-House*, the *Saenz* decision did not overrule *Slaughter-House*, but it took a tentative step in that direction. While the *Slaughter-House* holding effectively eliminated the clause from jurisprudence for 130 years,[444] this does not mean that it was the correct approach. Rather, the decision has caused disarray among other provisions of the Fourteenth Amendment and the Fifth Amendment Takings Clause.[445] As reviewed above, eradication of the Privileges or Immunities Clause has placed undue pressure on the Equal Protection Clause.[446] Furthermore, at least one scholar theorizes that the Court has been left to rely on the Due Process Clause substantively to validate decisions actually supported by the Privileges or Immunities Clause.[447] This theory will be expanded upon in analyzing whether *Lochner* and its progeny mistakenly emphasized "liberty protected against deprivation" rather than "privileges and immunities protected

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Clauses); Cruzan v. Mo. Dept. of Health, 497 U.S. 261 (1990) (recognizing a right to die despite holding that no such right existed under the facts of this case).

441. *See* Winick, *supra* note 356.

442. *See* Bunch, *supra* note 324, at 412.

443. *See* BICKEL, *supra* note 375, at 102 (stating that the right to work is included in the Civil Rights Act, which holds the fundamental rights that privileges or immunities are believed to encompass).

444. *See* Winick, *supra* note 356, at 573 (noting that before *Saenz*, the provision was considered a nonentity by lawyers and professors alike).

445. *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

446. *See* Harrison, *supra* note 2, at 1391.

447. *See* PERRY, *supra* note 76, at 161.

against abridgement."[448] Scholars also support that the resurrection of privileges or immunities is necessary to remove weight wrongly placed on the Takings Clause.[449]

If the *Slaughter-House* result was accurate in strongly limiting the Privileges or Immunities Clause, it is unlikely that such disarray and pressure would have been placed on these other provisions. While hindsight alone cannot justify reversing a decision, such strong evidence of the weaknesses of this result is somewhat dispositive. The *Saenz* Court seemed to recognize this, at least in the context of the impropriety of increased reliance on equal protection that it rejected. Therefore, while the *Saenz* holding is inconsistent with *Slaughter-House*, one must recognize the controversy of the latter decision itself and the strong dissents.

Slaughter-House was a 5-4 decision in which the dissenters strongly disagreed with the majority.[450] Reevaluation of such a weak decision 130 years later, with the benefit of hindsight, is hardly irrational. That the *Saenz* decision was reached by a 7-2 majority also illustrates the propriety of the decision.[451] If the precedent truly had strong roots, it is unlikely that such a majority could be reached in a landmark break with precedent, and that even the dissent would agree with the underlying proposition to reevaluate the clause.[452] The *Saenz* dissent's directives to reevaluate the Privileges or Immunities Clause to determine whether the clause should change or enhance substantive due process analysis[453] necessitates review of that line of decisions in the context of its birthplace, economic liberties.

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448. *Id.* at 163.

449. *See* Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1086 n.17 (1999) (opining that *Barron v. Baltimore*, 32 U.S. 243 (1833), correctly restricted the Takings Clause to federal government actions and that limitations of state appropriations are better analyzed under the Fourteenth Amendment Privileges or Immunities Clause).

450. 83 U.S. 36 (1872).

451. Justice Stevens issued the Court's opinion in *Saenz*, in which Justices O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer joined. Chief Justice Rehnquist and Justice Thomas offered separate dissenting opinions.

452. *Saenz*, 526 U.S. at 527-28 (Thomas, J., dissenting) (stating that although he disagreed that this was the right case in which to reevaluate privileges or immunities, he was open to such reconsideration in an "appropriate case," because the "demise of the Privileges or Immunities Clause has contributed in no small part to our current disarray of our Fourteenth Amendment jurisprudence . . . .").

453. *Id.*

B. The Turbulence of Economic Due Process

As established, the eradication of the Privileges or Immunities Clause is widely believed to have been a partial reason for the judicial creation of substantive due process. Both proponents and opponents of reviving the clause agree on that much.[454] One scholar argues that the constitutional source for the Court's evaluation of state economic regulation is not the Due Process Clause, but rather the Privileges or Immunities Clause.[455] The basis for this belief lies in the distinction between the two clauses' focal points. The Due Process Clause protects against deprivations of liberty while the Privileges or Immunities Clause protects against abridgement of privileges.[456] In the scholar's view, the *Lochner* Court erroneously emphasized the bakers' *liberties* to work whatever hours they desired when the focus should properly have been the bakers' *privilege* of freedom of occupation.[457] In doing so, the Court wrongly focused on the substantiality of the state's asserted health benefit balanced against the cost, instead of on whether the legislature could reasonably have concluded that the balance was justifiable.[458] This is wrong because of the necessary value impositions and the resulting premise that the Constitution contains some specific economic theory.[459] The result is that the duties of the legislature and judiciary are blurred because the Court asks itself if the state is reasonably regulating for the public good rather than whether the legislature had a rational basis for believing they were doing such.[460] However, left without the shield of privileges or immunities, the Court had no other way to review economic regulations.

Another scholar basically agrees with the above result, but disagrees that this right of review exists in privileges or immunities any more than in substantive due process.[461] Rather, the Court simply could not resist the idea that implicit rights could be read into the Constitution as argued, but rejected, in *Slaughter-House*.[462] The well-

454. *See* PERRY, *supra* note 76, at 161 (opining that the Court has traditionally used the Due Process Clause to support decisions that are more logically supported by the Privileges or Immunities Clause); BORK, *supra* note 36, at 40 (noting that the Court "created" substantive due process one year after eviscerating protection of privileges or immunities).

455. *See* PERRY, *supra* note 76, at 162.

456. *Id.* at 163.

457. *Id.*

458. *Id.* at 165.

459. *Id.* at 164 (citing *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting)) (arguing that the Constitution holds no certain economic theory for the Court to enforce).

460. *Id.* at 166, 168.

461. *See* BORK, *supra* note 36, at 40.

462. *Id.* (recognizing that the *Slaughter-House* majority used the very premise it rejected one year later, simply placing it under another clause).

documented result was the *Lochner* era and its creation of substantive due process.[463] As examined above, this result is often viewed as "evil" and has been described as the "quintessence of judicial usurpation of power."[464] For present purposes, it is important to determine whether there is truth to this view and, accordingly, whether economic substantive due process should remain dormant or may be moderately applied.

1. Lochnerism *Evility: Truth or Hypocrisy?*

A puzzling aspect of the near universal agreement that *Lochner* was constitutionally erroneous is that the Court continues to use substantive due process in realms outside of economic liberties.[465] The Court has often focused its substantive due process analysis on state regulation of intimate relationships.[466] State economic regulation is widely presumed legitimate when challenged on due process grounds, while regulations violating racial discrimination principles or the First Amendment are not automatically deemed valid.[467] Yet there is no justification that personal liberties are more deserving of protection than economic rights. Quite the opposite, interests in business are frequently independent. Therefore, they have no particular constitutional source as often exists for personal liberties.[468] Surely, many individuals view economic rights as equally important to their lives as personal liberties.

Ironically, President Roosevelt, largely responsible for eliminating economic due process as a viable tool for the judiciary,[469] expressed the importance of economic liberties.[470] In addressing Congress, Roosevelt voiced his belief that freedom is not complete without "economic security and independence."[471] In addition, he recognized the "right of every business man, large and small, to trade in an atmos-

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463. *See supra* note 19 and accompanying text.

464. *See* BORK, *supra* note 36, at 44.

465. *See* ELY, *supra* note 51, at 15 (noting that substantive due process analysis is still prevalent in personal liberties jurisprudence).

466. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a state provision limiting physician's ability to give contraception information to married couples violates the Due Process Clause).

467. *See* John Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 13, 31 (1958).

468. *Id.*

469. *See* BORK, *supra* note 36, at 54.

470. *See* CORWIN, *supra* note 74, at 4 (noting President Roosevelt's attempts to include greater economic liberties in a second Bill of Rights, which proved unsuccessful).

471. *Id.* (quoting President Roosevelt, who said: "Necessitous men are not free men.").

phere of freedom . . . ."[472] Viewing these statements in isolation, one would indeed be led to believe that Roosevelt was a great supporter of economic freedom. Nevertheless, when viewed in the context of the Great Depression and the developing New Deal framework, it is apparent that the emphasis necessarily rested on economic security.[473] One famous scholar has opined that this period resulted in the most changes to constitutional interpretation in our country.[474] The result was a radical transformation of the government's role in economic areas.[475] The new framework included the belief that it was the government's responsibility to assist people who could not help themselves.[476] In order to execute this framework, the Court had to recognize that economic liberties are sometimes violated by authorities outside of government, and legislation may be required to cure this.[477] Obviously, the Court's near *per se* invalidation of economic regulations could not stand in light of this.[478] The question should be whether it was necessary to cause such a complete reversal of *Lochner* and its progeny while still allowing vitality to remain in substantive due process outside the economic realm.

Opponents of substantive due process often cite judicial review as its main downfall.[479] The problem some scholars have with judicial review is that the Court strikes legislative acts and essentially replaces legislative judgment with its own views, which is difficult to rectify.[480] Therefore, the Court substitutes its judgments and values for that of the peoples' elected representatives, and thus harms the effectiveness of our representative democracy.[481] In contrast, the Fourteenth Amendment is ambiguous and seems to require an insertion of substance to interpret its provisions.[482] Further muddying the judicial task is the fact that few records of the Fourteenth Amendment debates still exist.[483] Therefore, the judiciary was left with only the

472. *Id.* at 5.

473. *Id.* at 158.

474. *Id.*

475. *Id.*

476. *See* CORWIN, *supra* note 74, at 158.

477. *Id.* at 161.

478. *See supra* note 19 and accompanying text.

479. *See* ELY, *supra* note 51, at 4; BORK, *supra* note 36, at 16.

480. *See* ELY, *supra* note 51, at 4.

481. *Id.* at 5.

482. *Id.* at 14.

483. *Id.* at 17 (citing Oregon v. Mitchell, 400 U.S. 112, 195 (1970)) (discussing the problems with construing the Fourteenth Amendment).

adopted language as evidence of what the Due Process Clause was intended to protect.[484]

As established above, *Lochner* has been in disrepute for decades. Therefore, substantive due process in the economic realm has been a virtual nonentity, requiring only mere rationality of government action to validate it.[485] How, then, is the Court to uphold the Constitution for the protection of economic liberties? Even the most stringent opponents of substantive due process must realize that the Court needs to evolve to uphold society's principles. One scholar has suggested that the Court's constitutional objective is to define values and state principles.[486] Why, then, are the economic values imposed in the *Lochner* era heavily criticized? Is it simply because values changed, rather than that the Court's actual approach was evil? If it is wrong to let the values of a past generation control us today,[487] then the role of economic liberties should be reevaluated in today's marketplace, one much different than that of the New Deal Era.

The Court has simply moved from the extreme of near *per se* invalidation of economic regulation to the opposite extreme of near *per se* validation.[488] If one extreme has been characterized as evil and inappropriate, it seems senseless that the complete opposite view would not be equally so. Especially where, as here, a provision's language is ambiguous and its directives unclear, a more moderate approach seems most appropriate. Certainly, some value lies in economic due process, or state courts would not continue to apply it.[489] Therefore, it is necessary to reexamine substantive due process and its values within a moderate framework.

2. *The Possibility of Moderate* Lochnerism

Despite the many adamant opponents of economic due process, this judicial concept is not wholly criticized. Some scholars have noted, as this Comment suggests, that the Supreme Court has been overzealous

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484. *Id.*

485. *Id.* at 20.

486. BICKEL, *supra* note 375, at 55.

487. *See* ELY, *supra* note 51, at 11 (quoting President Jefferson "that the earth belongs in usufruct to the living; that the dead have neither powers nor rights over it").

488. *See* Hetherington, *supra* note 467, at 32 (noting that the Court's past view that the production and sale of items should not be prohibited has been replaced by the view that even legitimate occupations may be constrained).

489. *See* Note, *State Economic Substantive Due Process: A Proposed Approach*, 88 YALE L.J. 1487 (1979) [hereinafter *A Proposed Approach*] (stating that despite federal courts' abandonment of substantive due process in the economic realm, state courts continuously use the analysis).

in eliminating economic due process.[490] Alternative methods exist for the application of moderate substantive due process to economic regulations.

a. The Less-Restrictive-Alternative Principle

The less-restrictive-alternative principle simply means what its name suggests. When a less restrictive alternative to an imposed economic regulation exists, this is evidence of the invalidity of the regulation.[491] Therefore, due process is violated if the legislature can reach its proposed ends equally as well through more limited regulations.[492] The Court used to rely on an economic less-restrictive-alternative approach, but stopped utilizing this approach in *Olsen v. Nebraska*.[493]

Dissenters of this approach object to its use based on the administrative burden of enforcing regulations, its ambiguity, and its incompleteness.[494] However, the administrative burden appears slight and does not outweigh the advantages of legislatures carefully thinking about the necessity of the challenged regulation.[495] The danger of ambiguity in applying the principle exists, but many areas of law require careful consideration on an ad hoc basis.[496] Incompleteness issues involve the belief that the principle should not be used if the result would merely restrict some but allow others to continue similar practices.[497] This can be resolved through recognizing that people and the economy are best served by having a greater number of options from which to choose.[498]

Admittedly, the danger of judicial value inferences still exists in this approach. However, this should not bar its use, but rather spawn certain guidelines for its application.[499] For example, one requirement of the less-restrictive-alternative principle is that the alternative be

490. *See* Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967) (proposing a moderate application of economic due process and criticizing the Court for its complete abandonment); *A Proposed Approach*, *supra* note 489 (discussing the remaining justifications for economic due process); Sunstein, *supra* note 25, at 883 (opining that in some ways, *Lochner* has never been overruled because its premises still exist in modern constitutional law).

491. *See* Struve, *supra* note 490.

492. *Id.*

493. *Id.* at 1463 (citing Carolene Prods. Co. v. United States, 323 U.S. 236, 246-47 (1941)).

494. *Id.* at 1465-66.

495. *Id.*

496. *Id.* 1466.

497. Struve, *supra* note 490, at 1466 (illustrating the incompleteness problem with the example of doctors allowed to give tattoos while other professionals are precluded from doing so).

498. *Id.*

499. *Id.*

equally as effective as the challenged regulation.[500] Whether the legislature considered alternatives, and its justifications for rejecting those considerations should be determined.[501] If no legislative findings about an alternative exist, this indicates that the legislature cannot strongly conclude it is not equally as effective. Conversely, evidence of careful consideration and reasons for rejecting an alternative should weigh in favor of the resulting economic regulation.[502] For example, despite the Court's ruling in *Carolene Products Co. v. United States*,[503] holding that a prohibition against shipment of filled milk did not violate due process, many state courts have found labeling requirements to be equally effective alternatives for the protection of public health.[504]

In addition, limitations may be imposed on this approach in order to guard against judicial displacement of the legislative role. Deference should be given to legislative decisions regarding quantitative or technical issues.[505] In addition, complex economic regulations should be given a stronger presumption of validity, as courts may not have adequate resources to determine alternatives.[506] Furthermore, placing the burden of production on the state should only be done when no apparent reason exists for why an alternative would not be valid, because this implies that the legislature did not consider the alternative.[507]

Guy Miller Struve then turns to a comparison of the less-restrictive-alternative principle to other principles of economic rights. In considering the Takings Clause, he suggests that the less-restrictive-alternative approach is preferable and that courts should consider it before deciding whether a regulation constitutes a taking.[508] Justifications for this are that an owner should not be required to relinquish property and the public should not have to pay if it is unnecessary.[509] In addition, the less-restrictive-alternative principle may be preferable to a straight balancing of whether the interests harmed outweigh those protected.[510] The former approach has a more neutral basis and does

500. *Id.* at 1467.
501. *Id.*
502. *Id.* at 1468.
503. 323 U.S. 18 (1944).
504. *See* Struve, *supra* note 490, at 1467.
505. *Id.* at 1469.
506. *Id.*
507. *Id.*
508. *Id.* at 1470.
509. *Id.* at 1486 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)) (applying the less-restrictive-alternative approach to an economic regulation challenged as a taking).
510. *See* Struve, *supra* note 490, at 1471.

not lead to a conclusion that specific economic issues are beyond the government's regulatory power, as may occur with balancing.[511]

b. The Use of Economic Theories

A second moderate approach recognizes the inherent dangers of economic due process and attempts to reconcile these with its justifying goals through the use of economic theories.[512] The overriding danger of economic due process is that the judiciary will impose its own values about what economic policy is and its beliefs about the market's workings.[513] In contrast, the justification of the concept lies in the recognition that states sometimes have no "public interest justification" but are merely regulating in favor of one group to the detriment of another.[514] Therefore, a court's analysis of public interest is necessary to determine when a regulation is really a result of private interest legislation.[515] Under a state economic due process analysis, as must be considered because of the lack of federal application, this scholar concludes that no sound approach exists for avoiding these dangers or reaching these objectives.[516] Rather, a more particular ends analysis than the general public welfare requirement should be used and health and safety justifications offered for impermissible ends to be removed through a less drastic means analysis and a heavy presumption of validity.[517]

i. A more specific ends typology

Legislation is generally upheld under an economic due process analysis if it furthers a permissible police power end.[518] One of these is a "general welfare" protection. The danger of judicial value imposition is likely here because the vagueness of the term invites the judiciary to impose its beliefs about what general welfare includes.[519] This problem can be resolved by using the allocation, stabilization, and redistribution categories used by economists to define general welfare.[520] Allocation and stabilization are termed "efficiency measures" because

511. *Id.*
512. *A Proposed Approach*, *supra* note 489.
513. *Id.* at 1489.
514. *Id.*
515. *Id.* at 1490.
516. *Id.* at 1491-1500 (analyzing three categories of state economic due process methods and concluding that they are inadequate).
517. *Id.* at 1501.
518. *See A Proposed Approach*, *supra* note 489, at 1492.
519. *Id.*
520. *Id.* at 1501.

of their focus on advancing community welfare.[521] Allocative measures repair market problems and stabilization increases employment to ensure stable prices and economic growth.[522] As suggested by their definitions, both categories are generally justifiable state ends and are usually deemed permissible when challenged.[523] In contrast, the third category encompasses actions that have a large potential to be impermissible. Redistributions focus on the transfer of wealth, such as welfare payments.[524] Redistributions from the rich to the poor, such as aid for subsidized housing, supplemental correctional redistributions to repair unintended legislative effects, and personal security redistribution to assist those harmed by sources beyond their control, should also generally be seen as permissible economic regulations.[525] In contrast, economic redistributions that do *not* increase community welfare, help a disadvantaged group or those harmed by "natural or market forces," or promote public health or safety are generally impermissible because there is a strong possibility that the regulation is actually private interest legislation.[526]

Application of these specific categories strictly limits judicial value impositions. In addition, this approach may be complimentary to takings analyses because where an efficiency measure takes from one group to achieve its legitimate end, an economic due process challenge will fail, but compensation may still be required under the Fifth Amendment.[527]

ii. Means approaches for solving impermissible health and safety ends rationales

As explained above, a court's determination of a "public interest" justification is crucial to identifying when the state is actually regulating for private interests.[528] Furthermore, economic due process requires a judicial determination of whether the means used are rationally related to achieving the purported ends.[529] When a court determines this relation without guidelines, it may inappropriately base its conclusion on its own beliefs about the economy and once

521. *Id.* at 1502.
522. *Id.* at 1501 (citing D. HYMAN, THE ECONOMICS OF GOVERNMENTAL ACTIVITY 5-6 (1973)).
523. *Id.* at 1502-03.
524. *See A Proposed Approach*, *supra* note 489, at 1503.
525. *Id.*
526. *Id.*
527. *Id.* at 1504.
528. *Id.* at 1489.
529. *Id.* at 1490.

again impose its own values.[530] Furthermore, requiring the state to have strong proof that the means will achieve the ends is not adequately deferential to the legislature.[531]

One scholar opines that three steps may correct these problems with economic due process. First, the burden should be placed on the state to identify its ends.[532] This seems sensible since the state is the party most familiar with its own objectives.[533] Next, the court should place the articulated end into one of the above categories of allocation, stabilization, or redistribution. Obviously, if the end is inappropriate, the inquiry will end there and the regulation justifiably may be overturned.[534] However, if the end is permissible, the court should apply the less-restrictive-alternative principle to determine whether the state's objective could have been reached in an equally effective but less burdensome way.[535] Finally, a low burden should be placed on the state to articulate the means/ends relationship because economic policies often change and the legislature must be given flexibility to regulate along with these changes.[536] In other words, the legislature's identified connection between the means and ends should meet with a heavy presumption of validity. This approach may minimize the dangers of judicial value imposition, allow protection of economic liberties, and aid the legislature in reexamining its goals and processes used to achieve them.[537]

3. Craigmiles v. Giles *and the Attempt to Moderately Revive Economic Due Process*

As previously discussed, there is little justification for eliminating the use of substantive due process for challenges to economic regulations while retaining its use in areas concerning personal liberties.[538] If anything, it seems apparent that the dangers of judicial value impositions are stronger when the interests at stake are an individual's rights to do what they desire with their bodies, such as in right to die and abortion cases. Although the Privileges or Immunities Clause may be a more appropriate place to base protection of economic liberties, it is not a completely viable option yet and thus raises more litiga-

530. *See A Proposed Approach*, *supra* note 489, at 1495.
531. *Id.* at 1497.
532. *Id.* at 1505.
533. *Id.*
534. *Id.* at 1506.
535. *Id.*; Struve, *supra* note 490.
536. *See A Proposed Approach*, *supra* note 489, at 1508.
537. *Id.* at 1509.
538. *See* ELY, *supra* note 51.

tion uncertainties than a limited substantive due process approach would. Both the district and appellate court in *Craigmiles v. Giles*[539] attempted to apply a moderate substantive due process analysis in striking the FDEA.[540] However, no specific technique was used to achieve moderation. Therefore, the decisions may have had stronger legitimate bases had they used one of the above approaches.

In striking the FDEA, the *Craigmiles* district court held that the state's means of requiring licensure as a funeral director for the sale of caskets was not rationally related to the advanced state ends of protecting funeral consumers and protecting the "health, safety and welfare of the public."[541] The *Craigmiles* court was obviously doubtful of the relationship between the FDEA and the state's purported ends and hinted that the interest may have been impermissibly private rather than public.[542] The court found no support for the state's public health protection argument because the state offered no evidence of any harm caused by faulty caskets.[543] Furthermore, the court relied on the general economic theory that competition is preferable because consumers are better served, rather than disadvantaged, when they have more options for places to buy a casket.[544] The problem with this opinion, and its various cites to *Lochner* era authority, is that it may not be viewed as moderate enough to legitimize it.[545] While applauding the court's protection of the plaintiffs' liberty interests in their chosen occupations, this Comment finds that use of the above moderate frameworks would lend the decision more credibility and steer it away from *Lochnerizing*.

The court summarily concluded that the protection of consumers, health, safety, and welfare were permissible state ends.[546] Although these ends superficially appear permissible, a deeper analysis would have been helpful. This is especially true because one of the advanced ends was the ambiguous public welfare justification. In using the economic categorization approach described above,[547] the purported end does not seem to fit into either efficiency measure. Protecting the public health and safety against the sale of a product designed to hold

539. 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *aff'd* 2002 U.S. App. LEXIS 24637 (6th Cir. 2002).

540. Funeral Directors and Embalmers Act, TENN. CODE ANN. §§ 62-5-101 - 62-5-611 (1997).

541. *Craigmiles*, 110 F. Supp. 2d at 662.

542. *Id.* at 622-24.

543. *Id.*

544. *Id.*

545. *Id.* at 661-62 (citing Nebbia v. New York, 291 U.S. 502 (1933); Meyer v. Nebraska, 262 U.S. 390 (1923); Coppage v. Kansas, 236 U.S. 1 (1914); Lochner v. New York, 198 U.S. 45 (1905)).

546. *Id.*

547. *See A Proposed Approach*, *supra* note 489, at 1502.

human remains neither increases net community welfare, helps a disadvantaged group, aids those injured by market or natural resources, nor increases public health and safety.[548]

Therefore, the possibility increases that the FDEA is an inappropriate redistributive measure intended to increase the wealth of licensed funeral directors by allowing them a monopoly in the sale of caskets, while harming equally qualified salespeople by restricting their occupational choices. The FDEA imposes large costs on business people through its requirement of attending a faraway school for a substantial amount of time and money while returning an almost nonexistent health gain.[549] By categorizing the end in terms of economic measures, the court could avoid criticisms of value imposition by basing its decision on its own judgment that public welfare does not require the FDEA for its protection.

After establishing the end categorization, the court should have next considered whether less restrictive alternatives to the FDEA existed in determining whether a rational relationship existed between the licensure requirement and public health and welfare.[550] The state advanced its end of consumer protection by proposing that funeral directors are better equipped to deal with the grievous circumstances the sale is made under, inform customers of their casket needs, and provide warranty information.[551] However, the legislature could have protected these interests, doubtful as they are, by simply requiring that *all* casket retailers, whether a funeral director or independent salesperson, provide consumers with information.[552] Thus, this would be much less restrictive than requiring expensive training unrelated to these issues.[553]

The second state justification offered was public health and safety. If the state were truly concerned about safety in using caskets for burial, it would regulate the construction of caskets or require protective sealants.[554] This would be more effective in achieving safety interests and less burdensome on potential individual salespersons. That the state offered no evidence of alternatives considered or showed why

548. *Id.*

549. *Craigmiles*, 110 F. Supp. 2d at 660.

550. *See* Struve, *supra* note 490, at 1463.

551. *Craigmiles*, 110 F. Supp. 2d at 663-64.

552. *Id.* at 663 (opining that no retailers need to be required to provide prices, because if they do not, they will fail in business of their own accord). The above opinion illustrates the judiciary using its own theories about how the economy works.

553. *Id.* (noting that the required training has nothing to do with public health and safety).

554. *Id.* at 662 (stating that evidence shows the state itself must not really believe that caskets are important to safety).

alternatives would be less effective in achieving the state's goals indicates a tenuous means/ends connection.[555]

Although the above analysis was undertaken before the Sixth Circuit affirmed *Craigmiles*, the court seemed to rely on much of this reasoning. Despite noting that rational basis review "does not require the best or most finely honed legislation to be passed," the court used what appears to be a less-restrictive-alternative analyis.[556] Rather than require casket retailers to obtain licenses as required by the FDEA, the court noted that the legislature could prevent misrepresentation by making FDEA provisions applicable to retailers without a license.[557] This would serve the state's purported end of protecting consumers against fraud while protecting casket retailers' economic rights. The *Craigmiles* court also noted that the Supreme Court is often suspicious when legislatures use an indirect path to reach ends that could be reached directly through "better-tailored regulations."[558]

However, in a possible attempt to defeat potential cries of *Lochnerism*, the court explicitly states that it is "not imposing our view of a well-functioning market" and reasons that "no sophisticated economic analysis is required" to reach its conclusion.[559] Despite these proclamations, the court *did* conclude that the FDEA licensure requirement blocks competition and that less competition actually harms consumers because prices are raised and lower quality caskets are available.[560] Although the premise that competition drives down prices is hardly complex or controversial, the court may have legitimized its decision by classifying the ends as redistributive due to the monopolistic effect of the FDEA.

Although *Craigmiles* is an extremely cautious step toward increased protection of economic liberties, and despite the Sixth Circuit's vehement rejection of *Lochnerism*, the opinions are a rare victory for economic due process. However, it is unlikely that such results will become common or that the level of scrutiny for economic regulation will be raised in the near future. Therefore, the doctrine continues to rest on perilous grounds and one last area of economic redress must be considered.

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555. *See* Struve, *supra* note 490, at 1468.

556. *Craigmiles*, 2002 U.S. App. LEXIS 24637 at 17.

557. *Id.*

558. *Id.* at 18 (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)).

559. *Id.* at 24.

560. *Id.* at 9.

C. *The Viability of the Takings Clause for the Protection of Economic Rights*

Justice Holmes forecasted the present condition of economic liberties in 1927, particularly the availability of only takings as an area for redress, when he opined that legislation may limit any business it wishes, as long as compensation is made when due.[561] The present tripartite problem is that insubstantial compensation is being given for takings, the Court still holds substantive due process in disrepute, and the revival of the Privileges or Immunities Clause is uncertain at this point. Therefore, little protection against economic regulation is available. The interrelationship between the three clauses is important because the demise of one often reflects the weight jurisprudence places on another. As illustrated, the early eradication of the Privileges or Immunities Clause led to the Court's development of the highly subjective substantive due process rationale.[562] Similarly, the Takings Clause has been subject to a historically contradictory analysis and application.[563] Yet strong takings jurisprudence is necessary both because it is the strongest area from which individuals may receive redress for governmental economic infringements and because of its complementary character to substantive due process.[564] The nexus between liberty, protected by the Due Process Clause, and property, protected by the Takings Clause, was evident early in our country's legal system. A quote by Madison in 1792 is illustrative:

> In its larger and juster meaning, it [property] embraces every thing [sic] to which a man may attach a value and a right . . . . He has property very dear to him in the safety and liberty of his person . . . . He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.[565]

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561. *See* Tyson & Bros. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) (dissenting from the Court's substantive due process finding that restraint of a business was unconstitutional).

562. *See* Saenz v. Roe, 526 U.S. 489, 527-28 (1999) (Thomas, J., dissenting) (stating that he is open to reconsidering the proper role of privileges or immunities because of the disarray its abandonment has caused in Fourteenth Amendment jurisprudence, namely the Due Process Clause).

563. *See* CLEGG ET AL., *supra* note 129, at 3 (noting that takings analyses are a special challenge to adjudicate because other economic protections have been eliminated, thereby placing increased weight on the Takings Clause).

564. *See A Proposed Approach*, *supra* note 489, at 1504 (noting the complementary nature between takings and substantive due process, because the former claim may succeed although the latter has failed, due to a statute's permissibility as an efficiency measure). *See also* Sunstein, *supra* note 25, at 886 (opining that analyses similar to those of the *Lochner* era have not been abandoned in the sense that they are still reflected in takings analyses).

565. *See* CLEGG ET AL., *supra* note 129, at 1 (citing *Property*, 1792 NAT'L GAZETTE 12; JAMES MADISON, THE PAPERS OF JAMES MADISON 201 (Hobson et al. eds., 1979)).

In the current information age, the definitions and protections of property have become both more difficult and more crucial to the security of economic rights. Furthermore, while interest in the Takings Clause is high, the area of law is in disarray.[566] Many scholars hold the view that the takings doctrine is highly in need of repair.[567]

1. The Present Regulatory Takings Analysis

A straightforward reading of the Fifth Amendment language implies a broad construction of private property and just compensation.[568] Furthermore, limitations on the clause's applicability to only takings for public use seems justified.[569] The original proposed text was narrower while the language actually adopted was more expansive and straightforward.[570] Therefore, while the records of the Takings Clause enactment are brief, it seems a broader interpretation is more accurate.[571] Furthermore, the Court has held that the just compensation component requires the government to compensate the property owner with something holding actual value.[572] In contrast, Professor Richard A. Epstein has argued that uncompensated takings, based on the state's police power to prevent or undo the property owner's wrong, are legitimate.[573]

Lucas v. South Carolina Coastal Council[574] establishes the balancing factors of a regulatory takings analysis. Although the Court has stated that the inquiry should be ad hoc, three factors are generally weighed and considered.[575] These factors are: (1) the character of the governmental action; (2) its economic impact; and (3) the interference with the plaintiffs' "reasonable, investment-backed expectations."[576]

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566. *Id.* at 3 (noting that the judiciary has only a "confusing array of ever varying precedent" with which to determine the proper Takings jurisprudence).

567. *See* Robert K. Hur, Note, *Takings, Trade Secrets and Tobacco: Mountain or Molehill?*, 53 STAN. L. REV. 447 (2000) (citing Jed Rubenfield, *Usings*, 102 YALE L.J. 1077 (1993); BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977) (describing takings law as "a chaos of confusing argument"); Andrea L. Peterson, *The Taking Clause: In Search of Underlying Principles Part I-A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989) (opining that the clause is in "far worse shape than realized")).

568. *See* CLEGG ET AL., *supra* 129, at 8.

569. *Id.* at 11.

570. *Id.* at 15.

571. *Id.* at 15-16.

572. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

573. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 59 (1985).

574. 505 U.S. 1003 (1992).

575. *See* Pa. Cent. Transp. Co. v New York City, 438 U.S. 104 (1978) (establishing that a regulatory takings analysis should be an ad hoc, factual inquiry).

576. *Id. See also* text accompanying note 150 (describing the three factors).

Lucas also established that when a regulation removes all economic value from property, a *per se* taking has occurred.[577] *Ruckelshaus v. Monsanto*[578] is the complex, but controlling authority for a regulatory takings analysis applying the above three factors.[579] *Monsanto* involved a challenge to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[580] requiring the disclosure of health, safety, and environmental information during three independent statutory periods. The Court held the third factor, interference with the plaintiff's reasonable, investment-backed expectation, to be dispositive in *Monsanto* for the 1978 FIFRA period.[581] During this statutory period, the plaintiff knew of the disclosure requirement regarding its trade secrets but submitted them anyway.[582] Therefore, the Court held that the plaintiff had no reasonable expectation that the trade secrets it submitted would remain confidential.[583] However, because of the factual complexities of this case, application of its holding to future cases is often ambiguous, as is evident in the *Phillip Morris III* and *Phillip Morris IV* decisions discussed below.[584]

Under the reasonable, investment-backed expectation factor, one scholar has noted that a "taking" is less protective of economic rights than a "deprivation."[585] This is because the word "taken" means that one loses a right that is given to another.[586] Therefore, a taking necessarily implies that the owner had possession of the right before he lost it. In contrast, a deprivation may consist of something never actually had, such as the liberty to work at a chosen occupation.[587] Similarly, an investment-backed expectation necessitates that a property owner had such an expectation before the government can be held to have interfered with it.[588] However, this issue is also subject to different analyses as to whether the time to evaluate the plaintiff's reasonable expectation is when the property was acquired or when the challenged

577. *Phillip Morris*, 2002 U.S. App. LEXIS 24403 AT 24 (citing *Lucas*, 505 U.S. at 1015).

578. 467 U.S. 986 (1984).

579. *See Phillip Morris III*, 267 F.3d 45 (1st Cir. 2001) (citing *Monsanto* as controlling authority).

580. *See* 7 U.S.C. §§ 136-136y (2000).

581. *Monsanto*, 467 U.S. at 1005.

582. *Id.*

583. *Id.* at 1009.

584. *Phillip Morris III*, 267 F.3d 45 (1st Cir. 2001) (holding a different *Monsanto* statutory period dispositive here than it did in its prior *Phillip Morris II* decision, 159 F.3d 670 (1st Cir. 1998)) *rehearing en banc* 2002 U.S. App. LEXIS 24403 (1st Cir. 2002).

585. *See* CLEGG ET AL., *supra* note 129, at 24.

586. *Id.* at 24.

587. *Id.* at 24.

588. *See Monsanto*, 467 U.S. at 1006-07.

regulation was enacted.[589] In other words, must the owner have an investment-backed expectation in the confidentiality of his or her trade secret at the time of acquisition or when interfering regulation is enacted?[590]

In contrast to a substantive due process analysis, one scholar has noted that the strength of the government's justification for regulation should not be considered regarding the character of the government action.[591] This is because the government must compensate regardless of the *strength* of a public interest justification, unless the property is illegal.[592] As will be examined, this is particularly relevant to analyzing the withdrawn *Phillip Morris III* decision, as it seems the court was balancing the need for public protection from cigarettes against the manufacturers' interest in their trade secrets.[593]

2. *Criticisms and Proposals for Takings Analysis*

One scholar has argued that takings analyses have completely moved away from reliance on the text of the Fifth Amendment and have essentially become ad hoc balancing tests.[594] He argues that this result is erroneous because the broad text of the clause illustrates the broad protections it was meant to effect.[595] To sustain the clause as a rule and ensure the protections it intended, rather than create a "mask for judicial predilections," he argues that courts should consider the three factors successively rather than grouped together.[596] Furthermore, the scholar argues that just compensation refers to complete compensation.[597] It would appear that the Court agreed with him on this point, holding in *Monsanto* that the compensation be of "real value."[598] However, as we will see, lower courts have split when ap-

589. *See Phillip Morris III*, No. 00-2425, No. 00-2449, 2001 U.S. App. LEXIS 22348, at *38-40 (1st Cir. Oct. 16, 2001) (considering the plaintiff's expectation at the time when the challenged regulation was enacted). *But see* Meriden Trust & Safe Deposit Co. v. FDIC, 62 F.3d 449 (2d Cir. 1995) (holding that the relevant time to determine the plaintiff's expectation to be when the property was acquired).

590. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (Blackmun, J., dissenting) (opining that personal property owners should be aware that new regulation may devalue their property because states commonly regulate commercial dealings).

591. *See* CLEGG ET AL., *supra* note 129, at 37. Compare the substantive due process applied in *Craigmiles*, where the legitimacy and strength of the government's end is a large part of the analysis.

592. *Id.* at 32-37.

593. *See Phillip Morris III*, 267 F.3d at 61 (Selya, J., dissenting).

594. *See* CLEGG ET AL., *supra* note 129, at 7.

595. *Id.* at 8.

596. *Id.*

597. *Id.* at 10.

598. *Monsanto*, 467 U.S. at 1003.

plying this directive.[599] Therefore, it is important to consider alternative views of takings analyses.

a. Spillover Theory

Scholars have argued that economic considerations surrounding regulatory takings should be the Court's guidepost.[600] Specifically, one scholar proposes that externalities should be dispositive to the Court's analysis. Externalities involve considerations of the spillover effects that occur when a property owner does not examine how his actions impact others.[601] In his view, regulatory takings should not be allowed unless substantial spillover effects are present. Therefore, when an externality impacts a large portion of the public, a taking could be justified on public use grounds.[602]

To illustrate his point, the scholar uses the helpful hypothetical of a coal-burning factory. In this example, air pollution is the spillover effect. The smoke resulting from burning coal impacts public health. If the factory owner does not consider this external cost, his production costs appear lower than they actually are. Therefore, the owner gains the advantage of increased output, while the public bears the higher cost of pollution.[603] The analysis of the taking should not hinge on the health of the public but on the undetermined cost against the advantages the factory gives the public.[604] This focus comports with the government's objective to ensure that the burden of externalities are placed on the public only when the return is justifiable.[605] In addition, another scholar argues that when a substantial spillover exists, the property owner is entitled to no compensation for the regulatory taking, regardless of the damage to the property.[606] However, examination and determination of what constitutes a significant spillover may lead to judges imposing their own values. In addition, the government is subject to political pressures that may cause it to disregard the public's interest.[607]

599. *See infra* notes 655-671 and accompanying text.

600. *See* CLEGG ET AL., *supra* note 129, at 69.

601. *Id.* at 70.

602. *Id.*

603. *Id.* at 71.

604. *Id.* at 71-72.

605. *Id.* at 72.

606. *See* Berger, *supra* note 158, at 179.

607. *See* CLEGG ET AL., *supra* note 129, at 72.

b. A Policy Theory

Another scholar has argued that an unexpected government regulation is not fair when it results in the loss of property without compensating such a loss.[608] This view seems to comport with the investment-backed expectation factor the Court has since developed. However, the scholar focuses more on the policies of fairness and efficiency relevant to a takings jurisprudence.[609] Considerations of the noxious use theory are relevant to fairness determinations. This approach rests on finding a government regulation just when the use of property is "wrongful, harmful or prejudicial to the health, safety or morals of the public."[610] Of course, this approach involves numerous value determinations that may undermine the legitimacy of decisions based on it where the use is less than egregious.

A second part of the policy consideration involves the distinction between the "enterprise or arbitral nature" of the government's action.[611] The regulation may be enterprising when the government is taking economic resources to fulfill its continuous function in a particular area, such as education.[612] In contrast, an arbitral regulation involves the government distinguishing between competing economic parties.[613] One scholar argues that when government action in this area causes property value to fall, no compensation is owed.[614] Difficulties with this distinction lie in deciding when one part of the public should prosper from regulation that harms another part of the public.[615] Hence, developing governing rules would be difficult here.

A third policy approach to takings is found in welfare economics.[616] This theory is based on a utilitarian objective of increasing the "greatest good to the greatest number" of people and determining when compensation should be enforced to further that goal.[617] This theory next considers when not compensating a party is fair. Social contexts should not be the decisive factor here. Rather, ensuring equal liberty

608. *See* Berger, *supra* note 158, at 169.

609. *Id.* at 167 (opining that a takings decision is unjust if it goes against a community's notion of fairness).

610. *Id.* at 172.

611. *Id.* at 177.

612. *Id.* at 178.

613. *Id.*

614. *See* Berger, *supra* note 158, at 178 (citing Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964)).

615. *Id.* at 178.

616. *Id.* (citing Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967)).

617. *Id.* at 182.

between parties should be the objective.[618] However, the parties may justifiably be treated unequally under certain circumstances.[619]

Berger concludes that the best policy is a "first-in-time approach" for compensation, which protects investments against future harms.[620] Government regulation often impacts property interests, yet is often not foreseeable. Therefore, the important issue is compensation.[621] In his view, this approach complies with both fairness and efficiency considerations.[622] Principles of fairness include the premise that parties know about facts that affect a property's value at the time they acquire it.[623] In addition, people often consider events that may alter the property's value.[624] Furthermore, this approach encourages economic efficiency by providing an incentive to the government to balance costs and benefits of regulation before enactment.[625] A first-in-time compensation rule would also deter the property owner from developing his property in a contradictory way to introduced legislation, because he would receive no compensation.[626]

c. "Implicit-In-Kind" Compensation

This takings approach is particularly relevant to the *Phillip Morris* decisions. Implicit-in-kind compensation reflects awareness that a government action that imposes costs on a property owner may also have implicit advantages.[627] The Court recognized the validity of this type of compensation in *Pennsylvania Coal Co. v. Mahon*,[628] discussing that some government actions do not require external compensation because they carry a reciprocal benefit. However, there is no justification for implicit-in-kind compensation where the government regulation does not offer substantial advantages along with its costs.[629] Scholars citing this approach have relied on the *Phillip Morris II* decision for the proposition that the benefit of continued business in an area is not sufficient compensation for taking trade secrets.[630] Whether the implicit-in-kind compensation is sufficient depends on

618. *Id.* at 183.
619. *Id.* at 184.
620. *See* Berger, *supra* note 158, at 193.
621. *Id.* at 166.
622. *Id.*
623. *Id.* at 195.
624. *Id.*
625. *Id.* at 197.
626. *See* Berger, *supra* note 158, at 198.
627. *See* EPSTEIN, *supra* note 573, at 195.
628. 260 U.S. 393 (1922).
629. *See* Lawson & Seidman, *supra* note 449, at 1100.
630. *Id.* (citing *Phillip Morris II*, 159 F.3d at 674-78).

whether the expected benefits will be equal to or surpass the resulting costs.[631] If the burdens imposed by the regulation are much larger than the benefits, there is no basis for justifying implicit-in-kind compensation.[632]

Scholars have determined three general areas where an implicit-in-kind compensation justification will fail.[633] The first situation arises when the party the government is imposing the regulation on can reasonably expect to bear the burden more often than not.[634] The second circumstance results when the scope of the regulation is large and complex, thereby causing large compliance costs, without equal advantages.[635] Finally, implicit-in-kind compensation will fail when regulation carries additional costs besides those of compliance.[636] The scholars note trade secrets as illustrative of this category, stating that they often carry high costs relating to disclosure.[637] The value of the trade secret is diminished by producing such and this decrease in property value will extend to areas outside the actual secret.[638] The scholars conclude that more takings cases should be analyzed under implicit-in-kind compensation.[639]

d. Legislative Window-Breaking?

A fourth takings analysis in the specific realm of trade secrets and the *Phillip Morris* decisions concludes that the real issue is how courts will deal with legislation like 307B, which scholar Robert K. Hur proposes is "malicious mischief directed against private industry."[640] However, the analysis is cut short by the conclusion that government action like 307B is rare and similar legislation is not likely to follow because of the judicial reaction to it.[641] This conclusion was largely based on the First Circuit's *Phillip Morris II* decision, upholding the district court grant of preliminary injunction against 307B.[642] The proposition that similar legislation requiring public disclosure of trade

631. *Id.* at 1099.
632. *Id.* at 1100.
633. *Id.* at 1108.
634. *Id.*
635. *See* Lawson & Seidman, *supra* note 449, at 1110.
636. *Id.* at 1111. For example, forcing Phillip Morris to produce trade secrets of tobacco ingredients will cause disclosure costs and lower the value of the products containing the secrets because of the competitors' access to them.
637. *Id.*
638. *Id.*
639. *Id.* at 1112.
640. *See* Hur, *supra* note 567, at 451.
641. *Id.* at 451.
642. *Phillip Morris II*, 159 F.3d 670 (1st Cir. 1998).

secrets will not follow because of negative judicial reaction to it is undermined by the First Circuit's subsequent reversal of the permanent injunction.[643] However, this premise may hold true after withdrawal of that opinion and affirmation of the district court's grant of summary judgment in *Phillip Morris IV*.[644] The characterization of 307B as "legislative window-breaking," or vandalism of private industry, is important because it raises questions concerning the strength of protection the Court will afford trade secrets in light of such regulation, or whether they will reevaluate the strength of protection offered at all.[645]

As it stands, the takings jurisprudence offers little protection in the respect that the government can simply pay to take as it desires.[646] This concept seems contrary to the Takings Clause's goal to protect certain parties from bearing the burden of correcting public issues that are not their responsibility.[647] The protection becomes even weaker when the compensation given is not sufficient.[648] One scholar has opined that a takings outcome rests on the deciding court simply choosing between economic analysis or police power justifications.[649] These distinct rationales have developed from contradictory case law either protecting the state's police power, as in *Mugler v. Kansas*,[650] or reviewing economic impact to determine whether a taking has occurred, as in *Pennsylvania Coal Co. v. Mahon*.[651] The conflict between the competing rationales has never been explicitly resolved, thereby rendering those whose economic rights have been harmed uncertain about how to approach redress.[652] Where the litigation involves strong arguments for both competing interests, the stakes are higher and the outcome less certain.[653] For example, the First Circuit

643. *Phillip Morris III*, 267 F.3d 45 (1st Cir. 2001). However, this case was inexplicably withdrawn by court order approximately a month and a half after the opinion was published.

644. *Phillip Morris IV*, 2002 U.S. App. LEXIS 24403.

645. *See* Hur, *supra* note 567, at 450.

646. *Id.* at 454.

647. *Id.* at 453.

648. *See Monsanto*, 467 U.S. at 1009 (requiring that compensation bestow an actual benefit on the property owner).

649. *See* Jed Rubenfield, *Usings*, 102 YALE L.J. 1077, 1089 (1993).

650. 123 U.S. 623 (1887) (holding that a prohibition law effecting a taking was valid under the state's police power).

651. 260 U.S. 393 (1922) (holding that state regulation prohibiting coal mining to protect streets and utility lines was an unjust taking).

652. *See* Hur, *supra* note 567, at 458.

653. *Id.* (discussing the tobacco industry's multi-billion dollar investment in its products and thereby, its trade secrets, while the competing interest is the state's strong police power to protect public health against potentially dangerous ingredients included in the formulae).

had an opportunity to address and resolve these inconsistencies at the preliminary injunction stage of *Phillip Morris*, but did not.[654]

3. Phillip Morris III: *Another Hurdle to Economic Rights?*

There was little forewarning that the First Circuit would effect a complete reversal from its *Phillip Morris II* decision.[655] Although only ruling on the likelihood of the success on the merits for preliminary injunctive purposes, the court opined in *Phillip Morris II* that it believed the government's argument would "bear no fruit" on remand.[656] Why, then, on review of the district court's grant of permanent injunction, did the court decide that 307B was a valid exercise of police power and not a taking?[657]

Of the above approaches to takings problems, it appears that the *Phillip Morris II* court relied in part on a noxious use approach in justifying the state's police power and on an implicit-in-kind compensation in justifying what it had before held was insubstantial compensation.[658] The Disclosure Act is premised on the state's asserted belief that public disclosure of the ingredients could result in a reduction of health risks associated with tobacco products.[659] Massachusetts argued its right to *Mugler* police power by stating that property owners may not use their property to the public's detriment.[660] While the court did not lend weight to that argument in *Phillip Morris II*,[661] its reliance on it in *Phillip Morris III* was clear. The court even cited *Corn Products Refining Co. v. Eddy*[662] for the proposition that manufacturers' rights to secrecy are subject to states' police power rights.[663]

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654. *Id.* at 471.

655. This case was originally meant to be illustrative of the trend toward increased protection of economic liberties in the takings area as well as privileges or immunities and substantive due process. However, the First Circuit completely departed from their *Phillip Morris II* reasoning in this decision. Similarly, Robert Hur, in his analysis of the decision in 1999, noted the likelihood of appeal, but seemed to summarily dismiss the possibility of government success. In yet another turn of events, the First Circuit has withdrawn the opinion. The subsequent opinion issued again raises hope that economic rights will be more adequately protected under the Takings Clause.

656. *Phillip Morris II*, 159 F.3d at 678.

657. *See generally Phillip Morris III*, 267 F.3d 45 (1st Cir. 2001).

658. *Phillip Morris II*, 159 F.3d. at 676 (noting that the continued benefit of doing business in Massachussetts did *not* constitute compensation).

659. *See* Hur, *supra* note 567, at 466 (citing *Phillip Morris II*, 159 F.3d at 675).

660. *Id.*

661. *Id.* (opining that the state's police power argument to protect public health was not likely to be successful on the merits).

662. 249 U.S. 427 (1919) (upholding a statute requiring a manufacturer to disclose information, despite its trade secret status).

663. *But see Phillip Morris III*, 267 F.3d at 81 (Selya, J., dissenting) (criticizing the majority's use of this outdated case for modern takings analysis).

In holding that Massachusetts had a rational concern about the dangers of tobacco additives, the court relied on the right to regulate when a noxious use of property is at issue.

As noted, the most startling break with its prior decision was the court's reliance on what appears to be a form of implicit-in-kind compensation. In *Phillip Morris II*,[664] the court rejected the state's argument that enactment of 307B removed any reasonable, investment-backed expectation in confidentiality. In doing so, the court noted that Massachusetts could not rely on *Monsanto* because compensation there is dependent on a voluntary exchange.[665] The court stressed the Supreme Court's recent decisions indicating its concern with the takings area and directing that it will demand substantial rather than nominal compensations to legitimize government takings.[666] In stark contrast, the court in *Phillip Morris III* held that permission to continue conducting business in Massachusetts was a real benefit in exchange for disclosure of the manufacturers' trade secrets.[667] Surely this is the type of nominal compensation that *Phillip Morris II* noted the Supreme Court looks upon unfavorably. However, even if this were considered sufficient compensation, which is highly doubtful, it does not achieve the spirit of implicit-in-kind compensation. There is simply no sound argument that 307B offers substantial net benefits in exchange for disclosure, merely by allowing the manufacturers to continue in an already established business venture.[668] Rather, 307B imposes costs beyond those incident to disclosure by decreasing the value of the trade secrets. As noted, when this results, implicit-in-kind compensation does not exist.[669]

In paying great deference to the state's purported police power and requiring only *de minimis* compensation for the resulting taking, the state ignored the tobacco manufacturers' economic rights in their property. This comports with neither the goal, nor the text of the Takings Clause. Rather, the *Phillip Morris III* majority seemed to rely on its own values and, as the dissent noted, "sacrifice[d] a bedrock principle of individual property rights" in order to respond to the public health problem of smoking.[670] If the First Circuit's fourth *Phillip*

664. 159 F.3d at 676.

665. *Id.* at 677.

666. *Id.*

667. *See generally Phillip Morris III*, 267 F.3d 45.

668. *See* Lawson & Seidman, *supra* note 449, at 1100.

669. *Id.* at 1111 (noting that the decreased value of trade secrets incident to disclosure also lowers the value of the underlying product, which would be cigarettes in this instance).

670. *Phillip Morris III*, 267 F.3d at 58 (Selya, J., dissenting) (opining that the majority's judicial exception to takings is bad law).

Morris opinion holds 307B constitutionally valid, the dangers of such increased "legislative window-breaking" will become much more prevalent and the economic impacts may be staggering. Increasing the police power drastically, while limiting the compensation required, would be devastating to individuals seeking to protect their economic liberties under the Takings Clause, as this is one of the few remaining areas of redress.[671]

4. Phillip Morris IV: *Is a Uniform Regulatory Takings Rationale Attainable?*

Fortunately, the First Circuit reverted to an analysis more closely resembing *Phillip Morris II* in its *Phillip Morris IV* decision. After en banc review, the court determined that 307B did violate the Takings Clause and therefore affirmed the district court's grant of summary judgment.[672] Although the result was the same as *Phillip Morris II*, the analysis differed, thereby raising questions regarding the correct regulatory takings rationale under *Monsanto*. In *Phillip Morris II*, the court held the plaintiffs' reasonable, investment-backed expectation dispositive and the second *Monsanto* period most analogous to the present case.[673] In contrast, in *Phillip Morris IV*, the court held that the character of government action was dispositive and that the second *Monsanto* time period was relevant but not controlling.[674] In addition, *Phillip Morris IV* indirectly rejected the premise *Phillip Morris III* accepted that an implicit-in-kind compensation had been made through its holding that Massachusetts cannot constitutionally condition the plaintiffs' right to just compensation on the nominal benefit of the right to sell tobacco.[675]

The concurring opinion in *Phillip Morris IV* highlights the conflict over which factor should control. Perhaps in an attempt to simplify the complex *Monsanto* analysis, the concurrence opines that the plaintiffs' reasonable, investment-backed expectation determines the outcome of a trade secret taking.[676] Under this analysis, *Monsanto* established a *per se* rule that if the government takes a trade secret in which the plaintiff has a reasonable expectation of secrecy and offers no just compensation, then the Takings Clause has been violated.[677] Therefore, the economic impact and character of regulation need not

671. *See* CLEGG ET AL., *supra* note 129, at 3.
672. *Phillip Morris IV*, 2002 U.S. App. LEXIS 24403.
673. *Phillip Morris II*, 159 F.3d at 676-77.
674. *Phillip Morris IV*, 2002 U.S. App. LEXIS 24403 at *37, *56.
675. *Id.* at 57-61.
676. *Id.* at 64.
677. *Id.* at 65-66.

be considered. The complexity of *Monsanto* and opposing viewpoints discussed above establish the need for clarity in reviewing regulatory takings to more adequately protect economic rights. Specifically, the Supreme Court must clearly address what constitutes a valuable benefit to rise to the level of compensation, and whether *Monsanto* established a *per se* rule where plaintiffs have reasonable, investment-backed expectations of confidentiality.

IV. IMPACT

In light of the recent *Saenz* decision, it is more possible than it has been in over a century that weight will be restored to the Privileges or Immunities Clause. This would be a positive effect because of the exemplified disarray in Due Process Clause jurisprudence due to that clause shouldering the burden of the nullified Privileges or Immunities Clause for years.

However, it is unlikely that the entire burden of protecting economic rights will be placed on the newly revived clause. The Court must first completely reverse the enduring taint of the *Slaughter-House* decision.[678] Although speculative, the Court has implicitly expressed a willingness to do this. By taking the first large step in *Saenz*, the 7-2 majority has restored to the clause the most weight it has enjoyed since its inception. In addition, the fact that even the dissent explicitly expressed a desire to reconsider the role of privileges or immunities in the proper case is highly probative of that possibility.

Justice Thomas, although dissenting in *Saenz*, reiterated his interest in reconsidering the role of privileges or immunities while concurring in *Troxel v. Granville*.[679] In this case, the Court affirmed a state supreme court reversal of an order granting visitation to grandparents.[680] The Court reasoned that the order's reversal was proper because it interfered with the parents' fundamental rights to raise their children in the manner desired.[681] Therefore, while it does not provide much hope from a privileges or immunities standpoint, it does shed light on the revival of substantive due process although applied in a personal, rather than economic context. However, Justice Thomas's cognizance of *Saenz* and the expectations of litigants waiting for further direction is a small, but positive, step. Referring to the *Saenz* dissent, Justice Thomas stated, "This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus

678. *See* Winick, *supra* note 356.
679. 530 U.S. 57 (2000) (Thomas, J., concurring).
680. *Id.* at 58.
681. *Id.* at 60.

does not present an opportunity to reevaluate the meaning of that Clause."[682] This statement, at least slightly, illustrates that although *Saenz* was a controversial decision, the Court, including the dissenters, are not completely backing down from that revival of privileges or immunities.

In contrast, a plaintiff who attempted to bring his claim upon grounds the Court treated favorably in *Saenz* was unsuccessful. The Court denied petition for rehearing after it denied writ in *Obermeyer v. Alaska Bar Ass'n*.[683] The *Obermeyer* plaintiff argued that the Alaska Bar Association had abridged his privileges by arbitrarily limiting the passage rate of those taking the Bar examination in order to control access to the legal profession.[684] The notable aspect of plaintiff's argument was that he alleged a violation of his constitutional right to travel because the bar association's rules limited applicants from other states from practicing in Alaska if they have failed the Alaska exam and imposed durational residency requirements.[685] Thus, he was attempting to apply the same key phrases to the facts of his case that the Court found dispositive of an abridgment in *Saenz*.[686] While the plaintiff's attempts failed, this may be more attributable to the strength of his argument than to the Court's unwillingness to recognize his privileges.[687]

Restoring the Privileges or Immunities Clause could increase the protection of economic liberties more than any action by the Court since the *Lochner* era. However, the Court should proceed cautiously by following a moderate fundamental rights understanding of original intent. By doing so, it can avoid the highly subjective type of judicial review which illegitimated substantive due process for so long.

As evidenced, the *Saenz* decision has piqued the interest of lower courts seeking to protect economic rights on firmer ground than substantive due process can offer. However, in lieu of an explicit reversal of *Slaughter-House*, district courts like *Craigmiles* must rely on the tenuous economic due process doctrine in order to afford any protection to economic liberties. While the *Craigmiles* conclusion was cor-

682. *Id.* at 80.

683. 2000 Petition for Rehearing, Obermeyer v. Ala. Bar Ass'n, 532 U.S. 1048 (May 21, 2001) (No. 00-1176) 2001 U.S. LEXIS 3828.

684. *Id.*

685. *Id.*

686. *Id.*

687. The key arguments that applied to *Saenz* do not fit appropriately within *Obermeyer*. For example, the *Obermeyer* plaintiff could feasibly live in Alaska despite not being able to practice law there, while the *Saenz* plaintiff's right to settle was violated because she could not live in California under the lower grant of financial aid regulated by the state.

rect, its reasoning may be too reliant on *Lochner* value inferences to be legitimate. The Court is still wary of economic due process. Therefore, a better revival of substantive due process in the economic realm would be to adopt the less-restrictive-alternative approach. Although the Sixth Circuit denied relying on this principle on review, its statements that Tennessee could serve its safety interests by making the FDEA applicable to casket retailers rather than requiring licensure appears to impose a requirement of narrowly tailored economic regulation. This approach will check the Court's judicial review and ensure a moderate restoration of substantive due process in the economic realm, rather than the all-encompassing role used in the past.[688] Furthermore, grounding the analysis in economic rather than value judgments will be more politically correct and will lead to more sound judgments. Past jurisprudence has proven that doctrines retain limited capacity once cries of judicial value implementations are made.[689]

The Court's current stance on substantive due process treats personal and economic liberties unequally. The Court maintains its use of substantive due process in the protection of personal liberties. As mentioned, *Troxel* was ultimately decided on substantive due process grounds.[690] Similar to the district court in *Craigmiles*, the Court even cited to *Lochner* era decisions to support parents' fundamental rights to make decisions regarding their children.[691] However, both decisions relied on were based on fundamental rights, not based on economic rights.[692] Justice Thomas also noted in his concurrence that the question of whether substantive due process and the "judicial enforcement of unenumerated rights" was improper was an issue to decide another time since neither party raised it.[693] Justice Antonin Scalia dissented and argued the impropriety of the Court citing to decisions from a repudiated era for support.[694] The dissent's open reference to *Lochnerism* and the plurality's staunch silence highlight the era's notorious largesse. If the Court is frowned upon for relying on even

688. *See generally* Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

689. *Cf.* Nebbia v. New York, 291 U.S. 502 (1934) (removing the powerful tool of substantive due process in striking state economic regulation after three decades of near *per se* invalidation), *and* Lochner v. New York, 198 U.S. 45 (1905) (forming the concept of substantive due process in striking economic regulations).

690. Troxel v. Granville, 530 U.S. 57 (2000).

691. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

692. *Id.*

693. *Id.* at 80.

694. *Id.* at 92.

personal rights decisions from the period, the possibility of economic substantive due process will be minimal indeed.

One possibility is that the Court may reintroduce economic due process principles in inadvertent ways. For example, the Court recently held that the Due Process Clause substantively limits states' discretion to impose punitive damages in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[695] The Court vacated and remanded the case to the Ninth Circuit, which previously found that the district court did not abuse its discretion in refusing to lower a $4.5 million punitive award.[696] *Cooper* was decided over the objection of the Association of Trial Lawyers of America, appearing as amicus curiae for the respondent who received the award.[697] Petitioner argued that allowing federal judges to rely on their own economic beliefs on substantive due process grounds "would be *Lochnerism* on a massive scale."[698] Although vacating the Ninth Circuit decision, the Court basically allowed it discretion to determine whether the award was constitutionally excessive, as petitioner feared. It is overwhelmingly apparent that the Court is not going to outwardly embrace economic due process, partly because of the fear of being labeled as *Lochnerizing*. The stigma must be removed through continued judicial reliance on the sound doctrines that may still be extracted from the era.[699]

In addition to the Fourteenth Amendment provisions, the Fifth Amendment is an important source for the protection of economic liberties. The Court has illustrated its increased interest in takings in recent years. Furthermore, because of the eradication of privileges or immunities and economic due process, the Takings Clause has a large burden—to fulfill protection of economic rights. Despite the complementary nature of substantive due process and regulatory takings

695. 532 U.S. 424 (2001).

696. *Id.* at 428.

697. Brief of Amicus Curiae Ass'n of Trial Lawyers of America, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (No. 99-2035).

698. Brief for Petitioner at 1, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (No. 99-2035).

699. *See generally* Moran v. Clarke, No. 00-1015, 2002 U.S. App. LEXIS 13293 (8th Cir. July 5, 2002) (reversing summary judgment for the defendant where the plaintiff claimed that his substantive due process rights were violated when the defendants' conspired to blame him for beating an inmate); Leamer v. Fauver, 288 F.3d 532, 544 (3d Cir. 2002) (noting that the right to receive mental treatment is the kind of liberty interest substantive due process generally protects in holding that prisoner's claim was proper under 42 U.S.C. § 1983); Craigmiles v. Giles, 110 F. Supp. 2d 658 (E.D. Tenn. 2000) (holding that a regulation requiring casket sellers to have a funeral directors license violated their liberty interest to work in their chosen occupation under a substantive due process rationale).

analyses, the Court has taken pains to distinguish them. In *Nollan v. California Coastal Commission*, the Court established that it "had no desire to resurrect the so-called Lochner era and the discredited practice of judicial disagreement with legislatively chosen policy ends."[700] *Nollan* illustrated the Court's view that regulatory takings require a more in-depth means/ends connection than substantive due process does.[701] This distinction merely emphasizes the importance of strong takings jurisprudence and underscores its necessity as an area for protection from government intrusion.

Despite this and contrary to ruling authority, the First Circuit applied a very weak takings analysis in *Phillip Morris III*.[702] If the conflict between *Mugler* police power[703] and *Pennsylvania Coal* economic impact considerations[704] is resolved as strongly in favor of police power as that decision was, protections through the Takings Clause will be substantially weakened. Furthermore, holding that the continued privilege of doing business in the state is just compensation under *Monsanto* seems contradictory both to *Monsanto* and to the goals of the Takings Clause. The impact of this decision reaches far beyond Massachusetts. If fully implemented, 307B would effectively destroy the tobacco companies' trade secrets, as the information would be easily accessible. Furthermore, numerous other industries would be at risk to similar legislation. If the characterization of "legislative window-breaking" is correct, there is no reason to believe that states will confine their targets to tobacco.[705] Other unpopular industries, such as alcohol, firearms, and processed food would likely be subject to similar destruction of their secrets, justifiable on public policy grounds.[706] If allowing the parties to continue business is considered adequate redress, compensation can almost always be avoided. For these reasons, the *Phillip Morris III* decision is much too broad and destructive.

Fortunately, the First Circuit recently withdrew that decision and retreated from its broad protection of police power in *Phillip Morris IV*. It is likely that this is due to the enormous corporate entities in-

700. Douglas W. Kmiec, *Is the Jury In or Out in Deciding Regulatory-Takings Cases?*, *in* 1 PREVIEW U.S. SUP. CT. CASES 42, 45 (American Bar Association 1998) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987)).

701. *See Nollan*, 483 U.S. 825.

702. *Phillip Morris III*, 267 F.3d 45 (1st Cir. 2001).

703. *See Mugler*, 123 U.S. 623.

704. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

705. *See* Hur, *supra* note 567.

706. *Id.* at 450-51 (noting this possibility but then dismissing it because of the now-reversed *Phillip Morris II* decision).

volved and the Supreme Court's recent favorable treatment of protecting against economic regulation.[707] In *Monterey v. Del Monte Dunes, Ltd.*, the Court decided the proper division of liability determinations between judge and jury for the first time.[708] The Court upheld the Ninth Circuit's decision and a $1.5 million verdict in holding that it is the jury's function to decide the reasonableness of a regulatory taking.[709] While obviously not an absolute jury right, expanding the jury's role in regulatory takings is likely to increase favorable findings on behalf of claimants. Citizens hold economic freedoms important and resent government intrusion therein.

The First Circuit's withdrawal of its *Phillip Morris III* decision offers litigants seeking protection of their economic rights a vestige of hope. *Phillip Morris IV* more closely comports with the Supreme Court's analysis of takings claims under *Monsanto*. The effect of this decision is that Massachusetts is required to provide compensation with real value to the plaintiffs.[710] Therefore, the government may still enact the ingredient-reporting regulation, but it must provide the plaintiffs with a benefit for destroying their trade secrets. Because the nature of trade secrets is complex, identifying the proper value may be difficult. The tobacco manufacturers involved in the *Phillip Morris* decisions have major shares of the market, therefore, enormous sums of money are at stake.

Phillip Morris IV is also likely to impact the amount and type of regulations that other states pass. Hur's prediction that "legislative window-breaking" will not become a prevalent problem may once again ring true based on the *Phillip Morris IV* decision against heightened regulation of unfavorable industries.[711] If Massachusetts attempts certiorari, it is likely that the Supreme Court may grant certiorari to apply the correct *Monsanto* analysis to such regulations and clarify Takings Clause jurisprudence because of the vast interests at stake and widespread impact of the decision on the tobacco industry.

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707. *See generally* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

708. *Id.* (holding that a jury could reasonably decide that the City's rejection of plaintiff's land development plan was a deprivation of property).

709. *Id.*

710. *Phillip Morris III*, 267 F.3d at 63 (Selya, J., dissenting).

711. *See* Hur, *supra* note 567.

V. CONCLUSION

Despite the importance of economic liberties to a free marketplace, corporations and individuals in the United States have never enjoyed sound protections of these rights. Although the Privileges or Immunities Clause appears to be the most appropriate source for these rights, it is an understatement to say that this intent has never been realized. The recent *Saenz* decision provides both hope for restoration of that clause, as well as reconstruction of the clauses harmed by its elimination. As with any large reconstruction, this will take time while the Court strives to determine the scope the Framers envisioned for privileges or immunities. Finding that privileges or immunities encompass fundamental rights protections would be the most sound and secure basis for rebirth of the clause.

Until that time, the Due Process Clause and Takings Clause must be given increased weight. There is no justification for according the Due Process Clause substance for personal liberties while eliminating that option for economic rights. A more moderate less-restrictive-alternative approach, together with economic measurements, can ensure judicial objectivity in the economic realm, where judicial values may be less inflammatory. Furthermore, the Takings Clause can be used to complement substantive due process, but must be given more independent weight in intellectual property and trade secret contexts. Compensation must actually hold value in order to be just. As Justice Douglas recognized, economic liberties must be protected in order to afford those opportunities to man that true freedom envisions.

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