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Historical Framework for Reviving Constitutional Protection for Property and Contract Rights

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THE HISTORICAL FRAMEWORK FOR REVIVING CONSTITUTIONAL PROTECTION FOR PROPERTY AND CONTRACT RIGHTS

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INTRODUCTION

Post-New Deal constitutionalism is in search of a theory that justifies judicial intervention on behalf of individual rights while simultaneously avoiding the charge of "*Lochner*ism."[1] The dominant historical view dismisses post-bellum substantive due process as an

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[1] Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum hours legislation as an unconstitutional violation of freedom of contract because it was an unreasonable exercise of the police power).

anomalous development in the American constitutional tradition. Under this approach, *Lochner* represents unbounded protection for economic rights that permitted the judiciary to read *laissez-faire*, pro-business policy preferences into the constitutional text.

Today's revisionists have mounted a substantial challenge to the dismissive views of traditionalists. Indeed, some claim *Lochner* reached the right result, but for the wrong reason. The revisionists characterize substantive due process as a genuine, albeit unsuccessful, attempt to apply constitutional protections for property and contract in light of the economic, social and political situation in the late nineteenth century. The revisionist account of *Lochner*ism is likely to replace the dominant historical view and to transform a central understanding of the American constitutional tradition. In particular, this view of *Lochner*ism will likely influence the analysis of constitutional protection of economic rights.

The extent to which both sides in the current debate draw upon the history of nineteenth century economic rights protection to validate their positions is striking. The standard criticism is that *Lochner* marked a decisive break with the past, a break effected at the cost of suppressing a heritage of collective regulatory intervention, utilizing even the common law to do so. Revisionists respond that *Lochner* was not part of a sudden eruption; rather, it continued a pre-*Lochner* tradition of substantive judicial review that was highly protective of economic rights.

Historical accounts of dubious accuracy have been produced by both sides, even as they attempt to treat history as a source of binding authority in constitutional law. Although a more accurate reading of the history of constitutional protection of economic rights reveals lessons that do bind us, they are not the lessons suggested by the revisionists or the traditionalists. The protection of economic rights requires some form of what amounts to substantive due process, but history does not dictate its content. Our constitutional heritage simultaneously condemns us and liberates us, forcing us to continually recreate constitutional economic rights protection.

This Article will demonstrate that both sides have overlooked a key element in the progression of economic rights protection from the early nineteenth century through the *Lochner* era to the present day: the changing conception of the principle of non-retroactivity. This oversight may not be surprising in one sense, for the modern view—traceable to the *Lochner* era itself—is that the principle of non-retroactivity is simply a mask for substantive review. But it was not always so. The principle of non-retroactivity, heavily dependent upon the notion of vested rights, was the primary organizing idea in the

constitutional economic rights protection that preceded the *Lochner* era of substantive due process.

The *Lochner* era stands as a bridge between nineteenth-century jurisprudence and the present day. The standard critique errs in labeling *Lochner* as a break with the past. The revisionist account is equally mistaken in finding *Lochner*'s lesson in the continuation of the past. In contrast, the constitutional tradition revealed by history is one of gradual metamorphosis. The nineteenth century idea of retroactivity drew heavily upon two distinctions that sound false to modern ears. One—familiar to the system of estates in land—was a distinction between "vested" legal interests and mere "expectancies." Drawing on these notions, courts held that retroactive legislation could destroy expectancies but not vested rights. The second distinguished between rights and remedies. Courts upheld retrospective legislation that changed remedies without materially altering rights. Courts also consistently contrasted rights and remedies within a system that recognized discrete legal and equitable rights—describing the former as a consequence of rules of law and the latter as a consequence of principles of equity. Drawing upon these notions, courts upheld retroactive legislation that afforded a remedy where none was previously available if doing so implemented equitable rights whose enforcement was precluded only by a defect in the remedial law.

Broad-based changes in legal thought during the *Lochner* era undermined these distinctions, and in this partial sense the standard critique is correct in viewing the *Lochner* era as a break with the past. The distinction between property and expectancies collapsed under the weight of a critique that saw all legal interests of value as property. Considerations that had once informed the analysis of equitable rights were increasingly incorporated into an enlarged conception of legal rules, leaving a greatly diminished role for equitable principles. Equitable rights came to be seen as subordinate to legal rights: mere responses to individual problems of remedial choice.

The modern era also represents a break with *Lochner*'s heritage, but again, one that is only partial. As the theoretical importance of retroactivity diminished, jurists in the nineteenth century increasingly perceived the decision on whether a statute impinged upon economic rights as requiring a choice between competing legal rules. Forced to recognize the necessity of this choice, the *Lochner* Court blunted its recognition by turning to an idealized vision of the common law of property and contract.[2] The evolution of that vision has been decisively rejected in the standard critique.

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[2] On the use of common law rules as the basis for economic freedom in the late nineteenth century, see Duncan Kennedy, *Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3

Nonetheless, an important part of *Lochner*'s gradual evolution away from its nineteenth century heritage remains with us today. The breakdown in the distinction between vested rights and expectancies and between rights and remedies—central to *Lochner*'s development of substantive due process—continues to inform the modern protection of economic rights. The same recognition of the need for choice that conditioned the *Lochner* decision inspired the charge made by critics that the Court usurped the legislature's role. *Lochner*'s critique of retroactivity jurisprndence rendered the substantive analysis of economic rights inevitable, just as it rendered the concept of vested rights-retroactivity untenable.

The modern attack on substantive due process criticizes pre-*Lochner* non-retroactivity jurisprudence, as well as *Lochner*'s incorporation of common law property and contract rules into constitutional protections of economic liberty. Although modern critics rejected the *Lochner* Court's particular substantive choice, they could not return to vested rights-retroactivity as the basis for a constitutional analysis of economic rights.

To look for a lesson from the evolution of the constitutional protection of economic rights is to examine the current debate on another level. The lesson lies in the process of critique and metamorphosis, not in the answers to the constitutional questions of the day. The revival of constitutional economic rights protection requires a theory of their legitimacy beyond that which is provided by history. Nevertheless, the lessons of history are rich and provoking and we will do well to consult history as we engage in an evolving constitutional debate. Indeed, we must remain skeptical of attempts to define part of that debate as taking place outside our constitutional heritage.

Part I of this article outlines the interpretation of substantive due process that remains dominant in constitutional theory and its recent historical revision. Part II contrasts the treatments of retroactivity in the constitutional protection of property and contract that are characteristic of the pre-*Lochner* and modern eras. Part III examines the nineteenth century logic of retroactivity in the context of legal

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(1980); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 253-66 (1977); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 9-31 (1992) [hereinafter HORWITZ, 1870-1960]; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1745-48 (1976) [hereinafter Kennedy, *Form and Substance*]; Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 940-58 (1985); John Nockleby, Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980); Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW 18, 23-26 (David Kairys ed., 1982); Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 879 n.30 (1987).

thought and relates the transition from the concept of vested rights-retroactivity to substantive due process to changes in contemporary ideas of property and equitable rights. The conclusion briefly discusses the implication of the analysis for attempted revivals of economic rights protection under the Constitution.

I
HISTORY AND THEORY IN THE INTERPRETATION OF SUBSTANTIVE DUE PROCESS

A. The Modern Assault on the Standard Criticism of *Lochner*

Substantive due process in the *Lochner* era is depicted by standard critics as the unrestrained protection of economic rights that permitted the judiciary to import illegitimately *laissez-faire*, pro-business policy preferences into its explication of the constitutional text.[3] The condemnation of *Lochner* remains largely consistent with the contemporary criticism offered by Justice Holmes: "[The] constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez-faire*."[4] Although often offered as a unified critique, the standard criticism actually comprises a methodological and substantive component. Methodologically, substantive due process violated the norm of non-discretionary adjudication upon which the legitimacy of judicial review depends. Substantively, the *Lochner* Era's protection of economic rights realized its counter-majoritarian potential by imposing an economic theory that served the interests of a few at the expense of the general public.

Many histories of the doctrinal evolution of the fourteenth amendment from the *Slaughter-House Cases*[5] to *Lochner* clearly incorporate this methodological critique. The central theme of these histories is the Court's gradual transformation of due process from the (legitimate) procedural to the (illegitimate) substantive variety after initially failing to incorporate substantive economic liberty into the privileges and immunities clause.[6] This account usually attributes the development of substantive due process to the ascendance of natural law jurisprudence and the identification of the elite bench and bar with business interests.[7]

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3 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 63-66 (1991) (discussing the standard view).

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

5 83 U.S. 36 (1873).

6 *See, e.g.*, Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368, 372-73 (1911); ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 115-35 (1960); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 232-46 (1989).

7 *See, e.g.*, EDWARD CORWIN, LIBERTY AGAINST GOVERNMENT 59-68 (1948); CHARLES G. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 80-85 (1930); CHARLES G. HAINES, THE

The substantive critique is most clearly expressed by progressive historians, who portray the battle over substantive due process as a conflict between the "interests" and the "people."[8] According to this account, the Court's misguided protection of contractual freedom in the name of economic liberty improperly shielded unequal property distribution from the democratic expression of what Holmes referred to as the "felt necessities of the time."[9] Freedom of contract protected those already possessed of economic power at the expense of the masses. It prevented the government from intervening to regulate or redistribute economic power in an attempt to approach "the equality of position between the parties in which liberty of contract begins."[10]

The methodological and substantive components employed by traditional critics depend upon a neutrality premise and a substantive premise, both of which are currently under attack. The modern assault begins by noting an apparent contradiction in the jurisprudence of substantive due process that grew out of the criticism of *Lochner*. On the one hand, the standard criticism requires that courts be neutral among competing economic theories, allowing the choice of economic goals to be left to elected representatives. Under this neutral approach, legislation affecting economic rights is upheld unless it is without rational basis. By emphasizing the fit between statutory means and legislative ends, the rationality requirement purports to allow the legislature discretion over the choice of appropriate economic goals.[11] This condemnation of "open-ended" substantive due process nonetheless leaves the courts free to enforce more specific constitutional provisions. Indeed, it even leaves them free to enforce

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AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (1932); BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 254-55 (1967); MCCLOSKEY, *supra* note 6, at 71-77, 104, 127-35.

8 Morton J. Horwitz, *Progressive Legal Historiography*, 63 OR. L. REV. 679 (1984) (describing the approach of progressive historians).

9 OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881). *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (discussing the right of the majority to enact a dominant viewpoint into law).

10 Coppage v. Kansas, 236 U.S. 1, 27 (1915) (Holmes, J., dissenting).

11 *See, e.g.*, Robert F. Nagel, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972) (discussing the foundation of the rational basis test). The author also argues powerfully that the rational basis test must implicitly rule out at least some plausible legislative ends to avoid the conclusion that the legislature's chosen means are always perfectly suited to its ends. *Id.* at 154. In a similar veiu, Felix Cohen noted that the rational basis test, taken literally, would make the Court a "lunacy commission" charged with watching over the legislature. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 819 (1935). Both *reductios* have been avoided only because, consistent with the neutrality premise underlying post-*Lochner* review of economic rights, the ends of economic legislation that are in fact ruled out by the rational basis test are those that are believed to reflect a malfunction in democratic processes. *See infra* text accompanying note 12.

the more open-ended clauses of the text, so long as they do so in a way that promotes rather than inhibits democracy.[12]

The modern assault, on the other hand, charges that post-*Lochner* jurisprudence tends to ignore the specific constitutional langnage that does protect property and contract. Within the framework of modern constitutional theory, the relative desuetude of these texts is as vulnerable to charges of judicial abdication of constitutional responsibility as the expansive application of the due process clause was susceptible to charges of judicial usurpation. This abdication is significant because, as recent scholarship and case law show, the contracts and takings clauses are alternative texts that can easily generate approaches and outcomes similar to those *Lochner* era jurisprudence ascribed to substantive due process.[13] Modern critics wonder how post-*Lochner* theorists can reconcile *express* substantive protection of property and contract rights with a rational basis test for economic legislation that defers to economic goals chosen by the legislature.[14]

The Supreme Court's approval of the reasonable impairment of contractual obligations in *Home Building & Loan v. Blaisdell*[15] typifies the New Deal response to this question. The Court treated the express substantive protection of economic rights in the contract clause in the same manner as the due process clause's protection of prop-

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12 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 14-18 (1980), which contains a comprehensive statement of this position and accounts for much of the Warren Court's jurisprudence. Ely's defense of judicial review, that it is simultaneously democratically legitimized and democratically reinforcing, is a creative synthesis of Justice Black's textualism and Justice Frankfurter's processualism, in that it transcends those Justices' certain disapprovals. *Id.* at 105-16. Prior to the Warren Court, Justices Black and Frankfurter were the primary judicial contestants in the battle to establish a theory of constitutional protection for individual rights that incorporated the lessons of "*Lochner*ism." See, for example, their respective opinions in Adamson v. California, 332 U.S. 46 (1947) (arguing over whether the incorporation of the Bill of Rights in the Fourteenth Amendment's limitations on the states avoids or repeats the errors of *Lochner*). In its response to those concerns that animated both Black and Frankfurter, Ely's theory reaches beyond the activities of the Warren Court and helps to illuminate premises underlying all of post-New Deal constitutional law.

13 *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 277-82 (1985) [hereinafter EPSTEIN, TAKINGS] (attempting to resurrect *Lochner*-type protection for property and freedom of contract through "takings" and contract clauses.); Richard A. Epstein, *Toward A Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984) [hereinafter Epstein, *Contract Clause*].

14 *See, e.g.*, ELY, *supra* note 12, at 91-93 (noting first, the difficulty posed by the contracts clause for his theory of judicial review because it is "not wholly susceptible to convincing rationalization in terms of either the processes of government or procedure," and second, the simultaneous difficulty of identifying and applying the "substantive value" incorporated in the clause in a manner consistent with the parameters of the judicial role he endorses).

15 290 U.S. 398 (1934) (upholding a statutory moratorium on mortgage payments as a reasonable impairment of the obligation of contracts).

erty, on the theory that both clauses were equally open-ended.[16] But the contracts and "takings" clauses are no more open-ended than the equal protection clause or the provisions of the bill of rights that have become the staple of modern constitutional protection for individual rights.[17] If the canons of constitutional interpretation require substantive protection of economic rights, then the claim that the Court can apply these protections while remaining genuinely neutral as between competing theories of economic rights is suspect. It would be equally suspect to claim that the Court could protect freedom of speech while remaining neutral as between competing theories of individual expression.

If the premise of judicial neutrality underlying *Lochner*'s criticism is rather dubious, then the substantive premise—that constitutional protection of economic rights can be easily reconciled with the legislative pursuit of the common good—is equally fragile. Rationality review of economic legislation expresses judicial deference to the legislature's response to "the felt necessities of the time."[18] The legislature's institutional advantages, which include institutional competence, expertise and electoral accountability, suggest that legislators are better qualified to determine the general welfare and provide the typical justification for judicial deference.[19]

Nonetheless, recent scholarship and judicial decisions no longer simply equate legislative intervention with the promotion of the common good; nor is the protection of economic rights automatically associated with the defense of entrenched interests. The increasing use of economic analysis by scholars to evaluate legal rnles has served to dissipate the suspicion that economic analysis necessarily implies a *laissez-faire* ideology that sacrifices the welfare of the many to the interests of the few.[20] Economic analysis aspires to help discover the *common* good, and in so doing it can align itself against entrenched interests who use political processes to insulate their own positions from change that promotes general welfare.[21] Coupled with the per-

16 *Id.* at 426 (including the contracts clause within the broad clauses necessarily requiring judicial construction, as opposed to the narrow clauses, such as the provision establishing that each state shall have two senators).

17 *See* LEARNED HAND, THE BILL OF RIGHTS (1958).

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

19 *See, e.g.*, Kennedy, *Form and Substance*, *supra* note 2, at 1753-66 (discussing the institutional competence and political question "gambits" in the post-New Deal conception of the judicial role in public law). The references to the legislature (or to legislation) here include administrative agencies (and regulations) whose authority ultimately derives from their status as delegates of the legislature.

20 *See, e.g.*, Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (discussing the contributions of liberal practitioners of law and economics).

21 *See, e.g.*, Williamson v. Lee Optical of Okla., 348 U.S. 483, 486-88 (1955) (rejecting equal protection challenge to economic legislation).

ception that legislation or equivalent administrative rules may be a poor measure of the common good because of logrolling, agency capture, and interest group politics, the revival of economic analysis in law suggests that the protection of economic rights against political intervention may itself be justified as being in the public interest.[22] At the very least, economic analysis undermines the simplistic assumption that economic legislation always protects the people against entrenched interests. Economic analysis properly focuses on identifying the interests that are served by particular regulations rather than on making blithe assertions about the general welfare.

Independently of the revival of economic legal analysis, the bases for the presumption of deference are being attacked on more traditional grounds. The dominant substantive critique of *Lochner* uses considerations of institutional competence, expertise and electoral accountability to justify deference to legislation that affects economic rights. It accepts the lack of deference to legislation affecting personal rights as a necessary antidote to unrestrained democracy, which tends to oppress those without political power[23] and destroy the bases of its own legitimacy.[24] But discontent with the distinction between property and personal rights, which is the heritage of New Deal constitutionalism, spans the political spectrum.[25] Criticisms from the left and the right deny the separation between economic rights and personal liberty.[26] Even the Supreme Court has directly attacked the distinction between property and personal rights:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than

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22 On the general point, there seems to be agreement between liberal and conservative critics of interest group politics. *See, e.g.*, Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 49-50 (1985); DAVID W. BARNES & LYNN A. STOUT, THE ECONOMICS OF CONSTITUTIONAL LAW AND PUBLIC CHOICE (1992) (applying public choice theory to constitutional law).

23 A classic example is the notion that the courts should protect "discrete and insular minorities." United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

24 Classic examples are Smith v. Allwright, 321 U.S. 649 (1944) (declaring white-only primaries unconstitutional) and Reynold v. Sims, 377 U.S. 533 (1964) (establishing the principle of one person, one vote).

25 For criticism from the left, see Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771-74 (1964) (arguing that the distinction misses the importance of private property to political liberty, especially for those who have little); Leonard W. Levy, *Property as a Human Right*, 5 CONST. COMMENTARY 169, 182-84 (1988) (arguing along the same lines as Reich). For criticism from the right, see Epstein, *Contract Clause*, *supra* note 13, at 704, 705; EPSTEIN, TAKINGS, *supra* note 13, at 277-82 (urging *Lochner*-type protection for freedom of contract and property through "takings" and contract clauses.).

26 *See* Epstein, *Contract Clause*, *supra* note 13, at 138; Milton Friedman, *The Relation Between Economic Freedom and Political Freedom*, *in* ECONOMIC FOUNDATIONS OF PROPERTY LAW 77-91 (Bruce A. Ackerman ed., 1975); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329 (1987).

> the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.[27]

The potential for oppression or delegitimation is as acute in the area of economic rights as it is in the area of personal rights. Deference to economic legislation, therefore, cannot be justified by institutional competence, expertise or electoral accountability any more than it can justify personal rights legislation.[28]

B. The Role of History in the Current Debate

Despite substantial critique of its theoretical premises, the standard criticism of *Lochner* continues to exert a powerful influence on constitutional protection of economic rights. Much of that influence derives from its historical foundation. Unlike the debate over protections for personal rights, the present contest over constitutional protection of property and contract primarily implicates constitutional history. That it does so is an artifact of the *Lochner* era and the attack on substantive due process that it engendered. To a large extent, the defense and critique of substantive due process *was* overtly historical, and legal history, purposefully or not, assumed a critical role in the debates.

In the lawyers' histories, which late nineteenth and early twentieth century courts relied upon to justify substantive due process, some economic regulations—even if admittedly well-suited to contemporaneous social needs—were portrayed as fundamentally inconsistent with historically embedded constitutional principles. For instance, the New York Court of Appeals in *Ives v. South Buffalo Railway Company*[29] struck down that state's workers compensation statute as violative of the federal due process clause. The court reasoned that the compensation scheme violated the principle of no liability without fault, which it perceived to be historically embedded in the common law and therefore constitutionally immune from regulatory intervention.[30] The court expressed considerable sympathy for the statute's

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27 Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citations omitted).

28 Reich, *supra* note 25, at 779-85; Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 270-76 (1988) (framers identified creditors as a class particularly vulnerable to factional politics at the state level).

29 94 N.E. 431 (N.Y. 1911).

30 *Id.* at 439 ("When our Constitutions were adopted, it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another").

policy goals and deference to the blue ribbon commission that had proposed it. In the end, however, the court concluded that a constitutional amendment was required to uphold the statute. According to the court, the historical foundation of the fault principle made it unnecessary to engage in explicit discussion of its consequences or its merits. This perception of historical legitimacy, applied generally to common law rules, provided an essential link between the formalist methods of the *Lochner* era substantive due process cases and their outcomes.[31]

Lochner's critics focused their attention upon the foundations of alleged common law rules threatened by legislative change. Within the canons of scholarly objectivity, the courts' historical premises were vulnerable to contradiction. Consequently, academic legal histories disputed the claim that, historically, the common law was hostile toward economic regulation.[32] The retelling of history helped to legiti-

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31 For an important account of the role of historicism in late nineteenth century constitutional interpretation, with a particular emphasis on the development of substantive due process, see Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 66-99 (1991).

By the "formalist method of substantive due process cases," I mean only to refer to the courts' reliance, when deciding constitutional cases, on an historical definition of economic rights in order to avoid an extensive analysis of the social consequences of economic regulations. I do not mean to adopt the view that the dichotomy between formalist and instrumentalist styles of legal reasoning provides much that can help us understand the structure of ideas that characterized late nineteenth century legal thought, nor do I even concede that it necessarily captures important changes in the approach indicative of the early and late nineteenth centuries. For critiques of the use of instrumentalist and formalist styles of legal reasoning as determinants of economic rights, see EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 253-54 (1992); James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation From Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 387-97 (1982); Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Legal Reasoning" in the Nineteenth Century*, 1975 WIS. L. REV. 1, 12-18. Professor Purcell lumps together the classic attempts to utilize styles of legal reasoning to explain outcomes and recent efforts to understand historical forms of legal consciousness as loosely-bound systems of shared commitments and assumptions that he notes extend far beyond modes of legal reasoning. *Id.* at 394 n.13. I would therefore not apply the critique of the former to the latter, which should be understood as developing a descriptive model that is not encompassed in the narrower uses of the term formalism.

32 *See* Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1042-43 (1981) (noting how progressive historians "discovered a history of extensive state promotion and regulation of the economy through legislative and administrative, as well as judicial action, so that the New Deal, in perspective, could be seen as the culmination of an American tradition of pragmatic response to social needs, without excessive fussing about ideological laissez-faire"). Primary examples include LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 229-65 (1957) and the sources cited in Gordon, *supra*, at 1042 n.94. *See also* Michael L. Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 293-98 & nn. 9 & 15 (1985) (noting that the earlier histories emphasizing government intervention in the nineteenth century economy perpetuate the view of *Lochner* as improperly protecting privileges of the wealthy and of corporations).

mize a series of *Lochner* critiques, from sociological jurisprudence to legal realism.[33] As the critics showed, the lawyers' histories, upon which *Lochner* era courts relied, suppressed a common law past that included collective regulatory intervention. For example, if common law rules did *not* consistently reflect a principle of no liability without fault, then the use of a fault principle had no flrm historical basis. The establishment of the fault principle, therefore, entailed a policy choice whose legitimacy depended on a democratic process.

The professional histories attacking *Lochner*'s legitimacy related the illegitimacy of its pedigree with a conviction rivaled only by the antithetical story once told by *Lochner*'s supporters.[34] Their claim gradually supplanted the older version, in which economic regulations interfered with an historically determined system of common law rules organized around principles of private property, no liability without fault, and freedom of contract. The new story alleged that substantive due process corrupted an otherwise consistent tradition of pragmatic judicial and legislative adaptation of law to social needs.[35]

More recently, however, professional historians have again challenged the constitutional orthodoxy. Although recent histories challenging the dominant interpretation of *Lochner* are quite diverse, they commonly reject previous attempts to depict substantive due process as a sharp break in the American constitutional tradition. Those repudiating the methodological critique of *Lochner* as extra-constitutional have established that the emphasis of previous scholars' on the late nineteenth century belief in natural rights is misplaced. The jurisprudence of substantive due process owed at least as much to constitutional positivism, and its conception of enforcing popular sovereignty through textual interpretation, as it did to natural rights theory.[36]

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33 *See, e.g.*, Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 568-70 (1933); Cohen, *supra* note 11, at 842-47; Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606-07 (1943); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1-3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140 (1911), 25 HARV. L. REV. 489 (1912).

34 HORWITZ, 1870-1960, *supra* note 2, at 7 (orthodox view that the New Deal's constitutional revolution was a conservative restoration of pre-*Lochner* principles reflects legitimating needs of the New Deal rather than historical truth). Professor Horwitz links post-New Deal constitutional orthodoxy to the continuing influence of progressive historiography, with its simplistic premise of conflict between the "people" and the "interests," on the legal history of the Gilded Age. *Id.* Benedict, *supra* note 32, at 296-97 notes the same linkage and goes so far as to argue that it is "possible once more to make sense of laissez-faire constitutionalism" only because "the intellectual commitments forged in the Progressive and New Deal eras have faded." *Id.* at 296.

35 *See* Gordon, *supra* note 32, at 1055-56 (discussing importance of adaptation theories in post-New Deal legal history).

36 Earlier histories stressing the impact of beliefs in positivism and natural law on the constitutional protection of individual rights associated positivism with legislative sovereignty. In contrast, constitutional positivism associates positivism with popular sovereignty

The prevalence of constitutional positivism diminishes the significance of the alleged discontinuity between constitutional protections of economic rights that characterized substantive due process and those that preceded it.[37] Moreover, the acceptance of constitutional positivism as an historically legitimate form of constitutional interpretation blunts the claimed methodological distinction between *Lochner* era and modern protection of individual rights. In a strong application of the argnment, constitutional positivism allows that *Lochner*'s protection of freedom of contract was the right result reached for the wrong reason; it should have been attributed to the contracts clause.[38] In a weaker form of the argument, constitutional positivism does not necessitate the resurrection of freedom of contract. Nonetheless, it is inconsistent with post-New Deal deference to economic legislation.[39]

The revision of the substantive *Lochner* critique challenges the earlier professional histories that portrayed substantive due process as a radical departure explained by the identification of the elite bench and bar with business interests.[40] Focusing on late nineteenth century decisions restricting governmental power to *promote* business and allowing legislation to destroy economic privileges previously granted, scholars have established that judicial identification with business interests is too broad to explain much of the *Lochner* era courts' attitude toward economic legislation.[41] Scholars have also increasingly noted that the notoriety of the decisions invalidating economic regulations exceeded the number of such cases and that many regulations passed

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as expressed in the constitutional text. *See* Kainen, *supra* note 31, at 388-89. In the latter conception, active judicial protection of individual rights may be justified without reliance on the proposition that laws are unconstitutional because they violate natural rights, a proposition frequently denied by late nineteenth century proponents of substantive due process. *Id.* at 392 n.46; HORWITZ, 1870-1960, *supra* note 2, at 156-59.

37 *See, e.g.*, ELY, *supra* note 12, at 209-11 n.41 (arguing that the Marshall Court's protection of economic rights was also consistent with constitutional positivism).

38 *See, e.g.*, Epstein, *Contract Clause*, *supra* note 13, at 729 (freedom of contract follows from the contracts clause, not from due process).

39 *See, e.g.*, ELY, *supra* note 12, at 92 (arguing, for example, that difficulty in establishing limits on freedom of contract requires application of contracts clause only to contracts previously formed); Douglas Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 529-34 (1987) (original understanding of the contracts clause requires that it be interpreted to apply only to retrospective legislation which violates vested contractual rights); McConnell, *supra* note 28, at 270-76; Richard G. Taranto, Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623, 1625 (1981) (urging a theory of the contract clause that "would scrutinize the manner in which the legislature bas adopted the particular law, but would not intrude upon the legislature's substantive policy judgment").

40 The best of these studies remains ARNOLD PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW (1960) (discussing the triumph of laissez-faire conservatism over traditional conservatism).

41 Kainen, *supra* note 31, at 396-97; Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1612-27 (1988).

the test of substantive due process as legitimate exercises of police power.[42]

Reevaluation of the relationship between substantive due process and business interests has led historians to reconceive the *Lochner* Era as representing a less radical departure from previous judicial efforts to protect economic rights. Judicial participation in the attack on economic privileges in late nineteenth century constitutional economic rights cases establishes continuity with the Taney Court and Jacksonian ideology.[43] Moreover, late nineteenth century jurists, schooled in pre-civil war classical American political economy, attributed monopoly to the existence of legislatively-created corporate privileges, and thus were hostile towards economic concentration.[44] The sharply contrasting historical portrayals of prominent late nineteenth century treatise authors Christopher Tiedeman and Thomas Cooley provide a striking example of the modern revision. Initially, they were depicted as among the most highly influential proponents of laissez-faire constitutionalism.[45] In recent portrayals, however, they evoke the hostility toward corporate power and economic concentration characteristic of the early nineteenth century.[46] Recent doctrinal studies all recognize

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42 PURCELL, *supra* note 31, at 401 n.50 (discussing emerging scholarly consensus); Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63 (1985).

43 Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975); Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property/Privilege Distinction and 'Takings' Clause Jurisprudence*, 60 S. CAL. L. REV. 1 (1986).

44 *See* Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1295-1308 (1984); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 428-40 (1988); HORWITZ, 1870-1960, *supra* note 2, at 7 (emphasizing "basic continuity in American constitutional history before the New Deal" by showing the *Lochner* Court to be "strongly representative of the old conservative view that big business was unnatural and illegitimate").

45 CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN DILLON UPON AMERICAN CONSTITUTIONAL LAW (1954); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT (1942).

46 *See* Louise A. Halper, *Christopher G. Tiedeman, "Laissez-faire Constitutionalism" and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1357-58, 1368-82 (1990) (emphasizing hostility to economic concentration in Tiedeman's thought and thus its continuity with early nineteenth century constitutionalism); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 752 (1967) (emphasizing Jeffersonian and Jacksonian roots of Cooley's thought and its hostility to business interests *qua* interests, thus characterizing Cooley as "an historically minded common lawyer, who was less concerned with abstract theories of economic liberty than with maintaining the older, broader, and more ambiguous doctrine of equal rights"). Interestingly, Professor Jones sought to distinguish Cooley from other "true" laissez-faire constitutionalists such as Justice Brewer, but Brewer also found his defender. *See* Robert E. Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 VAND. L. REV. 615 (1965) (noting Justice Brewer's hostility toward government-granted privileges and legal monopolies).

the continuity of the nineteenth century's economic rights protection, whether emphasizing the extent to which property was afforded protection or emphasizing the extent to which it was subject to destruction.[47]

Revisionist scholarship establishes that an accurate constitutional history must understand the tension between economic rights and public power as a more fluid and dynamic conflict than that captured in the standard accounts.[48] The framework for incorporating the insights of revisionist scholarship, however, remains limited by the continuing influence of *Lochner*'s standard interpretation. Despite substantial revision of its overall signiflcance, the core doctrinal account of the transformation of due process from procedural to substantive persists largely unaltered.[49] The standard interpretation of *Lochner* as somehow extra-constitutional continues to exert a powerful influence upon what it is that constitutional historians seek to explain and modern constitutional theorists attempt to avoid. That assessment, however, is less an accurate portrayal of how nineteenth century legal thinkers understood the protection of property and contract, than a reflection of modern constitutional theory's legitimizing needs. Modern constitutional theory still responds to the protection of individual rights and the avoidance of *Lochner*ism as its central dynamic. Because it does so, it seems to require a flat rejection of *Lochner* as a matter of constitutional interpretation. Otherwise, the theory threatens to implode in self-contradiction: it simultaneously criticizes the *Lochner* era for judicially imposing a substantive theory of property and contract protection *and* for choosing to impose the wrong substantive theory.[50]

Expanding the focus beyond the textual interpretation of the due process clauses contained in state and federal constitutions permits a

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47 *See, e.g.*, Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 227-28 (1984) [hereinafter Scheiber, *Public Rights*] (emphasizing continuity of the law of eminent domain in the nineteenth century and its limited protection of property); Siegel, *supra* note 43, at 10 (emphasizing continuity in the "letter . . . spirit and application" of contract clause doctrine from the Marshall Court until the New Deal in its protection of "property" as opposed to "privilege").

48 *See, e.g.*, Scheiber, *Public Rights*, *supra* note 47, at 217 (invoking a tripartite model of tension between vested rights, entrepreneurial initiatives and public rights that questions earlier emphasis on vested rights or economic growth as singular explanations for the extent of economic rigbts protection).

49 HALL, *supra* note 6, at 230-36.

50 For a striking example of this contradiction, see Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984). Siegel describes how liberals attacking *Lochner* era rate regulation cases vacillated between claiming that the Court chose the wrong cost-basis from which to derive a fair return on investment and asserting that the choice of any particular cost-basis entailed a policy choice that could only properly be made by legislatures.

broader picture of doctrinal development to emerge, one that is based on the relationship between economic rights and the non-retroactivity principle. The expanded focus leads to alternative conceptions of how nineteenth century jurists incorporated constitutional economic rights protection into their perception of the legitimate role of the judiciary. These alternative conceptions help to create a framework for understanding the constitutional history of economic rights from a vantage point outside the terms established by the debate over *Lochner*.

II

RETROACTIVITY IN NINETEENTH CENTURY AND MODERN CONSTITUTIONAL ANALYSES OF ECONOMIC RIGHTS

Pre-*Lochner* and modern constitutional retroactivity jurisprudence both embrace the view that retrospectivity[51] *per se* does not invalidate a statute affecting economic rights.[52] Nonetheless, the formal similarity between nineteenth century and modern constitutional rules conceals a significant change in analysis. Conceived to encompass "vested rights-retroactivity," the non-retroactivity principle had real force in the context of pre-*Lochner* constitutional protection of economic rights against the state. In contrast, retroactivity is a superfluous category in modern due process analysis.[53] The modern analysis treats the

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51 This Article follows standard practice in using the terms retrospectivity and retroactivity interchangeably. *See* NORMAN J. SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 41.01, at 337 (5th ed. 1993) ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage and may be employed interchangeably"); BLACK'S LAW DICTIONARY 1184 (5th ed. 1979) (" '[R]etroactive' or 'retrospective' laws are generally defined from a legal viewpoint as those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past."). *See also* JOHN SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 1-3 (1953) (drawing no distinction between retroactivity and retrospectivity). *But see* Gregory J. DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U. L. REV. 253, 254-57 (1983) (arguing that the two terms are significantly different).

The nineteenth century legal thinkers who are the focus of the present study drew no distinction between retrospectivity and retroactivity. *See, e.g.*, HENRY C. BLACK, AN ESSAY ON THE CONSTITUTIONAL PROHIBITIONS AGAINST LEGISLATION IMPAIRING THE OBLIGATION OF CONTRACTS, AND AGAINST RETROACTIVE AND EX POST FACTO LAWS § 170, at 211-12 (1887); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 160 (2d ed. 1874) (originally published in 1857); WILLIAM P. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS, AS AFFECTED BY CONSTITUTIONAL LIMITATIONS AND JUDICIAL INTERPRETATIONS § 1, at 2 (1880); W.W.B., *The Right of a Legislature (Without Reference to the Law of Eminent Domain) to Change the Legal Character of Estates, or the Title in Property, By General or Special Enactments*, (pts. 1 & 2), 7 AM. L. REG. 449, 513 (1859) (using retroactive and retrospective interchangeably).

52 *See infra* text accompanying notes 67 and 99.

53 *See infra* text accompanying note 100.

notion of vested rights as vacuous and collapses the idea of non-retroactivity into substantive due process.

A. The Importance of Retroactivity and Vested Rights in the Nineteenth Century

The idea of retroactivity played a central role in the constitutional protection of property and contract rights before the late nineteenth century development of substantive due process. When protecting contracts against impairment or property against deprivation by other than "due process of law" or "the law of the land," nineteenth century courts perceived themselves as shielding individual rights from only retrospective interference. In the most apparent manifestation of this limitation, the Supreme Court conceived the federal Contract Clause to prohibit impairment of contractual obligations created before the enactment of the challenged statute, but to extend no protection to contracts formed thereafter.[54] Thus, "laws which impair the obligation of contracts are fairly embraced within the meaning of [retroactive laws]. . . . [I]t is precisely their retroactive operation which lays them open to constitutional objection."[55] Similarly, pre-*Lochner* era courts conceived of state and federal constitutional protection of property against legislative interference as "intended to guard the rights of individuals against the consequences of retroactive legislation."[56] Thus, on the eve of the development of substantive due process, commentators summing up case law on the constitutional protection of economic rights interpreted the textual protections for property and contract rights as various species of non-retroactivity.

The ubiquity of the idea of retrospectivity in the nineteenth century protections of property and contract rights against state interference is manifest in the extent to which it controlled the interpretation of textual constitutional protections for "economic" rights.[57] One commentator writing in 1880, for example, described the following experience. Beginning with an inquiry into the constitutionality of state insolvency laws, the commentator ended with "a thorough examination of all the adjudged cases where laws operating upon past transactions had been construed, or their constitutionality deter-

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54 *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827); BENJAMIN F. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 28-29 (1938); Robert L. Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512-57, 621-74, 852-92 (1944); Kainen, *supra* note 31, at 411-13; Hovenkamp, *supra* note 41, at 1593.

55 BLACK, *supra* note 51, § 170, at 212.

56 WADE, *supra* note 51, § 10, at 12-13 (due process and law of the land clauses "should render vested rights sufficiently secure against the retroactive operation of statutes"). *See id.* § 156, at 187.

57 The phrase "economic" rights simply refers generically to "contract" or "property" rights and does not necessarily endorse distinguishing them from "personal" rights.

mined."[58] The inquiry included a review of all the operative nineteenth century constitutional protections for economic rights—the federal contract and due process clauses, as well as various state due process, law of the land, and retrospective legislation clauses.[59] The message was that the subject matter, namely retroactive laws conceived as "legislative acts . . . operat[ing] upon some subject, or affect[ing] some right or obligation, which existed prior to the passage of the acts,"[60] required such extensive treatment. The jurisprudence of constitutionally protected economic rights concerned the extent to which various positive constitutional provisions protected individuals against backward looking interference with past transactions.[61]

To understand the significance of retrospectivity as an organizing principle in constitutional law prior to the development of substantive due process, it is necessary to understand both its breadth and its narrowness in comparison to alternate conceptions of retrospectivity. First, nineteenth century legal thinkers conceived the category of retrospective statutes to include not only those with effective dates preceding their enactment, but also *any* statute that had a "retroactive" effect on an existing legal interest. The most frequently cited definition of retrospectivity was offered by Justice Story in *Society for the Propagation of the Gospel v. Wheeler*.[62] Story rejected the narrow view, which placed the retrospective label upon only those statutes "which are enacted to take effect from a time anterior to their passage." Story believed that such a narrow approach would be "utterly subversive" of the New Hampshire constitution's prohibition on retrospective legislation.[63] In its place, Story adopted the view that a retrospective law is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."[64] Thus, the prevailing notion of retrospectivity focused upon whether a statute operated to alter a pre-existing legal interest rather than on whether the law itself purported to take effect before its enactment.[65]

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58 WADE, *supra* note 51, at iii.

59 WADE, *supra* note 51, at iii.

60 WADE, *supra* note 51, § 1, at 2. Compare Story's definition of a retrospective law in the text *infra* accompanying notes 62-65.

61 WADE, *supra* note 51, § 1, at 2. *See also* BLACK, *supra* note 51, at v (noting "[t]he cardinal importance of the general subject of retroactive laws—and its especial importance as viewed in the light of the prohibitory clauses embodied in the Federal Constitution and in the constitutions of most of the American States").

62 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156).

63 *Id.* at 767.

64 *Id.*

65 Compare the definitions of retroactivity in the works cited in *supra* note 51, as well as the text accompanying *supra* note 60. The narrow view of retrospectivity had apparently

Consequently, jurists placed the "retrospective" label upon a great deal of legislation that was only nominally prospective—in that it became effective only after its passage—because of its effect on previously established property and contract rights. For example, the statute challenged in *Wheeler*, which entitled a good faith possessor of real estate to the value of his improvements as against the owner, did not by its terms purport to be applicable except in subsequent actions for possession. Nonetheless, Story held that the statute was retroactive insofar as it applied to improvements made before the statute's enactment.[66]

Second, despite the potential breadth of the concept of retrospectivity, it was limited by the doctrine of vested rights. The notion of vested rights acquired under existing law was narrower than the universe of all legal interests defined by the law existing at the time of past transactions or considerations. Although Story's broad definition in *Wheeler* might initially suggest otherwise, its emphasis on *vested* rights makes it clear that the concept of retrospectivity permitted the legislature to alter the rules affecting property and contract rights without necessarily violating the proscription against tampering with previously defined interests.[67] The prohibition against retrospective laws protected only those interests, as defined by pre-existing law, that had "vested" against substantive legislative interference.

In effect, the doctrine of vested rights narrowed the proscription against retroactive interference with economic rights, thereby preventing retroactivity from becoming an all-inclusive limitation that would effectively freeze the existing legal regime of contract and property rules.[68] Retroactivity did not protect all legal interests that might be thought to be defined by the standing law: non-vested interests were subject to being extinguished by retrospective changes in applicable property or contract rules. For example, a wife's capacity to be endowed of lands thereafter acquired by her husband is a legal interest defined by the standing law. According to Pomeroy, however, the courts do not protect this interest against retrospective alteration because, unlike inchoate dower in lands of which a husband is already seized, the interest in after-acquired lands is not a vested right.[69]

Alteruatively, statutes were often not considered retroactive at all when the interests extinguished by new rules were not defined as

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been developed in opposition to Parliament's practice of making statutes effective as of the date of the commencement of the session. *See* Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 779 (1936).

66 *Wheeler*, 22 F. Cas. at 767.

67 To compare the modern view, see *infra* text accompanying note 111.

68 *See* Kainen, *supra* note 31, at 437.

69 SEDGWICK, *supra* note 51, at 162 (note on dower inserted in the second edition (1874) by its editor, John Norton Pomeroy).

vested rights. This approach implicitly limited the protection against retrospective legislation to vested rights by denying legal recognition to non-vested interests. Thus, non-vested interests were incapable of being "extinguished" by subsequent legislation. For example, commenting on Pomeroy's discussion of dower, Wade argued that it was unnecessary to admit "the right by a retroacting statute to abolish the law giving dower in lands *to be acquired* . . . because a change in the dower law which only affected after-acquired property would not be *retroacting*."[70] Wade conceived that "[t]here would be nothing upon which [the statute] could retroact" because a recoguized right to dower did not accrue until "the husband's seisin of real estate during coverture."[71]

Thus, one analysis of retroactivity explicitly acknowledged that non-vested interests could be extinguished, and another implicitly yielded the same result by denying that a statute destroying non-vested interests was retroactive. This doctrine has been aptly called "vested rights-retroactivity."[72] While the breadth of the nineteenth century conception of retrospectivity made it possible for the proscription against retroactive legislation to encompass all constitutional protections for economic rights, the narrowing effect of the intimately related vested rights conception limited that proscription and rendered it plausible.

The doctrine of "vested rights-retroactivity" explains the nineteenth century rule that retrospectivity *per se* does not invalidate a statute affecting economic rights. Ideas of retroactivity and vested rights were central to understandings about appropriate constitutional protection of economic rights. These ideas influenced the extent to which positive constitutional provisions were held to incorporate prohibitions on retrospective legislation or protections for vested rights. The extent to which *express* constitutional provisions were necessary to legitimize vested rights protection also entered the debate, but because of the universal condemnation of vested rights-retroactive statutes, the question was less important than a modern perspective would assume.

A series of Supreme Court cases had the effect of limiting federal constitutional protections for vested rights against retroactive legislation. In *Calder v. Bull*,[73] the Supreme Court held that the federal prohibition against ex post facto laws applied only to crimmal, and not civil, legislation.[74] The Court's holdings that the Fifth Amendment's

70 WADE, *supra* note 51, § 180, at 216.

71 WADE, *supra* note 51, § 180, at 216.

72 The phrase is Professor Slawson's. *See infra* text accompanying note 101.

73 3 U.S. (3 Dall.) 386 (1798).

74 *Id.* at 390-91.

Due Process Clause was inapplicable to the states,[75] and that the Contract Clause protected only rights that had vested "by contract"[76] served to limit federal protection. These limitations on *federal* constitutional protection, however, did not altogether undermine the importance of vested rights-retroactivity. *State* constitutional provisions, ranging from specific prohibitions on retrospective legislation to general prohibitions against deprivations of property except by "due process of law" or the "law of the land," were interpreted to fill in the gaps by providing protection for vested rights against retrospective legislation that the federal constitution did not.[77]

Consequently, whether constitutional provisions expressly prohibited vested rights-retroactive statutes affected only the scope of federal economic rights protection.[78] The Contract Clause provided limited federal protection against retrospective state interferences with economic rights because it protected only vested contract rights. Although the federal due process and takings clauses were limited to protection against federal interferences with property rights, state provisions protected vested property rights. Thus, vested rights-retrospectivity was a matter for debate only in the context of defining the scope of federal protection of economic rights: considering both state *and* federal constitutional law, all retroactive statutes interfering with vested rights were unconstitutional. To decide, for example, whether the ex post facto clause prohibited retrospective *civil* legislation was to assume that it would be limited—as was state economic rights protection—to retrospective interference with vested rights.[79]

Nineteenth century courts and commentators acknowledged the questionable legitimacy of the judiciary's venturing beyond express protections for economic rights in order "to declare a statute invalid which violates the fundamental guarantees of the social compact or

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75 Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

76 Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380 (1829); Watson v. Mercer, 33 U.S. (8 Pet.) 88 (1834).

77 In 1868, Cooley's summary of the state cases protecting vested rights was incorporated in his chapter entitled "Of the Protection to Property by the 'Law of the Land.'" He prefaced his discussion by noting that "the phrase 'due process [or course] of law' is sometimes used, and sometimes 'the law of the land,' and in some cases both; but the meaning is the same in every case." THOMAS M. COOLEY, A TREATISE ON THE LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES IN THE AMERICAN UNION, § 353, (1868).

78 A statute did not violate the *federal* Constitution merely because it divested a vested right. *See supra* text accompanying note 76.

79 For example, see Justice Johnson's opinion in and appendix to Satterlee v. Matthewson, 27 U.S. (2 Pet.) at 414-16, 681-87 (arguing that the ex post facto clause applied to civil legislation and that *Calder* had been wrong on this point, although the case itself was properly decided because there had been no violation of a vested right). *See also* Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315 (1922) (arguing that the framers of the constitution intended the clause to apply to civil and criminal legislation).

the spirit and genius of the Constitution."[80] Nonetheless, differing views on whether such intrusion was legitimate did not detract from the perceived "substantive harmony of the decisions as to the constitutional status of retroactive laws."[81] One nineteenth century commentator believed that the judiciary could and should invalidate statutes that violate implicit guarantees of the social compact or the Constitution.[82] Another declared that "the courts are not at liberty to declare a statute void, because, in their opinion, it invades the fundamental principles of civil liberty or violates the maxims of republican government, unless those principles are declared and guaranteed by the Constitution; nor because the act is opposed to the *spirit* of the Constitution."[83] Both of these approaches to constitutional economic rights protection, however, led to the question of what rights were "vested" and thus immune from retrospective alteration:

> In certain States [retroactive laws] are expressly prohibited; yet there are several classes that are held valid, because not within a just construction of the inhibition. In other States, retroactive laws, as such, are not mentioned; yet the exclusion of such statutes as disturb vested rights, or violate the spirit of the constitution or the implications necessarily drawn from it, leaves certain classes of retroactive laws held valid, which are practically coincident with those just mentioned.[84]

No "substantive disharmony" emerged between cases decided in states with express constitutional prohibitions of retrospective legislation and cases from states where courts had recourse only to due process and law of the land clauses. All these cases were conceived as protecting only vested rights against retrospective alteration. Since retrospectivity *per se* did not require a statute's invalidation, vested rights were critical to retrospectivity analysis and retrospectivity analysis was critical to economic rights protection in every state, despite differences in the states' textual protections for economic rights. The proper approach to constitutional interpretation was a difficult question of constitutional theory, but the consensus on retrospectivity analysis rendered it unimportant to economic rights protection.

Nineteenth-century commentators also perceived vested rights-retrospectivity as directly implied by the concepts of sovereignty and the rule of law. For example, Francis Wharton, in an 1876 article enti-

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80 BLACK, *supra* note 51, § 177, at 229.

81 BLACK, *supra* note 51, §§ 177-78, at 223-29 (elucidating the harmony in the decisions).

82 BLACK, *supra* note 51, § 177, at 229. *See also* SEDGWICK, *supra* note 51 (the protection of vested rights defines the proper role of courts in securing individual rights against legislative interference when there is no express federal or state constitutional shield).

83 BLACK, *supra* note 51, at 228 n.3 (citing COOLEY, *supra* note 77 at § 164).

84 BLACK, *supra* note 51, § 178, at 229.

tled "Retrospective Legislation and Grangerism," examined the question of the extent to which legislatures may impose rate regulation.[85] Wharton approached the issue from a perspective outside the immediate confines of American constitutionalism. For this purpose, he posed the question raised by such legislation as the extent to which "a statute [may] have a retrospective force."[86] By the term "statute" Wharton included any "law imposed by the sovereign," which is the sense of the term as it is used in philosophical jurisprudence and Roman law.[87] Hence, neither the peculiarly American notion that the legislature's powers were delegated by the sovereign people nor the peculiarly American institution of judicial review would affect Wharton's conclusions as to the retrospective application of statutes:

> When we discuss the question . . . whether the State of Wisconsin is competent to adopt a statute reducing to a non-remunerative standard the railroad tolls of the State, the point is not met by saying that the *legislature* of Wisconsin has no such power. If Wisconsin, by a constitutional convention, has this power, then Wisconsin has the power to lower tolls by *statute.* So with regard to the Federal Government. If the Federal Government, by the agency of a federal convention, or by passing amendments subsequently adopted by the States, can make certain organic changes, these changes, in the sense in which we here use the term, are effected by *statute.*[88]

Consequently, Wharton's contribution to the debate was to revert to first principles that might limit rate regulation of railroads, regardless of any constitutional provision, as where such regulation was expressly permitted by federal or state constitutional amendment.[89]

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85 Francis Wharton, *Retrospective Legislation and Grangerism*, 3 INT'L REV. 50 (1876).

86 *Id.* at 53.

87 *Id.* at 50.

88 *Id.* at 51.

89 Accordingly, Wharton dismissed the federal constitutional limitation of the contracts or ex post facto clauses and the implied limitations on state legislatures stemming from the separation of powers. Wharton, *supra* note 85, at 53-54. On the centrality of the non-retroactivity principle as a consequence of republican government rather than American constitutionalism, see also Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 254-56 (1992). Professor Pearce notes that George Sharswood, in his seminal article on legal ethics, saw the ban on retroactive legislation as embedded in the republican vision of protection for property and contract. *Id.* Its authority was not dependent upon any constitutional text. For Sharswood, the lack of express supporting constitutional language at the state and federal level made it all that more important for lawyers to oppose such legislation. George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. REP. 1, 25 (5th ed. 1907) (originally published in 1854 as A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF LAW, DELIVERED BEFORE THE LAW CLASS OF THE UNIVERSITY OF PENNSYLVANIA (1854)). Sharswood argued that a case involving a lawyer seeking retrospective legislation on behalf of a client was "a flagrant case of professional infidelity and misconduct." Pearce, *supra*, at 255 n.108.

Although Wharton utilized the insights of civil law scholars,[90] he made it clear that his purpose was to elucidate principles already underlying "the decisions of our own courts."[91] To that end, he emphasized that the problem of retroactivity was a quintessentially judicial question irrespective of the particularly American gloss provided by judicial review. Properly understood, retroactivity was really an issue of conflict of laws and was endemic to any system that recognized sovereignty exercised through positive law:

> Laws may conflict not only because they emanate from rival sovereigns, each striving to possess the particular case, but because they emanate from distinct periods of time, each of which may claim to embrace the case in question within its sanctions.[92]

Thus, even where there were no limitations on the legislature's authority to make positive law, nor any judicial authority to void legislative enactments, the issue of retroactive application was ubiquitous. As Savigny put it, "the positive law may have undergone changes in the interval between the origin of the legal relation and the present time, [so] it must be determined from what point of time we are to take the rule which goverus the legal relation."[93]

Wharton proceeded on the theory that his inquiry entailed the "conflict of laws viewed in reference to time,"[94] without reliance on constitutional protections. He nonetheless perceived that the same concept of vested rights-retrospectivity employed by American courts could answer the universal jurisprudential question: To what extent may a statute be given retrospective force? Again, the key was the vesting of a right affected by retrospective legislation. Only "such special rights as vest the title to property in individuals [cannot be] affected by retrospective legislation."[95] Thus, "[t]he leading maxim . . . is that estates to vest in future, are expectancies which the law can mold or

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90 Wharton, *supra* note 85, at 51. Wharton placed special reliance upon

> Savigny, as representing the historical school, whose conclusions are based on a comprehensive induction; Schmid, as representing that school which seeks to construct, by criticism, a jurisprudence which is philosophically and logically consistent; and Lassalle, a political liberal of rare learning, eloquence and enthusiasm, whose office it is to maintain at once, that loyal protection of private obligations which is one of the first duties of the state, with that liberty to remodel obsolete institutions without which a sovereign must be comparatively helpless for good.

Id. at 52.

91 Wharton, *supra* note 85, at 52.

92 Wharton, *supra* note 85, at 52-53. In making this point, Wharton drew extensively on the work of Savigny. *See* FRIEDRICH C. VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RETROSPECTIVE OPERATION OF STATUTES (2d ed. 1880) (originally published in English in 1868 and in German in 1849).

93 SAVIGNY, *supra* note 92, at 49.

94 Wharton, *supra* note 85, at 57.

95 Wharton, *supra* note 85, at 54.

divest, but that estates now vested, it cannot touch."[96] Similarly, "[e]xpectations are not rights . . . [so] that unvested rights dependent upon a statute, fall when the statute is repealed."[97] Moreover, "on general juridical principles," quite apart from the Contract Clause:

> [N]o statutes which destroy the obligations of contracts, or particular classes of contracts, can be held by the courts to act retrospectively. For it is a fundamental principle of jurisprudence that a contract is to be construed according to the law which was in force at the time of its execution. . . . The right to insist on the perfection of these rules, no matter what may be the course of subsequent legislation, is vested in both parties at the time of the execution of the contract.[98]

Examining general jurisprudential principles that inform the civil law, Wharton ultimately arrived at the same conclusion as American courts. Wharton's application of the concept of sovereignty yielded the same underlying principle of vested rights-retrospectivity as that which animated American constitutional protection for economic rights.

In sum, vested rights-retroactivity served as the central organizing principle of early nineteenth century constitutional economic rights protection. It controlled the interpretation of express textual protections for economic rights and largely limited those invoking the spirit of constitutional protections, the fundamental principles of civil liberty, and the maxims of republican goverument. That the courts upheld the constitutionality of some retrospective legislation affecting property and contract rights merely reinforced the importance of *vested* rights while recognizing the difference between federal and state constitutional protection for economic rights.

B. The Irrelevance of Retroactivity and Vesting to Modern Substantive Due Process

The modern view also holds that retrospectivity *per se* does not invalidate a statute affecting economic rights. In contrast with the nineteenth century's emphasis on the vesting of rights, however, the typical modern approach considers the retroactive application of statutes to be no more than a factor to be weighed in deciding whether a particular interference with economic rights constitutes a violation of substantive due process.[99] Moreover, retroactivity has virtually no in-

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96 Wharton, *supra* note 85, at 56.

97 Wharton, *supra* note 85, at 57.

98 Wharton, *supra* note 85, at 60.

99 Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216 (1960). *See* Armstrong, *supra* note 51, at 1204.

dependent significance as a factor of consideration. "Questions of retroactive law are essentially questions of substantive due process" and "any attempt to treat retroactivity as a special category to which special rules are to be applied is wasted effort."[100]

The irrelevance of retrospectivity in the modern constitutional analysis of economic rights stands as a rejection of the vested rights-retroactivity logic that was predominant in the nineteenth century.[101] Central to that logic were two categorical distinctions used to determine whether a statute divested a vested right or was in any sense retroactive. The first categorical distinction separated "property" rights from "mere expectancies." Property rights, but not expectancies, were vested and thus immune from retrospective alteration.[102] The second distinction separated "rights" from "remedies." Rights, but not remedies, were vested, although a statute materially changing a remedy might be invalidated for having the practical effect of divesting a right. Additionally, a statute affording a remedy for a right previously lacking one might be permitted because of its effective implementation of an "equitable" right.[103] Nineteenth century courts applying these distinctions envisioned themselves as a legitimate "balance-wheel in the governmental machinery" because they were protecting economic rights, but not assuming the legislative power to review the "political sagacity or social wisdom" of enacted laws.[104]

In contrast, modern analyses of retroactivity and economic rights consistently emphasize the lack of a logical framework for determining whether rights are vested. Proponents of the modern view assert that the doctrine of vested rights did not prevent the nineteenth century judiciary from reviewing the wisdom of legislation. In essence, they conceptualize the retroactivity doctrine as a version of substantive due process.[105] This approach reflects the critique of the categorical distinctions used by courts to determine whether an interest defined by the standing (pre-enactment) law was "vested." The modern analysis of retroactivity and economic rights evolved from a successful attack on the meaningfulness of categorically distinguishing property

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100 Slawson, *supra* note 99, at 216.

101 Slawson, *supra* note 99, at 216-19.

102 *See* BLACK, *supra* note 51, § 184, at 236-37; COOLEY, *supra* note 83, at 359; SEDGWICK, *supra* note 51, at 653-54; Wharton, *supra* note 85, at 56.

103 *See* BLACK, *supra* note 51, §§ 133-49; COOLEY, *supra* note 83, at 286-87, 361.

104 BLACK, *supra* note 51, § 177, at 229. *See also* COOLEY, *supra* note 83, at Chapter XI (finding the legitimate meaning of the protection of economic rights by "the phrase[s] 'due process [or course] of law' [and] 'the law of the land'" in the concept of vested rights); SEDGWICK, *supra* note 51, at 649 (using the concept of vested rights to solve the problem presented by the constitutional protection of private property and contracts in cases that do not come within the prohibition of the positive clauses in our state or federal constitutions).

105 *See supra* text accompanying note 100.

rights from "mere expectancies," and differentiating "rights" from "remedies."

Using the vocabulary developed by Wesley Hohfeld in the early twentieth century to describe the universe of legal interests,[106] commentators in the 1920s concluded that the idea of vested rights was without legal meaning. First, they asserted that "property" as a matter of legal definition had come to include any legal interest of value. The idea of property was therefore incapable of isolating vested rights from the universe of legal interests:

> "Right" is here used in its general sense; but by splitting the term into some of its component legal parts of "right," "power," "privilege," and "immunity," the nature of the interest involved is made more manifest. Property interests are no more than legal relations of lesser or greater value, any one of which may accurately be brought within the popular term, "private property."[107]

For example, nothing in the definition of property excluded a wife's capacity to be endowed of her husband's after-acquired lands (a Hohfeldian "power") or distinguished between inchoate dower and dower consummate for purposes of deciding which of these interests—equally created and defined by the standing law—deserved protection as a vested right.[108]

Second, commentators observed that the notion of a "right" as a matter of legal definition became inseparable from the remedy for its violation. Thus, the availability of a remedy determined the existence and scope of a right:

> [A right] is the legal relation of A to B when society commands action or forbearance by B and will at the instance of A in some manner penalize disobedience.[109]

This view made it impossible to justify retroactive legislation on the grounds that it provided a remedy for a pre-existing "equitable" right where no remedy had previously existed. Under the modern right/remedy doctrine, such legislation amounted to the retrospective creation of a new right at the expense of another. As a result, retroactive legislation analysis became an inquiry into the extent, consequences, and justification for a statute's unavoidable alteration of pre-enactment interests.[110]

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106 *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

107 Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303 n.1 (1925).

108 SCURLOCK, *supra* note 51, at 285-97.

109 Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 167 (1919).

110 *See* Danforth v. Groton Water Co., 59 N.E. 1033, 1033-34 (1901). The "distinction between the remedy and the substantive right" cannot alter the fact that a statute "requires the property of one person to be given to another when there was no previously enforceable legal obligation to give it." *Id.* It is permissible for a statute to do so pursuant to "the

Due to the expansion of the legal definition of property to include all legally defined interests (or rights in the generic sense of the term) and the expansion of the legal definition of rights to include all remedies for their enforcement, the notion of retrospectivity became all-encompassing:

> [I]f . . . a law is retrospective which extinguishes rights acquired under previously existing laws, then all . . . laws . . . are retrospective. There is no such thing as a law that does not extinguish rights, powers, privileges, or immunities acquired under previously existing laws. That is what laws are for.[111]

Moreover, nineteenth-century distinctions between property and expectancy, or between rights and remedies, no longer described the logic determining whether an interest defined by the standing law was immune from alteration. Vesting became a question of substantive justice rather than legal definition:

> [W]e are driven to the conclusion that the term "vested right" . . . is one of convenience and not of definition. It cannot mean more than a property interest, the infringement of which would shock society's sense of justice. For the idea of a "vested right" is less legal than political and sociological. The traditions, mores, and instincts of a community determine it.[112]

Consequently, under the modern analysis a right's vulnerability to subsequent legislative interference does not depend upon whether the right has "vested."[113] Substantive due process provides the test. Courts consider the rationality, reasonableness or arbitrariness of legislation—factors which attach no independent significance to a statute's being vested rights-retroactive.[114]

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power to make small repairs which a Legislature naturally would possess." *Id.* *See also* Dunbar v. Boston & P.R. Corp., 63 N.E. 916 (1902) (the distinction between rights and remedies is a "cloudy phrase" that "disguises" the fact that courts can properly permit the legislature to "enact that the property of a person previously free from legal liability shall be given to another who before the statute had no legal claim" where "the legislature with its larger view of the facts . . . [was] satisfied that substantial justice required its action"); *see also* Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 246 (1927) ("[T]he distinction between . . . rights and remedies . . . is of use primarily as a basis on which to classify decisions after they have already been reached on other grounds").

111 Smith, *supra* note 110, at 233.

112 Comment, *supra* note 107, at 307 (footnote omitted).

113 *See* SCURLOCK, *supra* note 51, at 6.

> The expression 'vested rights' has been avoided as much as possible. A 'vested right' is an interest which in the opinion of the court is constitutionally protected against impairment. 'Vested Right' is a label which is attached after analysis and weighing of public and private interests. It is a conclusion and not a point of departure.

Id. *See also* Smith, *supra* note 110, at 246.

114 *See* SCURLOCK, *supra* note 51, at 6; Hochman, *supra* note 99, at 695-97; Slawson, *supra* note 99, at 216.

It does not necessarily follow, however, "that what [a State] can legislate prospectively it can legislate retrospectively."[115] The Supreme Court has held that "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."[116] Nonetheless, the justification for such retrospective aspects of legislation, and indeed the identification of those aspects, does not involve any vesting analysis. Modern commentators understand retroactivity as the way in which a statute attaches present legal consequences to past events. For them, the question is whether, under all the circumstances, those consequences are arbitrary or irrational. That question can only be answered by considering the substantive reasons for a legislature proceeding in this fashion, its predicted effects, and the possibility of attaining legislative goals through non-retroactive alternatives.[117] The analysis does not differ from that applied to prospective legislation. Under the doctrine of substantive due process, the courts also consider whether it is arbitrary or irrational for a statute to attach certain consequences to *subsequent* events.

For example, in *Usery v. Turner Elkhorn Mining Co.*,[118] the Supreme Court determined that the retrospective aspects of the Black Lung Benefits Act included those provisions imposing liability on coal operators for workers who had left the company prior to the effective date of the Act. In doing so, the Court addressed the justification for "basing liability upon past employment relationships, rather than taxing all coal mine operators presently in business."[119] Noting that the law imposed liability for acts which the coal operators might have been unaware were dangerous, as well as liability from which the coal operators might have reasonably believed they were immune, the Court "hesitate[d] to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness."[120] Nonetheless, it validated those portions of the statute as a cost-spreading device allocating to particular mine operators "an actual, measurable cost of [their] business."[121] In turn, the increased cost could be passed on to consumers if operators, "saddled with the burden of compensation for inactive miners' disabilities," were not prevented from passing those costs along by "competitive forces."[122] It was not irrational for Con-

115 Texaco, Inc. v. Short, 454 U.S. 516, 543 (1982) (Brennan, J., dissenting) (alteration in original) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976)).

116 *Id.*

117 *Cf.* Hochman, *supra* note 99, at 697-99 (discussing how courts have approached the issue of retroactivity).

118 428 U.S. 1 (1976).

119 *Id.* at 18.

120 *Id.* at 17-18 (citations omitted).

121 *Id.* at 19.

122 *Id.* at 18.

gress to "spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers."[123] Nothing of consequence, therefore, followed from the Act's retrospective character. The challenged provisions, like any of the Act's prospective provisions, had to pass the test of substantive due process. Because the constitutional inquiry did not turn on considerations of blameworthiness or deterrence, the retrospective character of those provisions was not dispositive.

Justice Powell's concurring opinion in *Usery* further displays the irrelevance of retrospectivity. Powell challenged the seriousness of the Court's suggestion that a theory of deterrence or blameworthiness cannot justify retrospective liability. Powell argued that the imposition of liability did not necessarily spread costs to those operators who had profited from the absence of liability in the past.[124] Historically, the coal industry had been highly competitive, and any savings realized from the absence of liability would have been passed on to prior consumers. The competitive nature of the industry, however, would also prevent operators from passing the increased costs of retrospective liability on to current consumers.[125] Consequently, burdened operators would have to bear the costs of retrospective liability without having obtained any countervailing benefit from the earlier no-liability regime. According to the Court's opinion, this result *would* reflect an irrational method of cost-spreading. Thus, Justice Powell would have permitted any particular operator to make a factual showing that the imposition of liability for retired workers was arbitrary as applied to its operation.[126]

Justice Powell's concurrence calls into question the *Usery* Court's cost-spreading analysis and suggests that concepts of deterrence and blame had more to do with the outcome than the majority opinion suggests. The Court's indifference to the real cost-spreading effects of the statute reveals its underlying adherence to a policy of deterrence. As Professor Kaplow's superb analysis of the economic effects of legal change reminds us, the imposition of retrospective liability may readily be justified for its ability to create appropriate economic incentives.[127] The justification applies despite the imposition of liability on persons who relied on a pre-existing no-liability regime, as well as those who were unable to predict the consequences of their conduct.[128] Indeed, despite its claim to address only "cost-spreading," the

123 *Id.*
124 *Id.* at 42 (Powell, J., concurring).
125 *Id.*
126 *Id.* at 45 (Powell, J., concurring).
127 Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 511, 565 n.162 (1986).
128 *Id.* at 522-27.

Usery Court in effect acknowledged a deterrence justification by recognizing that Congress could have chosen the scheme it did to award some competitive advantage to "farsighted early operators who might have taken steps to minimize black lung dangers."[129] Even if there were no operators who showed such foresight, the *Usery* compensation scheme could hardly be considered irrational for creating an incentive to invest in discovering currently unanticipated dangers.[130] Thus, although it expressly suggested otherwise, the Court's own opinion revealed that nothing in the nature of retrospective liability is inconsistent with a deterrence rationale.

The presence or absence of blame is also nothing more than an easily overridden factor in the substantive due process equation. That equation includes many other justifications for attaching present legal consequences to past acts, irrespective of moral blame.[131] In the *Usery* Court's own analysis, for example, the cost-spreading justification alone overrode any hesitancy to approve the statute's retrospective features. Though rejected by the majority, a deterrence rationale also provides a sufficient independent basis for imposing retrospective liability. Whether the operators had a meaningful opportunity to choose a course of conduct that avoided the statute's imposition of liability—so that we might consider their failure to do so worthy of moral blame—is simply not dispositive: there are many accepted reasons for imposing liability without a finding of moral fault.[132]

The *Usery* analysis shows that there is no meaningful difference between the substantive due process considerations applicable to retrospective and prospective aspects of legislation. The modern rule against allowing retrospectivity *per se* to invalidate a statute affecting economic rights reflects this collapse. The same test applies to both retrospective aspects and prospective aspects of a statute. The substantive due process test of rationality or reasonableness merely requires a substantive justification for choosing to attach legal consequences to past, rather than future actions.[133]

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129 *Usery*, 428 U.S. at 18.

130 Kaplow, *supra* note 127, at 565.

131 Hochman, *supra* note 99, at 697-711 (stating that the central factor in allowing retroactivity is the strength of the public interest served by the law and the extent to which its purpose can be achieved by prospective legislation); Slawson, *supra* note 99, at 251 (arguing that whether a party had an opportunity to avert a legal consequence for a past act is "largely irrelevant" in light of the range of factors relevant to the permissibility of the current imposition).

132 Moreover, it would not be inappropriate to attach an element of blame to employers for failing to investigate the potential dangers of long term exposure to coal dust, thereby justifying retrospective liability on a theory of blameworthiness.

133 Slawson, *supra* note 99, at 251. "To ask whether a law is vested-rights-retroactive . . . is only to restate the question of its sufficiency in light of substantive due process. Vested-rights retroactivity is a superfluous category." *Id.*

In addition, under the modern analysis, the very conception of *which* statutory provisions are retrospective is as likely to depend upon a provision's justification as it is on the legal consequences a statute attaches to a past event. Most statutory provisions impose liabilities based on a combination of past and future events. To the extent that affected individuals perceive the future event as providing a permissible basis for imposing those consequences, they are likely to ignore the retrospective aspect of the provision. For example, as the *Usery* Court noted, "[t]he Operators have not contended . . . that the Act is constitutionally defective insofar as it requires them to provide compensation for *present* employees whose disabilities may stem from exposure that was terminated before . . . the Act."[134] The operators did not even raise a claim with respect to the provisions that imposed liability based on a combination of pre-act exposure and post-act employment. Yet, as the Court suggested, those provisions were retrospective in the same sense as were the provisions that covered miners who had retired before the Act was passed. Apparently, the operators did not contest the benefits to current employees because, as Justice Powell noted, "liability . . . [to them] accords with familiar principles of workmen's compensation" and, therefore, the only "unprecedented feature of the Act . . . [is liability to] miners . . . no longer employed . . . at the time of enactment."[135] The operators apparently felt that it was legitimate to establish a cost-spreading scheme benefitting miners who were exposed pre-enactment but continued to be employed after enactment. Consequently, they failed to perceive that the provision was subject to constitutional attack on retrospectivity grounds. From the operators' perspective, liability for benefits to be paid to current employees, although premised on pre-Act exposure, amounted to a prospective change in the scope of worker's compensation coverage.

The role that substantive due process currently plays in determining whether a statute is retroactive is the same role that the doctrine of vested rights played in the nineteenth century. In vested rights analysis, a statute that altered a vested interest would be viewed as retrospective,[136] while a statute that altered a non-vested interest would be viewed as operating only prospectively. The analysis then turned on the definition of vesting with particular focus on what event was legally necessary to establish an interest as vested. The chosen legal vesting event served as a benchmark from which to judge whether a statute operated retrospectively. For instance, if inchoate dower is defined as vesting at marriage or at seisin of the husband, a statute abol-

134 *Usery*, 428 U.S. at 16 n.15.

135 *Id.* at 39-40 (Powell, J., concurring).

136 *See supra* text accompanying note 70.

ishing inchoate dower would be considered retrospective in its application. On the other hand, if the vesting event is not marriage or seisin, but rather the death of the husband, inchoate dower interests are not vested, and a statute extinguishing those interests would be held to operate only prospectively.[137]

In modern retrospectivity analysis, considerations of substantive due process play the same role as vesting analysis once did. The justification for a statute determines which of its consequences will be considered significant when deciding whether the law is retroactive. In *Usery*, for example, the statute attached legal consequences to pre-enactment events. Nevertheless, since the operators considered post-Act employment as justifying receipt of benefits, they viewed the provision imposing liability for those benefits as prospective. The event justifying these consequences—continued employment—occurred post-enactment. In contrast, where the statute based liability on pre-Act exposure and employment alone, the operators failed to see a justifying event, and challenged the provision as retroactive. One could conceive of alternative conditions for liability—such as the onset of Black Lung disease—which would justify both provisions.

Thus, both the nineteenth century and the modern approaches look to a determining event when deciding whether a statute is retroactive. The central difference between the two approaches lies in the analysis employed to determine the benchmark event. Nineteenth century jurists defining retroactivity looked to the events which caused rights to vest. Modern jurists reject the categorical logic of vesting and consider the statute's justifications under the rubric of substantive due process.

The unimportance of retroactivity in modern economic rights protection, therefore, flows from the collapse of the logic of vesting previously used to define the extent of constitutional economic protection. Both contexts in which one currently encounters the term "vested rights" reflect that demise. First, courts occasionally slip into using the language of vesting when deciding whether a statute may be given retroactive effect. For example, a North Carolina appeals court recently addressed the constitutionality of a statute that abolished a husband's common law right in property acquired by the entirety.[138] The court wrote that a "statute may not be given retroactive effect when such construction would interfere with vested rights acquired by reason of transactions completed prior to its enactment."[139] The court ultimately upheld the application of the statute on other

137 *See supra* text accompanying note 70.

138 Perry v. Perry, 341 S.E.2d 53 (N.C. Ct. App. 1986).

139 *Id.* at 56.

grounds.[140] Its reference to vested rights, however, prompted one commentator to voice the critique of vested rights that permeates modern cases dealing with the constitutional protection of property rights,[141] namely that the adjective "vested" only means that an interest is for some reason afforded constitutional protection.

> There has been no satisfactory general rule to aid us in making the distinction . . . between mere personal powers and privileges created by statute or existing at common law and subject to legislative withdrawal, and those to be recognized as "vested rights" under constitutional protection. When dealing with rights of the latter class it will be found that text writers and courts are usually forced to define them in terms of themselves, or "beg the question."[142]

Without the foundation provided by the earlier categorical distinction between property rights and other legal interests, it is equally plausible for any interest to be vested. "[T]he phrase[ ] 'vested right' " is only a "statement[ ] of legal conclusion" used to hold that alteration of the interest violates substantive due process.[143] Thus, although modern-day courts may sometimes slip into using the language of vested rights, they no longer undertake a formal vesting analysis. Substantive due process considerations continue to control whether a statute may be applied retroactively.

The second context in which vested rights language sometimes still appears is in cases analyzing land use and development rights.[144] State courts have developed a substantial body of law identifying when a landowner's development or use rights have become "vested" under applicable zoning regulations, thus exempting the landowner from subsequent changes in the regulatory regime. In this context, too, the term "vesting" bears no more than a linguistic relation to the nineteenth century analysis of vested rights-retroactivity.

In substance, the doctrine of vested development rights is identical to the doctrine of zoning estoppel, which protects a landowner from regulatory changes if he is relying:

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140 The Court held that the common law rules giving the husband exclusive control over the management and income from entirety property violated Equal Protection and, therefore, were incapable of creating a constitutionally protected right. *Id.* at 56-57.

141 Armstrong, *supra* note 51, at 1201-02.

142 Armstrong, *supra* note 51, at 1202 (quoting Pinkham v. Urborn Children of Jather Pinkham, 40 S.E.2d 690, 695 (N.C. 1946)).

143 Armstrong, *supra* note 51, at 1202 (quoting Gardner v. Gardner, 268 S.E.2d 468, 471 (N.C. 1980)).

144 *See, e.g.*, CHARLES L. SIEMON ET AL., VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS 96-100 (1982) (collecting cases); Grayson P. Hanes & J. Randall Minchew, *On Vested Rights To Land Use and Development*, 46 WASH. & LEE L. REV. 373, 373 n.1 (1989); Robert M. Rhodes et al., *Vested Rights: Establishing Predictability In a Changing Regulatory System*, 13 STETSON LAW REV. 1 (1983).

> (1) in good faith, (2) upon some act or omission of the government, (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.[145]

Thus, the rule for identifying vested development rights is interchangeable with the concept of zoning estoppel. Consequently, some courts have denied that vested development rights are constitutionally protected at all. Instead, those courts have suggested that judicial protection follows simply from the application of equitable estoppel to local zoning authorities. These courts conceive zoning estoppel as a procedure implicit in the enabling legislation's regulatory process.[146] Other courts have rejected even this limited, essentially statutory, protection for property rights. Those courts have concluded that if vested development rights have no constitutional foundation, then they must be illegitimate because equitable estoppel does not typically apply against the government.[147]

Most courts that have protected development expectations, however, *have* employed a constitutional notion of vested rights. They argue that if a landowner relies in good faith on a governmental act or omission, and suffers substantial loss as a result, then an otherwise unprotected expectancy may become "property" for purposes of constitutional protection. Interestingly, this constitutional reliance doctrine depends upon considerations of substantive due process rather than any independent theory of vesting.

First, the consequences of finding that a development expectation has become a vested property right are different from those under the nineteenth century analysis. The difference is highlighted by what land use scholars have come to describe as the "vesting paradox."[148] On the one hand, the designation of development expectations as "vested"—as in the nineteenth century—purports to establish that they are immune from subsequent changes enacted pursuant to the police power.[149] On the other hand, the finding that development expectations have attained the status of constitutionally protected "property" cannot achieve such a result in a modern context. In the modern analysis, *all* property is held subject to the police power,[150] and "vesting" only serves as a prelude to the application of the substantive due process test. Even according to the supporters of

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145 SIEMON ET AL., *supra* note 144, at 13.

146 SIEMON ET AL., *supra* note 144, at 38, 82.

147 SIEMON ET AL., *supra* note 144, at 38, 82; *see* Lewis Cox & Son v. High Plains Underground Water, 538 S.W.2d 659, 662-63 (Tex. Civ. App. 1976); Harrell v. City of Lewiston, 506 P.2d 470 (Idaho 1973).

148 SIEMON ET AL., *supra* note 144, at 49.

149 SIEMON ET AL., *supra* note 144, at 49-53.

150 SIEMON ET AL., *supra* note 144, at 49.

vested development rights, the police power defeats those rights if the government can show that a new peril has arisen since the rights vested.[151] Also, when it is beyond cavil that the subsequent regulation *is* a justifiable exercise of the police power—where for instance it prohibits a use that would amount to a nuisance—the vesting of development rights does not exempt them from the regulation.[152] Thus, the doctrine of vested development rights amounts to the application of substantive due process in a specialized context, not an alternative to its application. The doctrine addresses situations in which local regulators may have adequate justification for enacting new restrictions but, considering the individual circumstances, inadequate justification for withdrawing an earlier, specific approval.

The comparison between the modern protection of development expectations and the nineteenth century vested rights doctrine is misleading for a second reason: it presupposes that constitutional protection of development expectations depends upon those expectations becoming a vested interest.[153] That proposition is belied generally by the modern definition of property as a "bundle of rights" within which use rights are prominent "sticks," and more specifically by the law of regulatory takings. The doctrine of regulatory takings includes use rights and development expectations under the rubric of "property" irrespective of vesting.[154] The *extent* to which these interests are protected by the takings doctrine remains highly problematic and hotly contested, but because of the expanded conception of property, *all* regulations are vested rights-retroactive. Whether the owner receives compensation depends upon the economic impact of the regulation and its justification.[155] Establishing that development expectations are "vested rights" is neither a necessary nor a sufficient condition to their constitutional protection.

In summary, the moderu constitutional doctrine of economic rights protection accords little siguificance to retrospectivity. Nineteenth century jurists believed that the notion of vested rights-retrospectivity was grounded in a categorical logic that determined the scope of constitutional protection without requiring judicial review of legislative policy. Twentieth century jurists reject the earlier classifications and see substantive review of legislative policy as an inevitable consequence of protecting economic rights. That the courts continue to address the retrospective aspects of legislation and occasionally, vested rights, does not detract from the fact that these concepts have

151 SIEMON ET AL., *supra* note 144, at 49.
152 Hanes & Minchew, *supra* note 144, at 387-88.
153 Hanes & Minchew, *supra* note 144, at 386-87.
154 *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).
155 *Id.*

lost their nineteenth century significance as they have been absorbed into the modern doctrine of substantive due process.

III
FROM RETROACTIVITY TO SUBSTANTIVE DUE PROCESS

The contrast between vested rights-retroactivity and its modern critique provides a useful framework within which to understand *Lochner* era substantive due process as a transitional period with strong links to its antecedent and successor forms of constitutional economic rights protection. This framework reveals that historians and constitutional theorists have been mistaken in seeking to identify Lochner as extra-constitutional. On the contrary, *Lochner* era substantive due process grew out of retroactivity jurisprndence, transforming it in accordance with a critique with which the modern era has significant affinity. Although the modern approach rejects *Lochner*'s particular doctrine of substantive due process, *Lochner* did respond to broad changes in legal thought that continue to inform post-*Lochner* substantive due process. The critique of retroactivity jurisprudence rendered substantive review of legislation impinging on economic rights inevitable. The *Lochner* era response to the critique may have been wrong, but it did not represent an improper abandonment of the established framework for the constitutional protection of economic rights.

A. The Standard Account: Procedural to Substantive Due Process

An appreciation of nineteenth century vested rights-retroactivity and its modern critique provides a different perspective on the cases that have continued to be accepted as marking the transition from procedural to substantive due process.[156] The most prominent of these is *Wynehamer v. The People*.[157] In *Wynehamer*, the New York Court of Appeals invalidated a statute that criminalized the sale and possession of liquor for non-medicinal purposes. The statute also declared such possession to be a nuisance and subjected any liquor so possessed to forfeiture. Commentators have seen this ruling as the first instance of a court using due process "to prohibit, regardless of the matter of procedure, a certain kind and degree . . . of legislative power altogether."[158] But *Wynehamer* expressly relied on a traditional vested-rights retrospectivity rationale. The *Wynehamer* court invalidated the act "in its operation upon property in intoxicating liquors existing in the hands of any person within this state when the act took

156 *See supra* text accompanying notes 5-6.
157 13 N.Y. 378 (1856).
158 Corwin, *supra* note 6, at 467.

effect,"[159] although "all the judges were of opinion that it would be competent for the legislature to pass such an act as the one under consideration . . . , *provided such act should be plainly and distinctly prospective as to the property on which it should operate.*"[160] Thus, in its reliance upon vested rights-retrospectivity, *Wynehamer* did not differ fundamentally from the broad spectrum of cases decided under the contracts, "law of the land," or "retrospective legislation" clauses. These cases provided constitutional protection for previously accrued debts, dower rights, and other interests in land when they were impaired or destroyed by subsequent legislation. *Wynehamer* protected liquor already purchased because "*it is property* innocently acquired under existing laws."[161] The holding did not challenge the legislature's ability to impose prohibitions on the *future* production or acquisition of liquor.

Since the statute exempted possession of liquor for medicinal purposes, much of the controversy in *Wynehamer* centered around whether the statute actually destroyed the defendant's existing property right in the liquor.[162] Conceding that some use might remain after the statute, the court asserted that "this would not affect the question."[163] The existing liquor had been produced "for sale and consumption as a beverage" and its commercial value for sale for that purpose constituted ninety-nine percent of its value; thus, where the act so "deprived" the property "of its essential attributes" as to render it "worthless," the regulation operated as the functional equivalent of physical destruction.[164] In dissent, Justice Johnson argued that the Due Process Clause "has no application whatever to a case where the market value of property is incidentally diminished by the operation of a statute . . . which in no respect affects the title, possession, personal use or enjoyment of the owner."[165] The debate between Johnson and the majority concerned the legal concept of property as a bundle of use rights with commercial value. It did not, however, represent any immediate break with the concept of vested rights-retroac-

159 *Wynehamer*, 13 N.Y. at 486-87 (Wright, J., dissenting) (emphasis added).

160 *Id.* at 487 (emphasis added).

161 *Wynehamer*, 13 N.Y. at 385-86 (emphasis in original). Similarly, *Wynehamer* contained an eloquent attack on claims that statutes violating implied limitations on legislative power or natural rights were unconstitutional because they posed a "great danger," especially "now, when theories, alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men." *Id.* at 390-92. Insofar as it did appeal to these theories, it harkened back to Calder v. Bull, in which Justice Chase's appeal to non-textual principles largely restated the doctrine of vested rights. *Id.* at 390-91.

162 *Id.* at 387-90.

163 *Id.* at 385-87.

164 *Id.* at 386-87. For good measure, the Court also noted that the act permitted physical seizure under some circumstances. *Id.*

165 *Id.* at 466-67.

tivity, nor any transformation from procedural to substantive due process. Justice Johnson was quick to concede that "a person is deprived of his property . . . [without] 'due process of law,' [when] the thing itself . . . with the legal title is taken away."[166] According to Johnson, the word " '[d]eprived' is there used in its ordinary and popular sense, and relates simply to divesting of, forfeiting, alienating, taking away property."[167] This is hardly the argument that one would expect from a dissenter in a case that broke with an entrenched tradition limiting constitutional due process protection of property solely to matters of procedure.

Having determined that the statute in effect destroyed the property itself by depriving its owners of its value, the court went on to note that no justification based on the public good could allow the destruction of private property because "*the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law.*"[168] It would be erroneous, however, to interpret *Wynehamer* as a new use of the Due Process Clause rejecting the legislature's power to regulate property pursuant to the police power. By arguing that it was beyond the scope of the police power to destroy vested rights, the *Wynehamer* court was merely using traditional vested rights-retroactivity doctrine to define the scope of constitutionally protected property and contract rights.

The United States Supreme Court drew the same distinction between liquor in existence and liquor not yet manufactured as the *Wynehamer* Court had. In *Beer Company v. Massachusetts*,[169] the Court expressly held that the state could not "bargain away" its discretion to legislate for "the protection of the lives, health, and property of the citizens, and the preservation of good order and the public morals."[170] Yet, the police power extended only to liquor manufactured post-enactment and not to "property actually in existence, and in which the right of the owner has become vested."[171] Subsequently, the Supreme Court changed its position in *Mugler v. Kansas*.[172] In a holding which permitted application of the police power to destroy liquor already manufactured, the Court linked the extent of protection accorded to property with the scope of the police power, which it judged in a manner characteristic of *Lochner*.[173]

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166 *Id.* at 467.

167 *Id.*

168 *Id.* at 386 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *135).

169 97 U.S. 25 (1877).

170 *Id.* at 33.

171 *Id.* at 32.

172 123 U.S. 623 (1887).

173 *See supra* note 1.

B. An Alternative Account: From Expectancies to Property

Wynehamer illustrates the movement toward expanding the constitutional definition of property beyond the confines of what Professor Jeremy Paul has aptly called a "physicalist model"[174] without abandoning the central idea of vested rights-retroactivity. Other cases of that period similarly expanded the conception of what rights defined by the standing law were vested, but their analyses remained well within the retroactivity framework. In *Holmes v. Holmes*[175] and *White v. White*,[176] New York courts invoked the federal contracts clause and the state's law of the land clause to extend constitutional protection to husbands' *jure uxoris*, holding that New York's Married Women's Property Act could not be applied retroactively. In *Holmes*, decided under the contracts clause, the court found that a husband's rights were fixed at the time of marriage. Consequently, a husband married before the Act would even retain common law control over property acquired thereafter by his wife.[177] In *White*, the court rejected the contract clause rationale and, under the law of the land clause, established that a husband's common law control would apply over property acquired prior to the Act, but not to that acquired thereafter.[178] *Holmes* was unusual in restricting the Married Women's Property Act in order to protect a husband's capacity to control the property of his wife as a vested right. The court, however, stayed within the conceptual framework of retroactivity; its holding posed no greater threat to that framework than one protecting a wife's capacity to be endowed of realty.

Ultimately, though, the property right expanded generally to embrace the *capacity* to acquire property:

> It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community, which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property, once it is acquired, but left unprotected by the law in his efforts to acquire it. The cup of Tantalus would be a fitting symbol for such a mockery. Our Constitution recognizes no such notion . . .[179]

This expansion of the property right led directly to the *Lochner* era's protection of freedom of contract. The key difference, however, be-

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174 *See, e.g.*, Jeremy Paul, *The Hidden Structure of Takings Law*, 64 So. CAL. L. REV. 1393, 1416-23 (1991).

175 4 Barb. 295 (N.Y. 1848).

176 5 Barb. 474 (N.Y. 1849).

177 *Holmes*, 4 Barb. at 301-03.

178 *White*, 5 Barb. at 481-82.

179 Brennan v. United Hatters, 65 A. 165, 171 (1906).

tween constitutional protection of vested rights and *Lochner* is that freedom of contract was derived directly from the Constitution. Cases like *Holmes* represented a false start of sorts by extending vested rights protection to the capacity to acquire property *under pre-existing law* rather than rooting it directly in the Constitution. These cases also illustrate the extent to which extending the definition of property would require rethinking the meaning of constitutional protection of economic rights.

Dissenting in *Wynehamer*, Justice Johnson foresaw that abandoning the old categories would necessitate widespread reconceptualization of constitutional economic rights protection:

> The inquiry, whether the chattel in its corporeal substance and entity is property, or whether the legal property does not consist in some incident or right which the law confers or attaches, is one more appropriate to the schools than the courts. . . . If we permit ourselves to depart from the obvious, general fact, that the thing is property, and enter this field of speculation into which we are thus invited, we shall be in great danger of losing our way in its uncertain paths. . . .[180]

For example, if property meant market value, and any diminution violated due process, then "all regulations by the legislature, and all restrictions upon . . . commerce of the state" would be prohibited.[181] Nevertheless, the reconceptualization of the definition of property as encompassing all valuable rights was already underway in many areas of the law and would continue throughout the *Lochner* era. For example, statutes removing common law restrictions on the alienability of future interests were enacted in England well before the Civil War, and their influence was apparent in the post-civil war United States.[182]

Some states moved more slowly to make particular interests alienable, but others, such as New York in 1896, simply declared that:

> An expectant estate is descendible, devisable and alienable in the same manner as an estate in possession.[183]

Although Wharton seemed to suggest that interests in land, in order to be vested, had to be "vested in possession" (a proposition that in any event was never fully accepted), the New York statute made clear that a future interest need not even be "vested in interest" to be conceptualized as property. Increasingly the cases began to recoguize plausible grounds for protecting contingent remainders, executory interests, and reversionary interests against retrospective destruction in

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180 *Wynehamer*, 13 N.Y. at 468-69.

181 *Id.* at 467.

182 *See generally* LEWIS M. SIMES & ALLEN F. SMITH, FUTURE INTERESTS §§ 1852-62 (1956).

183 1896 N.Y. Laws c. 547 § 49.

the same manner in which other "estates" in land were protected.[184] By 1905—coincidentally the same year as *Lochner* itself—courts in several states moved, without legislative mandate, to render future interests alienable.[185] They reasoned that the qualitative distinction between possessory and future interests was a product of discredited economic theory rather than a modern conception of property.[186]

The redefinition of property extended in to the heart of the notion of estates in land. In one article,[187] A.G. Sedgwick criticized the courts for misconceiving "the term 'property,' as used in the various State constitutions."[188] According to Sedgwick, courts misconstrue the definition of property when they insist upon transfer of title, interference with possession, or physical interference with land before awarding compensation to landowners, who have already seen "the actual market value of . . . [their] property . . . greatly diminish[ ]."[189] Properly understood, "[t]he term property . . . in its legal signification means only the rights of the owner in relation to it."[190] After all, Sedgwick continued, that was the lesson of the estate system itself:

> The feudal system was coherent, logical, and intelligible. No feudal lawyer could ever have confounded the land itself with the tenure by which it was held or the quality of the estate. The fee was as distinct a conception in his mind as any *universitas* of rights and duties in the mind of a classical jurist.[191]

According to Sedgwick, Blackstone confused the true meaning of property by using it to signify both a bundle of rights and the object owned; accordingly, Austin's strict definition of property was responsible for setting things right again.[192]

In response, A. Knauth exposed Sedgwick's analytic error, but accepted his conclusion nonetheless.[193] Although it was true that Blackstone confounded "the thing owned, with the right under which it is held,"[194] Knauth maintained that Austin's strict definition of the term property included only instances of "exclusive possession, indefinite user, and unlimited disposition."[195] The definition that Sedgwick meant to urge, that Knauth endorsed, and that courts seemingly ac-

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184 SCURLOCK, *supra* note 51, at 136-241.
185 SIMES & SMITH, *supra* note 182, at § 1859, at 173 n.69.
186 SIMES & SMITH, *supra* note 182, at § 1852, at 156-58.
187 A.G. Sedgwick, *Constitutional Protection of Property Rights*, 135 N. AM. REV. 253 (1881).
188 *Id.* at 255 (quoting Eaton v. Boston, Concord, & Montreal R.R., 51 N.H. 504, 511 (1872)).
189 *Id.* at 253.
190 *Id.* at 255.
191 *Id.* at 258.
192 *Id.* at 258, 260.
193 A. Knauth, *Constitutional Protection of Property Rights*, 26 ALBANY L.J. 326 (1882).
194 *Id.* at 327.
195 *Id.* at 328.

cepted on an increasing basis, was simpler and far more comprehensive: "Taken in its natural and ordinary acceptation in which the word is used at the present time by lawyers as well as by laymen, 'property' consists of the whole mass of things or rights of pecuniary value owned by an individual."[196] Knauth also acknowledged the existence of another sense of the term that included estates in land and other rights coupled with possession, but he considered this meaning to exist "more in scientific treatises than in the minds of our profession or the reports."[197]

Christopher G. Tiedeman delivered what was perhaps the crowning blow to the estate system and its traditional emphasis on title and possession in his well-known *Treatise on the Limitations of Police Power in the United States.* In his 1886 law review article, *What is Meant By "Private Property in Land?,"*[198] Tiedeman defended against Henry George's and Herbert Spencer's attacks on private property in land with a plea in avoidance. Both, according to Tiedeman, attacked a straw man inasmuch as they presupposed that "the law recognizes an absolute right of private property in land."[199] Spencer saw this notion as violating the law of equal freedom because "no one may use the earth in such a way as to prevent the rest from similarly using it."[200] George saw this notion as a means of defending landowners' receipts of monopoly rents.[201] Spencer's solution was to replace private property with collective ownership; all proprietors of land would become lessees of the nation, allowing their rents to be used for collective purposes.[202] George's solution was to leave private individuals "the shell" of private property in land, but to "take the kernel" by appropriating the rent of land through taxation. This approach would allow individuals to retain "possession of what they are pleased to call . . . *their* land" and even the right to sell and devise it.[203]

In response, Tiedeman argued that, once it was recognized that there was no concept of absolute ownership of land, both solutions were essentially compatible with the estate system. Implementation of either George's or Spencer's schemes, while certainly requiring an "economical revolution," did not require a legal one.[204] The structure of the estate system demonstrated that there was no ownership of land

196 *Id.* at 327.

197 *Id.* at 328.

198 Christopher G. Tiedeman, *What is Meant By "Private Property in Land?"*, 19 AM. L. REV. 878 (1885).

199 *Id.* at 878.

200 *Id.* (quoting Herbert Spencer).

201 *Id.* at 879.

202 *Id.*

203 *Id.*

204 *Id.* at 884.

per se, only "land tenures" defined by the state. Even the fee simple was qualified by the powers of eminent domain and taxation. Thus all property interests were qualified, so that "[a] man can have only an estate in the land, the absolute right of property being vested in the State."[205] Tiedeman concluded that "there is no 'private property in land,' in the sense in which Mr. Spencer and Mr. George employ the term, and the provisions of the law in respect to the tenancy of lands are in strict conformity with the principles they advocate."[206]

Tiedeman's analysis was hardly an endorsement of the "economical revolution" proposed by George or Spencer. Nonetheless, it incorporated into the analysis of land ownership the redefinition of property that influenced the evolution of *Lochner* era substantive due process. The model for the protection of property rights was no longer ownership of land with its associated concepts of title and possession. Rather, it was embodied in the concept of value and the main issue was the extent to which one was entitled to the value of her property. The model focused on personal property rather than real property because, in the absence of monopoly, personal property was thought to reflect the value of individual labor.

For example, Tiedeman noted that both Spencer and George "recognize[d] the absolute right of private property in the improvements which the possessor may put upon his land . . . which are, of course, the products of man's labor."[207] In George's scheme, improvements would not be subject to conflscatory taxation except insofar as they "in time become indistinguishable from the land itself."[208] In Spencer's scheme, lessees of the state would presumably be permitted to sublet, assign, or devise their "leaseholds" (which might extend indeflnitely and therefore operate as the functional equivalent of a fee simple),

> as long they pay a certain rent, the amount of which is to be determined and varied by society from time to time, and provided further, that the land may be at any time reclaimed by society . . . upon payment to these parties, their heirs and assigns, of a compensation for the loss of improvements, which have become inseparable from the land, and for future profits in the continued possession.[209]

In either event, property's legitimate legal protection became associated with ascertaining the extent to which its value was properly protected, and that depended upon the extent to which it reflected individual labor rather than illegitimately acquired monopoly power.

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205 *Id.* at 882.
206 *Id.* at 883.
207 *Id.* at 880.
208 *Id.*
209 *Id.* at 882.

In Spencer's analysis, the value of property was unprotected if it was acquired in violation of the law of equal freedom. In George's analysis, the value of property was unprotected where it included profits of those who "cheated society out of its dues" by obtaining land from the state without adequate payment, and by maintaining it while paying taxes "grossly inadequate to the benefits thus received."[210] Although Tiedeman did not endorse either view of the economy of land ownership, he agreed that property's protection depended upon the legitimacy of claims to its value rather than the system of estates in land.

Lochner era substantive due process questioned the extent to which property values were entitled to constitutional protection. In the railroad rate regulation cases, for example, the entitlement to a reasonable return on investment became the first substantive due process right protected by the United States Supreme Court in that era.[211] The *Lochner* Court used freedom of contract to invalidate a "labor law pure and simple," which it held was not justified by the state's police power over health and safety. The Court proceeded on the premise that the Constitution equally protected the free market value of the employees' labor, to which they had a property right, and the free market value of the employer's capital investment. Later decisions used a similar freedom of contract justification to invalidate labor laws prohibiting yellow dog contracts.[212] The *Lochner* analysis rested on the assumption of classical economics that capital was merely "stored up labor" yielding legitimate market power rather than illegitimate monopolies. Legislative attempts to remedy inequalities of bargaining power between workers and employers were, therefore, mere confiscations of the free market value of legitimately acquired property. One side of the *Lochner* debate held that the unregulated free market, structured by common law rules, yielded results that reflected the actual value of labor in a free market. The other side argued that the common law rules allowed illegitimate accumulations of property in a market characterized by monopoly power. Ultimately, the debate shifted to whether it made sense at all to think of property's legitimate protection as tied to the value of individual labor. In neoclassical economics, there was no value attributed to labor independent of the structure of legal entitlements, the legitimacy of which was the very question raised by the concept of market value as property.

While identifying the doctrine of vested rights as "the basic doctrine of American constitutional law," Edward Corwin noted that the doctrine encompassed a more limited conception of property than

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210 *Id.* at 878, 883-84.

211 *See* Siegel, *supra* note 50, at 211.

212 Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

that reflected in Madison's celebrated *Essay on Property*.[213] In that essay, Madison observed that property "in its larger and juster meaning . . . embraces everything to which a man may attach a value and have a right" and, therefore, "just governments . . . will equally respect the rights of property and the property in rights."[214] Corwin noted, however, that "[s]uch latitudinarian views . . . found little or no support from the Common Law, and had in consequence before the Civil War little influence upon judges."[215] Instead, "the doctrine of vested rights . . . shield[ed] only the property right" that Corwin strictly deflned as "the right . . . of one who had *already* acquired some title of control over some particular piece of property, in the physical sense, to continue in that control."[216]

Committed to attacking substantive due process as a "virus" that had corrupted the constitutional text through the due process clause, Corwin missed the broader significance of the reconceptualization of property rights that occurred during the evolution from vested-rights retrospectivity to *Lochner*. Corwin saw that the inclusion of the fruits of one's lawful contracts in the category of vested rights under the contracts clause constituted an exception to the rule that the doctrine largely protected "tangible . . . [and] especially real property."[217] However, nineteenth century jurists conceived of protection for both property and contact rights in terms of retrospectivity, and their analysis was not clause-bound in the manner that Corwin assumed constitutional interpretation should function. More importantly, Corwin confused the "latitudinarian" extension of the concept of property, which he attributed to the development of substantive due process, with a broad-based change in legal thought that *required* the recasting of constitutional economic rights protection. As shown by Tiedeman's response to George and Spencer, and cases such as *Mugler* permitting police power regulations to destroy what had been vested rights, the consequences of this change were by no means determined. The expansion of the property right consistently required jurists to acknowledge that economic rights were in conflict with each other *and* with the state. By focusing on vested rights-retroactivity, the courts had simply denied those conflicts by distingnishing the effects of laws on past and future transactions. In resolving those conflicts, *Lochner* era jurists developed their own characteristic modes of interpretation, which subsequently bore the brunt of Progressive and Realist criti-

213 Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 271 (1914) (quoting James Madison, *Essay on Property*, *in* JAMES MADISON, 6 WRITINGS 101 (Hunt ed., 1909)).

214 *Id.*

215 *Id.* at 272.

216 *Id.* at 275.

217 *Id.* at 272.

cisms. To the extent that those criticisms were premised on *Lochner*-ism as an entirely revolutionary concept, however, they failed to comprehend the progression away from nineteenth century vested rights-retroactivity as the central concept mediating between economic rights and legislative power.

C. An Alternative Account: From Remedies to Rights

The distinction between rights and remedies was central to the nineteenth-century belief that vested rights-retroactivity legitimately protected economic rights without interfering with legislative power. Because this distinction suggested that a person might have a right but no remedy, it was subject to frequent attack.[218] After all, an accepted function of equity was to provide a remedy where no remedy, or no appropriate one, was available at common law. Moreover, the distinction between rights and remedies was universally qualified: although a person might have no right to a *particular* remedy, if retrospective legislation changed the remedy attached to a right, then a substantially similar effective remedy had to be put in its place.[219] Nonetheless, the concept of rights without legal remedies implied that the nonretroactivity principle was flexible. Even critics of the doctrine conceded that changes in *procedure* could be applied retroactively to prior transactions.[220]

The distinction between rights and remedies, however, was also critical to the maintenance of the non-retroactivity principle for another reason. Nineteenth century conceptions of law and equity justified permitting some legislation to be applied retroactively if the statute provided a remedy for an equitable right that was unavailable only because of a defect in the pre-existing law. Statutes designed to cure these defects, called "curative" acts, could be applied retroactively, even in the face of constitutional provisions expressly banning retrospective legislation.

To twentieth century observers, it seems odd that a statute might provide a remedy for a right that existed in the standing law, although the standing law provided no remedy. Used in this manner, however, the distinction between rights and remedies reflected the nineteenth century idea that the existing law included *both* legal rnles and equitable principles as sources of judicially enforceable rights. According to this idea, judges could properly use equitable principles to enforce equitable rights that were without precedent; in the same manner, it was constitutionally permissible to vindicate equitable rights through retrospective legislation. In the retroactivity cases, conflicts between

218 *See, e.g.*, SEDGWICK, *supra* note 51, at 630.
219 COOLEY, *supra* note 77, at 286-87, 289, 361.
220 *See, e.g.*, SEDGWICK, *supra* note 51, at 630.

rights—where one party claimed a right under pre-existing law and the other claimed under present law—were mediated in a fashion similar to nineteenth century private law, with courts routinely considering both the legal rights and the "equities" of a particular case. When retroactive statutes rendered results that were consistent with the equities, they were upheld as constitutionally permissible, even if in the absence of the statute a court might have hesitated to establish a new equitable right on its own.

Nineteenth century litigation over betterments acts provides a good example of the interaction between the notion of equitable rights in private law and the logic of vested rights-retroactivity. Betterments acts were statutes extending the rights of a good faith improver of real property to the value of improvements. Under the common law of the early nineteenth century, a nonowner who, in good faith or otherwise, entered, possessed, and improved real property was generally not entitled to the value of those improvements if they were "permanently affixed to real estate."[221] Under the doctrine of accession, such improvements lost their identity as personal property and became "part of the land."[222] Consequently, when an owner vindicated his title to the land by ejecting the improver from possession, his title was held to encompass title to the improvements. Thus, the landowner acquired the improvements free of any obligation to compensate the improver.

Nonetheless, equity might provide a good faith improver with relief in three situations. First, if the owner commenced an action against the wrongful possessor for mesne profits—rents and profits obtained by the improver by virtue of his wrongful possession[223]—the improver would be entitled to a set-off against that liability in an amount equal to the increased value of the property due to the improvements.[224] Second, if the owner otherwise sought equitable relief, the chancellor might invoke the theory that "he who seeks equity must do equity"[225] and condition such relief on the payment of compensation for improvements. Finally, a court of equity might grant the improver affirmative relief if, besides realizing the benefit of the

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221 For a general account of the law of betterments in the early century see Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37 (1985).

222 Dickinson, *supra* note 221, at 39.

223 Since the owner's action often required an accounting, the action might be an equitable one. Thus, awarding the improver the value of his improvements might be explained as a consequence of the owner's invoking the aid of a court of equity. Such an award might also be rationalized by the maxim that "he who seeks equity must do equity." *See infra* text accompanying note 225. Chancellor Kent treated an action for mesne profits as an equitable one that allowed equitable defenses such as a set-off of the value of improvements. Murray v. Gourverneur, 2 Johns. Cas. 438, 441 (N.Y. 1800).

224 Dickinson, *supra* note 221, at 40.

225 Dickinson, *supra* note 221, at 40.

improvements, the owner engaged in "inequitable" conduct, such as standing silent while the improver made the improvements, while aware of the improver's mistaken belief in his title.[226]

A debate arose between Chancellor Walworth of New York and Justice Story over whether equity might grant relief regardless of inequitable conduct by the owner, or whether it might be appropriate to award relief to the improver in the amount of the permanent value of the improvements over and above mesne profits. In *Putnam v. Ritchie*,[227] Walworth agreed that it would be consistent with equitable principles "to introduce this principle of natural equity into the law"[228] and wrote that if he felt authorized to do so, he "should give the [owners] the right to elect . . . whether they would retain the legal title . . . and pay . . . the value of such improvements, or would release to [the improver] their legal estate . . . upon being paid the value thereof."[229] Nonetheless, because the Chancellor was unable to discover "any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief"[230] he did not feel authorized to "introduce a new principle . . . without the sanction of the legislature."[231]

In *Bright v. Boyd*,[232] Justice Story took the opposite tack. Recognizing that "our courts of equity" have yet to extend protection to improvers seeking relief where the owner did not seek mesne profits or otherwise invoke equity, Story nonetheless saw no insurmountable difficulty in providing such relief where appropriate. Story maintained that "the denial of all compensation to such a *bona fide* purchaser . . . where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity."[233] Equity already provided relief where "the defendant has lain by, and allowed the improvements to be made, without giving any notice to the plaintiff, or to those, under whom he claims, of any defect in their title."[234] However, even where

> [T]he defendant was not . . . affected by this equity, as a case of constructive fraud or concealment of title; yet that as the improvements were made *bona fide*, and without notice of any defect of title, and have permanently enhanced the value of the lands, to the ex-

226 Dickinson, *supra* note 221, at 40.
227 6 Paige Ch. 390 (N.Y. Ch. 1837).
228 *Id.* at 404.
229 *Id.*
230 *Id.* at 405.
231 *Id.*
232 4 F. Cas. 127 (C.C.D. Me. 1841) (No. 1,875).
233 *Id.* at 133.
234 *Id.* at 132.

> tent of such enhanced value the defendant is bound in conscience to make compensation to the plaintiff.[235]

For the necessary precedent to this equitable proposition, Story did not look to English or American cases. He found authority in the "positive dictates" of the Roman law where, he noted, improvers recovered the permanent value of improvements beyond any offset to rents and profits. He found further support in the civil law treatises, as well as the positive law of France, Scotland, and Spain, which provided relief in some circumstances even to *mala fide* improvers.[236]

The private law disagreement focused on the extent to which the absence of English and American precedent disabled the courts from enforcing the improver's acknowledged equitable right. All the constitutional cases, however, accepted the proposition that statutes that extended protection to improvers, while properly recognizing the improver's equitable right, could be applied retroactively. Ironically, Justice Story's opinion in *Society for the Propogation of the Gospel v. Wheeler*[237] and the Supreme Court's opinion he joined in *Green v. Biddle*,[238] came closest to suggesting that retroactive betterments acts were unconstitutional because they altered the parties' rights as they would have been adjudicated in the absence of the statute. Although both of those opinions denied retroactive application to betterments acts, neither did so without also considering whether the particulars of the statutes were consistent with the improver's equitable right. Both opinions defined this right more broadly than the courts would have done in the absence of the statute.

In *Society for the Propogation of the Gospel*, for example, Story suggested factors which, if necessary to establish the improver's claim under the statute, would have changed his view of the improver's equity, and would have altered his view about whether the statute could be applied retroactively. He noted that "[t]here would . . . have been plausibility in the [improver's] argument if the statute had confined itself to visible erections," did not extend to "improvements . . . in the soil" or to improvements that "would be deemed waste at common law," and applied only to claims "made by the original wrongdoer."[239] Similarly, in *Green v. Biddle* the Supreme Court noted that the statute at issue would permit recovery by the improver of the value of the

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235 *Id.*

236 *Id.* at 133-34.

237 22 F. Cas. 756 (C.C.D. N.H. 1814) (No. 13,156).

238 21 U.S. (8 Wheat.) 1 (1823).

239 22 F. Cas. at 768. The improver argued that "upon the principles of natural justice, it is iniquitous that one man should enjoy the fruits of another man's labor." *Id.* While "there was no legal remedy" for the improver under pre-existing law, the statute provided one that might be properly applied because it merely recognized the improver's pre-existing equitable right and, thus, did not "devest previous rights" of the landowner. *Id.*

improvements made up until the time of the judgment dispossessing him, "although the occupant was for a great part of the time a malae fidei possessor."[240] At the same time, the statute would permit the landowner to offset against the value of improvements only those rents and profits accruing after he instituted suit.[241] Finally, in *Society for the Propogation of the Gospel*, Justice Story did not hesitate to respond to the merits of the improver's equitable claim:

> It is difficult to perceive the foundation of the equitable or moral obligation, which should compel a party to pay for improvements, that he had never authorized, and which originated in a tort. If every man ought to have the fruits of his own labor, that principle can apply only to a case, where the labor has been lawfully applied, and the other party has voluntarily accepted those fruits without reference to any exercise of his own rights. For if, in order to avail himself of his own vested rights, and use his property, it be necessary to use the improvements wrongfully made by another, it would be strange to hold, that a wrong should prevail against a lawful exercise of the right of property.[242]

Although inconsistent with Story's later endorsement of the claims of good faith improvers in *Bright*,[243] this response showed Story's acceptance of the notion that a statute could be retroactively applied *if* it properly recognized the improver's equitable right, regardless of whether that right was previously enforceable. Absent particular departures from the improver's equitable right, the retroactive application of betterments statutes was universally upheld on the theory that it provided a remedy for an equitable right.[244] A court approving retroactive application of a betterments statute in 1900 could declare:

> It is a matter that may be regarded now as almost an elementary principle in the construction of constitutional law upon the subject of retrospective legislation, that it does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right, equitable and just in itself, but which they were not able to enforce on ac-

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240 Green v. Biddle, 21 U.S. at 82.

241 21 U.S. at 82-83.

> Thus it may happen that the occupant, who may have enriched himself to any amount, by the natural, as well as the industrial products of land, to which he had no legal title, (as by the sale of timber, coal, ore, or the like,) is accountable for no part of those profits but such as accrued after suit brought; and on the other hand, may demand full remuneration for all the improvements made upon the land, although they were placed there by means of those very profits, in violation of that maxim of equity, and of natural law, *nemo debet locupletari aliena jactura.*

242 Society for the Propogation of the Gospel v. Wheeler, 22 F. Cas. at 768.

243 *See supra* text accompanying notes 232-36.

244 *See* Bacon v. Callender, 6 Mass. 303 (1810); SCURLOCK, *supra* note 51, at 58 n.94 (citing cases).

> count of defects in the law or its omission to provide the relief necessary to secure such right.[245]

The invocation of natural rights and justice presented a problem for nineteenth century jurists who portrayed vested rights-retroactivity as consistent with legislative control over statutory policy. Sedgwick, for example, argued that the doctrine holding that "there could be no vested right to do wrong" reflected "a fallacious line of reasoning" because it "assumes that a power exists in the judiciary to decide on the morality, wisdom, or justice of . . . legislation, and to treat them accordingly."[246] The notion of true equitable rights, however, supported the belief that this doctrine did not, in fact, require an illegitimate "assumpt[ion of] legislative power" to review the "political sagacity or social wisdom" of enacted laws.[247] Justice Story took pains to defend equity jurisdiction from the charge of arbitrariness by systematizing its principles into a science.[248] Nevertheless, he had no difficulty acknowledging those true equitable rights which were not dependent upon any legal rule for their existence. The practice of applying equitable principles and legal rules to derive rights in ordinary private law cases provides the backdrop for jurists' understandings about equitable rights. Against this backdrop, judicial recognition of equitable rights did not require policy judgments entrusted to the legislature.

When Cooley referred to a vested right as requiring the rightholder to have already acquired a "title," the required title could be "legal *or* equitable."[249] Thus, it was not surprising to discover that "courts do not regard rights as vested contrary to the justice and equity of the case."[250] For example, statutes that "conflrm[ed] acts invalid by reason of some informality" such as a "sale of lands defectively made or acknowledged . . . have never been questioned."[251] "Although by such enactment individuals may be [thought to be] deprived of . . . [a] right of property previously vested,"

> Such laws, so far as they cure defects, are not considered as impairing the obligation of contracts, or as divesting any right secured by the law of the land, or as creating any new right: but as confirming rights already existing, by furthering the remedy. *The legal rights of others affected in these cases are deemed to have vested subject to the equity*

245 Mills v. Geer, 36 S.E. 673, 676 (Ga. 1900).

246 SEDGWICK, *supra* note 51, at 660-61.

247 BLACK, *supra* note 51, § 177, at 229.

248 *See, e.g.*, JOSEPH STORY, 1 COMMENTARIES OF EQUITY JURISPRUDENCE §§ 18-19 (1836).

249 *See, e.g.*, COOLEY, *supra* note 77, at 357 (emphasis added).

250 COOLEY, *supra* note 77, at 370.

251 W.W.B., *supra* note 51, at 518-19.

> *existing against them, which equity these confirming statutes recognize and enforce.*[252]

Because legal rules and equitable principles were considered equally embedded in the existing law, courts and commentators treated questions about whether a statute provided a remedy for a pre-existing equitable right as a legal question that was familiar to the judicial role. Recognizing the existence of an equitable right was not the same as deciding upon the wisdom of the statute recognizing the right. One commentator summarized the point as follows:

> [I]n numerous cases, the courts dwell largely upon the justice and public tranquility that are promoted by these laws of amendment and confirmation; and in speaking of certain retrospective laws as being valid, take care to qualify their language, by calling them such as are just and reasonable, and conduce to the general welfare, and are not clearly unjust. *But it will be found that justice is not the criterion by which the cases are decided* . . . . [Such] laws as cure mere defects in form or remedy, do not impair the obligation of any contract. Neither do they trespass on the judicial functions, since they are cases in which the courts can give no remedy. *Nor do they violate the "law of the land," in the divesting of rights, since equitable rights are confirmed rather than divested, and the spirit of the law of the land is carried out by the curing of mere defects in form.*[253]

Moreover, equitable principles were not without limit. The claimant who could assert only what Cooley called a "naked legal right" unsupported by the equities—such as the right to avoid a contract or conveyance defective for want of observance of some legal formality—might find the right destroyed by retrospective legislation. Whether that would be the result, however, depended upon the extent to which equity could properly intervene to protect the claimant rather than the beneficiary of the statute confirming the contract or conveyance:

> The operation of these cases . . . must be carefully confined to parties to the original contract, and to such other persons who occupy the same position with no greater equities. Subsequent *bona fide* purchasers cannot be divested of the property they have acquired, by a retrospective act changing the legal position of the grantor in regard to the thing purchased. . . . The position of the case is altogether changed by this purchase. *The legal title is no longer separated*

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252 W.W.B., *supra* note 51, at 519 (emphasis added).

253 W.W.B., *supra* note 51, at 520 (emphasis added). The reference to the spirit of the law of the land clause also invoked the doctrine of equitable construction of statutes. For a discussion of that doctrine during the nineteenth century, see William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 805-08 (1985) (showing that equitable construction during the early nineteenth century meant giving a liberal construction to remedial statutes).

> *from the equities . . . . Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and it is secure against legislative interference.*[254]

Changes in the conception of equitable principles in the late nineteenth century rendered unavailable the argument that some retroactive statutes merely provided remedies for equitable rights already embedded in the standing law. Only the main points can be outlined in this article. Basically the interpretative principle supporting the claim that the ban on retrospective legislation was to receive "equitable construction" was largely rejected.[255] Objectivism in private law rejected the notion that looking behind the technical rules of property and contract to discover and enforce the parties' intent was consistent with the emerging will theory. Considerations of good faith and notice in property law, once the purview of equitable principles such as constructive fraud, were increasingly incorporated into legal rules governing adverse possession and the interpretation of recording acts. Considerations of equity no longer seemed so easily distinguishable from policy in the enactment of laws. By 1881, Cooley seemed to change his mind about curative acts:

> If one curative law may be held good, and another not good, the result is that the validity of legislation in this class of cases must depend upon the view the court may take of its justice. If, in the opinion of the court, it operates unjustly, it must be held void: but, if not, it may be upheld. This is not a satisfactory condition of the law; for *the theory of our Government undoubtedly refers all mere considerations of equity in the enactment of laws to the legislature itself, with powers of final decision.*[256]

Finally, the notion that equitable rights were independent of legal rights rather than subordinate to them collapsed. Proponents of vested rights-retroactivity had asserted that equity could provide remedies for legal rights unavailable at law *and* remedies for equitable rights whose enforcement would "trump" legal rights. In 1887, however, Langdell announced that "[e]quity jurisdiction is a branch of the law of remedies" and that "true equitable rights . . . are derived from, and dependent upon, . . . legal right[s]." Consequently, if "courts of equity and courts of common law declare the law differently . . ., one of them *must*" be wrong.[257] By dint of history and the continuing recognition of legal and equitable jurisdiction, the remedy may be available only in equity. If so, that only demonstrates that "courts of equity

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254 COOLEY, *supra* note 77, at 378-79.

255 Blatt, *supra* note 253, at 820-23.

256 Thomas M. Cooley, *The Limits To Legislative Power In the Passage of Curative Laws*, 12 CENT. L.J. 2, 3-4 (1881).

257 Christopher Columbus Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 59 (1887).

may treat an act as a violation of a *legal* right."[258] Professors Hohfeld and Cook subsequently took the point to its logical conclusion in an effort to root out the inconsistencies in the law that existed because law and equity conflicted on the existence of legal rights.[259]

The collapse of the notion that the existing law was comprised of legal rules and independent equitable principles gave rise to subsequent notion that the existence or nonexistence of a remedy implied the existence or nonexistence of a right. Henceforth, the "standing law" could only assign legal rights to the parties in a given instance. It could not simultaneously suggest that some of those rights were defective and that the defects were subject to being cured by retroactive legislation. Almost by definition, any statute with legal significance would alter the available remedies and thus, be vested rights-retroactive. Statutes that purported to provide a remedy for a right previously without a remedy were in fact creating a new right at the expense of the beneficiary of the old rule. By changing what would have been the result under pre-existing law, these statutes were retroactively legislating that the property of one person, previously free of liability, should be given to another.

The new analysis, however, did not necessarily mean that all such statutes were unconstitutional. Instead, it meant that vested rights had no special immunity from legislative change; they were subject to the same substantive due process analysis that applied to all economic rights. The modern analysts who treated vested rights-retroactivity as a sociological or a political concept determined by community mores found some basis for protecting those mores in the earlier claims of "equitable right." Shorn of its roots in the standing law, the retroactivity analysis used to protect so-called equitable rights became just another form of substantive due process. To protect economic rights meant to protect "reasonable expectations" or "reliance interests"[260] where their destruction was not justified under the state's police power.

CONCLUSION

By examining the overlooked history of the nonretroactivity principle, this Article has attempted to offer a more accurate depiction of the historical transformation of the constitutional protection of economic rights. This depiction has revealed moments of profound

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258 *Id.* (emphasis added).

259 Walter W. Cook, *The Place of Equity in Our Legal System*, 3 AM. L. SCH. REV. 173 (1912); Wesley N. Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537 (1913).

260 *See, e.g.*, Ray A. Brown, *Vested Rights and the Portal-to-Portal Act*, 46 MICH. L. REV. 723 (1948).

change in the midst of an otherwise gradual evolutionary process, demonstrating that the standard and revisionist accounts of *Lochner* era substantive due process are only partially correct. The change from vested rights-retroactivity to substantive economic rights distinguishes *Lochner* from its predecessors. Consequently, this Article criticizes revisionist accounts of the continuity of economic rights protection. At the same time, the story of how that change occurred criticizes the standard accounts of *Lochner* as interrupting the otherwise continuous protection of economic rights. The changes that undermined vested rights-retroactivity and helped produce substantive due process were part of a broad-based transformation in legal thought. They remain with us today in the perception that, despite contrary claims, vested rights-retroactivity does not circumvent substantive judgments about economic rights.

The criticism of the standard account undermines the historical foundation of attempts to limit debate about economic rights protection by invoking *Lochner*. It remains uncertain how various newfound continuities between *Lochner* and its predecessors will be understood. It is unclear whether they establish a "republican" past, whose normative vision is more dependent upon equal opportunity and relative substantive equality than previously thought, or whether New Deal deference to economic legislation is a judicial abdication of responsibility for enforcing contract and property rights, or even whether, in the long run, judicial passivity is preferable, despite express constitutional protections. That question is ultimately one of constitutional theory rather than history, for the history itself is one of theoretical transformation. The question of what constitutes appropriate constitutional protection for property and contract is informed, but not determined, by history because our own commitments deeply reflect prior critiques. Even if we should create similar doctrinal formulations, we would, and properly should, undoubtedly do so for different reasons and to accomplish different purposes. One hopes that this study assists in exorcising the demon of substantive due process, not by banishing it from the realm of constitutional law, but by revealing it to be an ordinary inhabitant of that realm. Each age has its own form of what amounts to substantive due process in the justifIcations it invents for the constitutional protection of economic rights. In inventing those justifications, we can do better than to pretend that they are historically determined.