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LOCHNER, LIBERTY, PROPERTY, AND HUMAN RIGHTS

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Introduction

We are here to mark the centennial of *Lochner*, a seemingly minor case in which the U.S. Supreme Court struck down a state law limiting the working hours of bakers and thus triggered an enduring controversy over the proper roles of legislatures and courts in setting the boundaries of private rights. This opening century of the third millennium is witnessing the early stages of adjudication of claims of individual rights under several international declarations and conventions. The "rule of law" and "human rights" movements are both attempting to spread regard for individual rights and will result in increased levels of judicial interpretation of these claims. When that occurs, the legacy of *Lochner* will be at the forefront of judicial inquiry.

American arguments over the role of "economic" and "personal" rights have endured for over 150 years. They spilled into the international arena as post-World War II activists promoted "second generation" rights of social and economic welfare.[1] At the same time, the breakup of the Soviet Union and collapse of communism fueled the claim that property rights and limited government were essential to the existence of rights of conscience and autonomy. Perhaps a truly socialized economy lacking rights of private ownership could still respect rights of conscience, expression, and a general level of autonomy that we could call the right to be left alone.[2] But it is difficult to find an example of this in history.

More generally, unenumerated liberty rights have been both criticized and extolled in the context of the American constitutional "privacy" rights such as human sexuality and end-of-life decisions.[3] Supreme Court Justices who believe firmly in protection of privacy from government interference must explain how the privacy right and its *Lochner*-like methodology differs from the discredited economic rights of *Lochner*.[4] Meanwhile, Justices who desire protection for property rights yet believe in the power of the majority to have their views enforced by law should be prepared to explain how the *Lochner* experience can be a basis for criticizing an "activist" judiciary yet leave room for protection of property from "regulatory takings."[5]

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[1] In this terminology, "first generation" or "primary rights" are the civil and political rights such as those reflected in the Covenant on Civil and Political Rights. The "secondary" rights are claims on the state for protection and assistance in the basics of life (food, shelter, employment, education) as reflected in the Covenant on Economic, Social, and Cultural Rights. The "third generation" rights are those that belong to groups, such as religious or cultural minorities, and are even less well-recognized. Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 INT'L J. CONST. L. 56, 57 (2004).

[2] Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 J. TRANSNAT'L L. & CONTEMP. PROBS. 529 (2004).

[3] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 760-61 (1997) (Souter, J., concurring) ("[W]hile the cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review, they harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused.").

[4] Roe v. Wade, 410 U.S. 113, 117 (1973).

[5] *Compare* Planned Parenthood v. Casey, 505 U.S. 833, 961 (1992) (Rehnquist, C.J., dissenting), *with* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

In this fashion, *Lochner* sets the terms of a debate that will now move to the global stage.[6] To what extent are claims of personal autonomy to be protected by international law; *i.e.*, will protection for rights of privacy, conscience, and association lead to protection of sexual privacy?[7] Will an explicit "right to own property"[8] lead to elaborate property concepts as it has in American law?[9] When rights of property conflict with secondary economic rights such as the right to a decent wage,[10] what guiding principles will provide resolution? If and when secondary rights to social services such as a free education[11] and adequate health care[12] conflict with rights of employment, will American experience and the methodology of unenumerated rights provide any guidance?

This article recognizes that *Lochner* is justly criticized for protecting the property and contract claims of the strong against the weak. But it can be seen as part of a continuum of protection for a general concept of liberty that flowed from English concepts into today's cases dealing with personal autonomy. After elaborating the basic themes in Part I, Part II traces the history[13] of the general concept of liberty and makes an admittedly speculative claim: Perhaps the disruption of the *Lochner* era was in part attributable to the crabbed view of liberty that prevailed in the first interpretations of the post-Civil War Amendments. If the Supreme Court in the *Slaughter-House Cases*[14] had recognized the right of occupation claimed by the New Orleans butchers as part of the liberty protected by due process, then the reformers of the late 19th and early 20th Centuries would have been on notice that economic rights existed. In return, the Court might have felt less pressure to lash out against economic-social reforms like wage and hour legislation. This claim only notes the relationship between the so-called economic and personal rights of due process liberty.

Part III then attempts to link these Anglo-American developments to international human rights. The general concept of liberty that has emerged victorious

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[6] *See* Sujit Choudhry, *The* Lochner *Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1 (2004).
[7] *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 72, art. 3 (1948) (life, liberty and security of person); *Id.* at 74, art. 18 (conscience); *Id.* at 76, art. 26 (assembly and association); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 11th Sess., Supp. No. 16, at 55, art. 17, U.N. Doc. A/6316 (1966) (privacy); *Id.*, art. 18 (conscience); *Id.*, art. 22 (association).
[8] *See* Universal Declaration of Human Rights, *supra* note 7, at 74, art. 17.
[9] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. SC Coastal Council, 505 U.S. 1003 (1992).
[10] *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, U.N.G.A. Res. 2200A, U.N. GAOR, 11th Sess., Supp. No. 16, at 50, art. 6, U.N. Doc. A/6316 (1966) [hereinafter ECOSOC] (right to work); *Id.*, art. 7 (decent living wage); *Id.* at 50-51, art. 11 (adequate standard of living)).
[11] *See* ECOSOC, *supra* note 10, at 51, art. 13.
[12] *See* ECOSOC, *supra* note 10, at 51, art. 12.
[13] Economic rights, along with the concepts of property and liberty, are among the most thoroughly critiqued topics in all of American law. The tracing of history in this article is only slightly different from what has been done by other commentators. Rather than attempt to cite every scholar who has examined this history, I refer the reader to the excellent *Bibliographical Essay* in JAMES ELY, THE GUARDIAN OF EVERY OTHER RIGHT 167-79 (1992).
[14] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

in Anglo-American law allows courts to consciously balance majority and minority interests. It can helpful moderate conflicting claims of right. Finally, it can help breathe content into some of the economic rights of international covenants such as the rights of education and medical care. As an element of liberty, these rights cannot support a specific allocation of resources, but could support enforceable claims to protection of economic rights against action by third parties.

I. Fundamental Rights and Liberty

The foundation of the Warren Court era was the concept of fundamental rights. That concept helped satisfy two obligations of the Court: explaining the source of unenumerated rights and emphasizing the heightened importance of certain claimed rights.[15] Those obligations existed because the demise of the *Lochner* era meant judicial denial of a generalized claim of liberty.

The Rehnquist Court has moved away from fundamental rights language[16] and has come to rely almost exclusively on the general concept of liberty.[17] This has resulted in both a return to more traditional understandings of the nature of liberty and a more limited but perhaps more honest explication of the judicial role. As an interesting side benefit (or perhaps an explicit benefit not yet widely recognized), this development may position American courts more centrally in international debates over human rights.

The language of fundamental rights has venerable roots in the Privileges and Immunities Clause and in the incorporation debate. Phrases attempting to preserve western notions of liberal individualism within those clauses include "those privileges and immunities which are fundamental; which belong of right to the

[15] Michael H. v. Victoria D. & Gerald D., 491 U.S. 110, 122 (1989) ("In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the 'Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental."' (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

[16] Webster v. Reproductive Health Services, 492 U.S. 490, 520 (1989) ("[T]here is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion, as the Court described it in *Akron*, a 'limited fundamental constitutional right,' which Justice Blackmun today treats *Roe* as having established, or a liberty interest protected by the Due Process Clause, which we believe it to be.").

[17] Planned Parenthood v. Casey, 505 U.S. 833 (1992), at 846 ("The controlling word in the cases before us is 'liberty.'"); *Id*. at 853 ("It was this dimension of personal liberty that *Roe* sought to protect, and its holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person."); Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.").

citizens of all free governments,"[18] rights "implicit in the concept of ordered liberty,"[19] "canons of decency and fairness which express the notions of justice."[20] These phrases were particularly important in explaining why federal protection should exist against encroachment on such liberties by the States.

The Equal Protection Clause generated another quest for fundamental rights by demanding rigorously even-handed policing of important individual political and social activities. "Strict scrutiny" and its companion "compelling state interest" test became the watchwords for challenging differentiations with respect to who could both enumerated and implied rights to vote,[21] to legal counsel,[22] to marry[23] or have children,[24] or to travel in interstate commerce.[25] Juxtaposed against all these expressions of fairness with respect to fundamental rights, especially during the 1960s, was the constant refrain of Justice Black, occasionally joined by others, that the enumerated rights should mean precisely what they say without qualifications or additions from the personal values of the Justices.[26]

Development of the fundamental rights and equal protection intersection tailed off in the Burger Court. In *San Antonio Ind. Sch. Dist. v. Rodriguez*,[27] the Court held that education was not a fundamental right because it was neither explicitly nor implicitly guaranteed by the Constitution.[28] When the Court rejected "strict scrutiny" for government refusal to fund the exercise of protected rights,[29] it became apparent that equal protection added nothing to the recognition of a protected constitutional right.

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[18] Corfield v. Coryell, 6 Fed. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230). Justice Washington, sitting as Circuit Justice, held that noncitizens of New Jersey had no right to gather shellfish in New Jersey waters. In the process, he placed a "natural rights" reading on the original Privileges and Immunities Clause of Art. IV. As later re-interpreted in *Slaughter-House*, however, the *Corfield* language became a statement of "equal protection" for fundamental rights, mandating nondiscrimination against the citizen of another State with respect to whatever rights the State chose to grant its own citizens from among those that could be considered to "belong of right to the citizens of all free governments." Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Probably the most mysterious aspect of *Slaughter-House* is how a State could decide not to grant fundamental rights to its citizens, which led eventually to the incorporation of some rights into the Due Process Clause.

[19] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[20] Adamson v. California, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

[21] Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Harper v. Virginia St. Bd. of Elections, 383 U.S. 663 (1966).

[22] Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

[23] Zablocki v. Redhail, 434 U.S. 374 (1978).

[24] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[25] Shapiro v. Thompson, 394 U.S. 618 (1969).

[26] *E.g.*, Harper, 383 U.S. at 675-76 (Black, J., dissenting) ("I have heretofore had many occasions to express my strong belief that there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems.").

[27] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[28] *Id*. at 30 ("[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.").

[29] Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

In the area of sexual and reproductive freedom, the Court relied heavily on the concept of fundamental rights to justify the recognition of claims against the state and also to explain the "heavy burden" of justification that the state would bear. *Skinner* recognized a fundamental right of procreation in what purported to be an equal protection context,[30] *Griswold* recognized a fundamental right of "privacy" for married couples to use contraception,[31] *Eisenstadt* extended the right to unmarried persons,[32] *Roe* broadened it to include abortion,[33] and the subsequent controversy prompted Justice O'Connor to develop an "undue burden" doctrine[34] culminating in the shift to a "liberty interest" in *Casey*. *Bowers* asked whether there was a "fundamental right to engage in homosexual sodomy" but *Lawrence* said the issue was whether the state had a sufficient justification for intruding upon the liberty of consenting adults acting in privacy.

In neither *Casey* nor *Lawrence* was the word "right" used to describe the interest of the individual in any way other than to express conclusions. For example, in *Lawrence*: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[35] And in *Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[36]

Liberty is both a more ancient and a more modern term than the language of fundamental right. It is tied to the language of the Due Process Clause, which in turn derived from Magna Carta. As a modern term, it is a more honest expression of the judicial role because it avoids the illusory rigidity of the "scrutiny" standards of review. It also has the advantage of more concretely displaying the link between property or economic interests and the more personal interests commonly associated with fundamental rights, such as rights of conscience, speech, sexuality, nondiscrimination, and the like. These topics will be explored in the following sections.

II. Historic Links Between Property and Liberty

The structure of the Due Process and Takings Clauses encourages the application of due process tests to "deprivations of property" and compensation tests to "takings." The difference reflects the "positivism conundrum"—deprivation of an existing "right" requires due process, but the state is free to redefine rights; and yet, if the state could redefine property rights without running afoul of the Takings

[30] Skinner v. Oklahoma, 316 U.S. 535 (1942).
[31] Griswold v. Connecticut, 381 U.S. 479 (1965).
[32] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[33] Roe v. Wade, 410 U.S. 113 (1973).
[34] *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting).
[35] Lawrence v. Texas, 539 U.S. 558, 567 (2003).
[36] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

Clause, the Clause would become a nullity.[37] The structural answer to the conundrum is that there are some core elements of property that government cannot take, either through executive action or legislative redefinition, without addressing the compensation question. But does this approach comport with the history of the twin clauses?

It is unclear how the practice of compensation for takings arose in England. Some have traced the practice back to the Sewer Acts of the fifteenth century, which provided compensation to owners of property invaded during the placement of the sewer lines.[38] Compensation gradually became the accepted norm, and by the time of Blackstone, Coke and Littleton was accepted as a given of the common law.[39] By the late 18th Century, compensation for takings was probably considered part of the "law of the land" incorporated into their due process and takings clauses.[40] But British courts did not exercise judicial review and would not have declared a taking without compensation to be invalid unless it lacked parliamentary sanction. The law of the land in British practice was merely a requirement of regularity and legislative authority.

A. Substantive Due Process and Public Purpose/Use

The intellectual heritage of property rights and substantive due process includes the natural rights rhetoric of Locke,[41] which traces its roots through Grotius[42] back to ancient Greek and Roman thought.[43] Thus, natural rights rhetoric arose in times when positive law did not protect specific human rights against government intervention. When the Constitution declared protected rights, it became necessary to define them. The Federalist Papers[44] and Convention debates[45] shed little light on property or due process, although Madison later wrote of property in terms of conscience and personality as well as things.[46] Because the rights of contract, property, and liberty were not spelled out in the Constitution, many judges understandably looked to existing hortatory statements of rights, like natural law

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[37] The Takings Clause would not be a complete nullity because it would still exist to provide damages for irrevocable takings of property. For example, the destruction of a house to stop the spread of fire or the seizure of goods for support of a wartime army would still be within the Takings Clause. It is conceivable that this could have been the answer to the conundrum, but it is such a limited answer that almost nobody accepts it. Moreover, it still leaves the problem of whether a taking is remediable.

[38] PHILIP NICHOLS, LAW OF EMINENT DOMAIN § 1.21 (3d ed. 1980); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 562 (1972).

[39] *See generally* NICHOLS, *supra* note 38.

[40] ELLEN PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 72-73 (1987).

[41] *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[42] *See generally* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (1625).

[43] *See*, EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 10-57 (1948); EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF LAW 31- 48 (rev. ed. 1974).

[44] THE FEDERALIST NO. 10 (James Madison) talks about property holdings as the principal source of the factions which diffusion of power was intended to modulate.

[45] *See generally* DEBATES IN THE FEDERAL CONVENTION OF 1787 (Hunt & Scott ed. 1920); ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 (1955).

[46] James Madison, Essay on Property, *in* 4 LETTERS & OTHER WRITINGS OF JAMES MADISON 478 (1884).

rhetoric, to produce a catalog of rights that ought to be protected.[47] They produced the "vested rights" approach of the 19th and early 20th Centuries, which emphasized the immunity of existing property from government interference.[48]

The transformation of takings doctrine during this century reflects changes in the concepts of public purpose and public use. Just as the Civil War coincided with the Industrial Revolution, the Civil War amendments coincided with Progressivism and increasing regulation. The issue of the late 19th Century was whether the Due Process Clause constrained the ability of government to regulate the use of property.[49] The free-enterprise argument was that property and liberty could not be invaded for a private purpose, that public purposes would require compensation, and that public purposes were narrowly limited.

The Supreme Court's initial response to the entrepreneurial argument was to feign ignorance.[50] But increasing regulation soon forced the Court to articulate a response. The grain-elevator[51] and railroad-rate cases[52] held that government could regulate property used in a way that affected the public.[53] Thus, businesses were subject to regulation if "clothed with a public interest." The Court focused on the effect of a business on the public interest, not the relation of an owner's claim to personal autonomy and to the public's claim for regulatory control. The result was to isolate some businesses such as transportation and warehousing because of their importance to the general economy.

The limitations inherent in this public interest response came to a head in the early part of this century with *Lochner v. New York*.[54] The Court's response to wage and hour legislation focused on the entrepreneur's claim to autonomy and made that question turn on whether the particular business seemed, in the Court's view, important to the structure of society. The Court then pushed that notion to the limit when it dismissed legislative claims of public interest with regard to categories of business entities. The most instructive cases on this point were those that

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[47] Other available statements regarding rights, such as utilitarianism or even strict social compact theory, would not have helped much in creating a catalog of rights for judicial protection because they looked to the structure of society for individual protection rather than specifying enduring rights. Thus the choice of natural law rhetoric was not a conscious rejection of other systems but simply absorption of the only system that had anything to offer on the subject.

[48] CORWIN, *supra* note 43, at 65-72 (1948).

[49] *See generally* 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY ch. 32 (1923).

[50] *Slaughter-House Cases*, 83 U.S. 36, 81 (1873) ("[U]nder no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.").

[51] Munn v. Illinois, 94 U.S. 113 (1877).

[52] Chicago, Burlington & Quincy RR v. Jones, 94 U.S. 155 (1877).

[53] *Munn*, 94 U.S. at 126 ("Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the pubic an interest in that use, and must submit to be controlled by the public for the common good, at least to the extent of the interest he has thus created.").

restricted Congress' power under the Commerce Clause. The Court's reluctance to see the public interest in a business for due process purposes was analogous to its reluctance to see the interstate impacts of mining and manufacturing.[55] In developing the doctrines of substantive due process and limits on Congress' power under the Commerce Clause prior to 1937, the Court did not recognize the ripple effects of individual economic decisions on others.[56] It viewed legislation affecting employee rights as constituting shifts of values from one party to another for private purposes and therefore found it invalid under the Due Process Clause.[57]

The Revolution of 1937 came when the Court recognized the interlocking effects of individual economic actions.[58] At that point, the focus of the Court's inquiry shifted to the public interest in each decision and on the interaction between the business and others in the marketplace. The greater the involvement of an enterprise in the public sector, the easier it became to show its effects on nonparties and the public's interest in its individual transactions. The increasingly interlocking character of economic decisions eventually meant that there was virtually no commercial activity that did not affect public interests.[59] As a result, the entrepreneurial claim for autonomy became lost in the quest for the public purpose in enacting legislation. So long as the Court could perceive any public interest or purpose, the claim for autonomy was subordinated to the claim for regulation.[60] The effect was to take the Due Process Clause out of operation as a constraint on economic regulation.

When the New Deal produced widespread acceptance of regulation and redistribution of wealth, we were left without a clear path to protection of economic and property interests that would also provide government the ability to meet the exigencies of the times. With due process out of the picture, the Takings Clause had to carry the whole baggage of the entrepreneurial claim. But the Takings Clause did not seem to apply to regulations that did not result in either loss of property or physical invasion of a tangible item. The Court's determination in several cases that governmental actions constituted regulations rather than takings reflected the inordinate difficulty involved in valuing a loss of autonomy when the owner remained in possession of property and had other uses available to him. Moreover, the transfer of values involved in most regulations were from private

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[54] 198 U.S. 45 (1905).
[55] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. E.C. Knight & Co., 156 U.S. 1 (1895).
[56] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[57] Adair v. United States, 208 U.S. 161, 175 (1908) ("[T]he employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.").
[58] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); United States v. Darby, 312 U.S. 100 (1941).
[59] It is sometimes thought that the Court reached its pinnacle in allowing Congress to claim an interstate impact from the production of home-grown wheat for home consumption. But it must be remembered that the regulation of home consumption occurred only when the grower was involved in commercial production as well. Wickard v. Filburn, 317 U.S. 111 (1942).
[60] Ferguson v. Skrupa, 372 U.S. 726 (1963); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

party to private party. They were for a public purpose but not for a public use, and the Takings Clause on its face applies only to takings for a public use. It seemed that there was nothing in the Constitution that dealt with forced transfers to other private parties.

Two exaggerations have been made in due process law in the post-37 era. The first is that virtually every economic regulation carries a public purpose and not a private purpose. Very often private lobbying results in a conclusion that the public interest would be served by regulation, a serving of private interests linked with public interests.[61] The second is that an economic regulation affects all private interests in the same way. The question of whether one individual has an autonomy claim different from others, for example because she is not engaged in commercial activity or the regulation happens to touch a liberty interest, has been lost until very recently.

The revival of economic substantive due process is occurring because of the realization that governmental infringements on personal liberty for the purpose of others' personal gain ought to be prohibited by the Constitution. If the optometrists persuade the courts that they have lost part of their ability to pursue a chosen profession because the ophthalmologists have a stronger lobby and not because of strong public needs, the courts will respond by invalidating unwarranted restrictions on the optometrists' professional autonomy.[62] With the Due Process Clause back in operation as a substantive constraint on the regulatory movement, the pressure on the Takings Clause can ease and we can focus on its unique role in the constitutional framework.

It must be remembered, of course, that under the revived doctrine of substantive due process, there will be extremely few holdings that a regulation does not sufficiently serve a public interest to survive due process attack. A public purpose sufficient to satisfy due process merely opens the question of whether a "taking" for a "public use" has occurred. In other words, finding that a regulation is justified by a sufficient governmental interest does not answer the question of whether compensation must be provided.

B. Natural Law, Social Compact and Common Law Theories

1. Blackstone and Locke's Language

Some of the economic rights advocates claim intellectual lineage from Locke and Blackstone.[63] Blackstone listed three "absolute rights" protected by the

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[61] *See* McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397 (1993).
[62] *Cf.* No. Dakota St. Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973); Gibson v. Berryhill, 411 U.S. 564 (1972).
[63] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 5 (1985). *Cf.* S. MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1987) (eschewing intellectual traditions for common sense).

common law: personal security, personal liberty, and property.[64] A person's rights of property "consist in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[65] This simple statement encompasses two important questions regarding the scope of property rights: first, it seems to assume that we know how "acquisitions" come to belong to that person; and second, it makes those rights subject to the "law of the land." The former difficulty shows up when even a self-proclaimed naturalist recognizes the "social conception of ownership at its roots."[66] The second difficulty anticipates the now familiar problem of what "due process" or the "law of the land" permits government to do to existing interests in property. These two questions today form the heart of the economic rights dispute: do rules of acquisition predate government, and how free is government to change the law of the land?

Blackstone was operating in a world which might have contained a close connection between creation of property and ownership and in which the law of the land was a relatively known quantity. Thus these questions might not have been so troubling in his time, and he could be forgiven for not approaching them. The irony in his being touted as an absolutist, however, is that he did address these questions and answered them in a resoundingly positivist fashion.

Blackstone was far removed from the natural law.[67] His definition of property rights quoted above is followed by a statement that these rights may have been natural in origin but that their current dimensions are entirely derived from society. The oft-quoted Blackstone depiction of property, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,"[68] may sound natural-law in tone, but it also sounds a bit tongue-in-cheek, similar to the way a republican democrat might have extolled the "natural order and divine right of the monarchy, supreme over every other individual in the universe." The quote introduces a chapter in which Blackstone goes on to demonstrate at length that the most to be said for natural law is that it would establish original ownership based on occupation by an individual of something previously in the common. All other rules of property have their origin in positive law decisions of government, although these rules would be zealously guarded in his view by a sensible government.[69] Indeed, while Blackstone recognizes an argument between other philosophers over whether the right of original occupation depends upon the "assent of all

[64] 1 W. WILLLIAM BLACKSTONE, COMMENTARIES *125.
[65] 1 BLACKSTONE, *supra* note 64, at *134.
[66] EPSTEIN, *supra* note 63, at viii.
[67] For a thorough refutation of the notion of Blackstone as a naturalist, see Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67 (1985).
[68] 2 BLACKSTONE, *supra* note 64, at 2.
[69] *Id*. at 13-14.

mankind" (a governmental creation) and professes not to resolve it,[70] his own argument would fit only the notion of assent and not the notion of "natural justice."

Locke's attitudes toward property were much more rigid than Blackstone's. Although he could not be called a natural law theorist, his brand of social compact implied extensive protection for property interests.[71] For Locke, property was the most important of the three natural rights. It was property that generated civilization and protected an individual's claim to the fruits of his labor. As applied to personalty in a day of artisans who made an entire product from raw materials to finished product, the protection of labor point might have made good sense. Even in his day, however, this theory was inconsistent with the operation of realty, which was passed on from generation to generation through such inequitable and occasionally unproductive devices as primogeniture.[72] Moreover, Locke himself carefully limited the operation of his theory to situations of plenty; under conditions of scarcity, the demands of other persons on "owned" assets could become legitimate claims of right.[73]

Given the questionable fit of the opinions of Locke with the reality of his world, and the rejection of his views by Blackstone, two questions that naturally arise are why Locke wrote as he did and how these views of "absolute rights" fit into the jurisprudence of the British courts. The latter question has important implications for the traditions against which our constitutional provisions were framed.[74] One difficult question encountered in deriving the original intent of the framers in the property clauses is whether they intended to incorporate the British law and traditions as it existed in the statutes and cases or as Locke might have liked it to be. As we shall see, there is a significant difference.

2. Coke, Locke, and the Glorious Revolution

The basic dimensions of British constitutional law today are contained in the notion of Parliamentary Supremacy.[75] It can be said with confidence today that Parliament is under no domestic constraints with respect to taking private property.[76] It can as easily nationalize, confiscate, or regulate property as it can increase

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[70] *Id.* at 8.
[71] *See* LOCKE, *supra* note 41.
[72] *See* Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 15 (1927). Primogeniture was often inequitable in terms of negative rewards for individual merit. It may have been efficient (serving a social purpose) in holding large blocks of land together.
[73] *See* Walter Hamilton, *Property According to Locke*, 41 YALE L.J. 864, 876-77 (1932).
[74] EPSTEIN, *supra* note 63, at 26-29, rejects intent of the framers as a guide to interpretation because very often the framers were confused or did not have the ability to predict modern events. Therefore, he purports to rely on the "plain meaning" of the Takings Clause, supplemented by the general theory of Locke.
[75] *See generally* SIR DAVID LIDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 295 (9th ed. 1969).
[76] Protocol 1 of the European Convention on Human Rights subjects member states, including Britain, to constraints on the taking of private property. Customary international law for some time has required fair compensation for the confiscation of property of foreign nationals.

taxes by 1%. It has been said that Parliament can repeal the Bill of Rights by a mere stroke of its collective pen.[77] What is left of the common law constraints is merely a presumption that Parliament does not intend to abrogate existing private rights unless it specifically states that intent. By contrast, the executive is not free to violate existing private rights, as defined by the common law or the legislature. Neither the Crown nor its ministers has the power to take private property without compensation or other remedy.[78]

Takings of private property for a public use in British practice occurred in the early stages mostly as responses to emergencies. The privilege to enter private land and even damage it to prevent a greater harm was recognized in early British cases. At the beginning, the privilege seemed to be complete so that there was no tort when the Crown dug saltpeter from a plaintiff's land to make gunpowder[79] or tossed articles overboard to save a ship.[80] "The prevailing American view of necessity is that compensation is not required if the public official acts reasonably, despite the argument that compensation should be provided unless the property itself was threatened, as in the example of a house in the way of a fire or supplies subject to capture by an advancing enemy.[81]

Neither the principle of parliamentary supremacy nor of crown prerogatives in cases of necessity was established at the time of Locke's writing. Locke published the *Second Treatise of Civil Government* in 1690, two years after the Glorious Revolution of 1688, in which James II was expelled in favor of William & Mary of Orange, and one year after promulgation of the Bill of Rights. The Glorious Revolution was nominally a victory for the Church of England against the Catholic James, but underlying causes could be found in the rise of a merchant middle class and the gross excesses of the Stuarts in seizing property or titles for their friends and kin. Locke was using the hyperbole of absoluteness in response to the abuses of King James at the time of his writing. Moreover, the legislative authority was virtually indistinguishable from the executive at that time.[82] Thus Locke's thoughts were addressed to justifying limitations on the monarchy. Parliament had not yet attempted the types of regulation or redistribution of wealth that would give rise to the later problems of regulatory takings. Locke produced a strong intellectual rationalization for what had just taken place and was still evolving.

Chief Justice Coke, on the other hand, was a coldly rational and pragmatic common law judge who must have had a major influence on Locke during his tenure in the first half of the 17th Century. His COMMENTARY ON MAGNA CARTA advocated vigorous support of the rising middle class and the protection of existing in-

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[77] *See, e.g.*, E.C.S. WADE & G. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 46 (8th ed. 1970).
[78] LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 155 (1965).
[79] King's Prerogative in Saltpetre, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (1607).
[80] Mouse's Case, 12 Co. Rep. 63, 77 Eng. Rep. 1341 (1609).
[81] RESTATEMENT (SECOND) OF TORTS §§ 196, 262 (1965).
[82] Hamilton, *supra* note 73, at 867–69.

terests. He condemned the royal seizure of offices and royally chartered monopolies as violating the freedom of the person who previously held the office or pursued that calling.[83] "Generally all monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against the law of the land."[84] Although he argued that acts of Parliament contrary to "common right and reason" were void,[85] his view on this point was never accepted; indeed, the point was not terribly important in a century when the major battle was between the King on one side and the courts and Parliament on the other.

Locke's reaction to the abuses of James resulted in overstatement that is understandable for its purpose but became used for something else when opponents of social legislation found comfort in his words.[86] Although some of the Framers found Locke's natural law rhetoric useful against George IV, there was little in British law at 1787 or 1791 to be incorporated into the positive law of the Constitution.

3. Americanizing the Concept of Liberty

One cogent objection to re-creation of the substantive due process concept is the textual difficulty. The phrase itself has an oxymoronic quality to it—is not process by definition distinct from substance? In 1934, Professor Corwin urged that the commonsense reading of the phrase may have been correct.

> To the lay mind the term "due process of law" suggests at once a form of trial, with the result that if it limits the legislature at all, it is only when that body is delineating the process whereby the legislative will is to be applied to specific cases; and a little research soon demonstrates that the lay mind is probably right so far as the history of the matter is concerned.[87]

But a different reading of the history from Corwin's is also available. Interestingly, the phrase "substantive due process" did not exist during the time that the Supreme Court was employing the methodology in the economic arena. The derivation of the phrase lay in the post-New Deal need to distinguish what the Court did under *Lochner* from what it started to do in the 1940's. This history will be traced in the next section. When the Court exercised substantive review of regulations under the Due Process Clause, it thought in terms of a unitary notion of due process that included both reasonableness and procedural fairness. The historical underpinnings of this unitary concept can be found in both British and American caselaw prior to the 20th Century.

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[83] *See* ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 42–48 (1957).
[84] EDWARD COKE, SECOND INSTITUTE § 19(4)2.
[85] Dr. Bonham's Case, 8 Co. Rep. 107a, 114a (C.P. 1610).
[86] Hamilton, *supra* note 73, at 872–74.
[87] EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 68–69 (1934).

The due process phrase derives from the "law of the land" clause in chapter 39 of Magna Carta, providing that "no freeman shall be taken, imprisoned, disseized, outlawed, or in any way destroyed, nor will we proceed against him or prosecute him, except by the lawful judgment of his peers, and by the law of the land." A later statute, 28 Edw. III, c. 3, (1354), guaranteed that "no man of what state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law." This assurance was reaffirmed in the Petition of Right.

Lord Coke certainly believed that the concept protected Englishmen against unjustified restrictions on market entry. He went so far as to say: "Generally all monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against the law of the land."

Referring to decisions of Lords Coke and Holt, as well as other British decisions, and asserting a heavy reliance by American revolutionaries on these sources, Roscoe Pound argued strongly in 1945 that the American protection for liberties under due process referred to unenumerated rights against monopoly as part of the "law of reason."[88] Although the British courts eventually developed the doctrine of Parliamentary Supremacy, dictating that the omnipotent legislature can amend even Magna Carta, Lords Coke and Holt viewed even Acts of Parliament as being subject to the established rights of Englishmen. The extent to which Parliamentary Supremacy had defeated the law of reason by 1776 or 1789 is unclear. Pound claims that the law of reason still prevailed, but Blackstone seems to point in the direction of Parliamentary Supremacy.

Due process guarantees in some form found their way into most early state constitutions. While the law of the land and due process clauses came to be used interchangeably, American courts, unlike their English counterparts, treated the due process clauses as restrictions not only on the King or executive and the judiciary but also on the legislature. In the early days of the Republic, they frequently made recourse to the "unwritten law" ordained by "nature and nature's God."

A general acceptance of this limitation on government in the seventeenth and eighteenth century is suggested in the Declaration of Independence. The Declaration proceeds from the premise that it is a "self-evident truth" that "all men are created equal" and endowed with divinely-granted, inalienable rights to life, liberty, and the pursuit of happiness. While influentially discussed in Locke's *Second Treatise of Government*, the origins of natural rights are traceable to ancient Greece and Rome. Social compact theory would not view all rights as equally inalienable, because some were partially surrendered as a consequence of living in civil society. Nevertheless, the idea of "inalienable rights" places limits on the claims that gov-

[88] POUND, *supra* note 83, at 48–53 (collecting lectures delivered in 1945).

ernment can make on an individual, and posits that those claims are not dependent on human laws and constitutions but belong naturally to all persons.

If a government abuses its power, what is the remedy? The answer of the Declaration was revolution. A more temperate alternative is judicial invalidation. An early American example of judicial implementation of natural rights philosophy came in *Calder v. Bull*,[89] involving the validity of a Connecticut law that overturned a probate court decree and granted a new hearing to claimants under a will. The legislation was attacked as an ex post facto law prohibited by Article I, § 10. While the Court held that the constitutional provision applied only to penal, not civil, legislation, Justice Samuel Chase commented on the limitations of governmental power arising from the social compact.

> I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law of the state. The people of the United States erected their constitutions or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are proper objects of it. The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded.

Justice Iredell, in a separate opinion, admitted that "some speculative jurists have held, that a legislative act against natural justice must, in itself, be void" but he rejected the power of a court, in the absence of any constitutional restraints, to declare the law void. Justice Iredell argued that

> [i]t has been the policy of all the American states, which have, individually, framed their state constitutions, since the Revolution, and of the peo-

[89] 3 U.S. (3 Dall.) 386 (1798).

> ple of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is undoubtedly void.

On the other hand, he contended that if

> the legislature of the Union, or the legislature of any member of the Union shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

In any case, the natural rights philosophy was an integral part of judicial decisionmaking through much of the early nineteenth century. And, in the process, the courts fashioned what has been called "the basic doctrine of American constitutional law," that of vested rights. Although early state cases rejected attempts to read their "law of the land" or "due process" guarantees as a sanctuary for vested rights, the principle gradually found acceptance. *Wynehamer v. People*[90] involved a New York penal statute forbidding the sale and storage of intoxicating liquors except for medicinal or sacramental purposes. The New York Court of Appeals held the act violative of the due process of law clause in the state constitution. Judge Comstock for the Court, citing Blackstone for "the sanctity of private property, as against theories of public good," argued that,

> in a government like ours, theories of public good or public necessity may be so plausible, or even so truthful, as to command popular majority. But whether truthful or plausible merely, and by whatever numbers they are assented to, there are some absolute private rights beyond their reach, and among these the constitution places the right of property.

Noting "the great danger in attempting to define the limits" of the natural rights philosophy which had previously been used to protect property, Judge Comstock saw no necessity to decide the question on this basis. The necessary substantive restraint on legislative power was found in the due process guarantee. "The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away. Where rights of property are admitted to exist, the Legislature cannot say they shall exist no longer."

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[90] 13 N.Y. 378 (1856).

Judge Johnson, dissenting, branded the majority opinion as judicial usurpation, arguing that protection of citizens' rights from legislative abuse lay "in their reserved power of changing the representatives of the legislative sovereignty; and to that final and ultimate tribunal should all such errors and mistakes in legislation be referred for correction." The majority's use of the due process guarantee placed property rights over all other rights, independent of the powers of government. "A government which does not possess the power to make all needful regulations with respect to internal trade and commerce, to impose such restrictions upon it as may be deemed necessary for the good of all, and even to prohibit and suppress entirely any particular traffic which is found to be injurious and demoralizing in its tendencies and consequences, is no government."

The doctrine of vested rights, "setting out with the assumption that the property right is fundamental, treats any law impairing vested rights, whatever its intention, as a bill of pains and penalties, and so, void."[91] Property was a natural right protected by the social compact. To Locke, property was the most important natural right because it generated civilization and assured to an individual the rewards of his or her labor and talents. Blackstone's Commentaries in 1765 listed three "absolute rights" assured by the common law: personal security, personal liberty, and property. The latter "consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

According to Corwin, the shield erected around property rights against legislative attack "represented the essential spirit and point of view of the founders of American Constitutional Law, who saw before them the same problem that had confronted the Convention of 1787, namely, the problem of harmonizing majority rule with minority rights, or more specifically, the republican institutions with the security of property, contracts, and commerce."[92]

In light of the vested rights doctrine's zeal in protecting property, critics of the doctrine unsurprisingly viewed it as a bulwark of aristocracy. James Madison, on the other hand, suggested a broader meaning for the right of property in his *Essay on Property*:

> This term means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." But in its larger and juster meaning, it embraces everything to which a man may attach a value and may have a right; and which leaves to everyone else the like advantage. In the former sense, a man's land, or merchandise, or money is called his property. In the latter sense, a man has property in his opinions and a free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and prac-

[91] Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 243, 255 (1914).
[92] *Id.* at 276.

> tice dictated by them. He has a property dear to him in the safety and liberty of his person. He has equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his right.

Madison to the contrary, the courts used the doctrine of vested rights principally as a bulwark for economic property interests against state legislative intrusion. But if the doctrine was to provide a secure base for economic interests, it needed to be grounded in a constitutional nexus rather than the vague natural rights jurisprudence.

Fletcher v. Peck[93] involved the Yazoo land-grant scandal. Many members of the Georgia legislature were bribed to grant 35 million acres of land to private companies at 1.5 cents per acre. A year later, the legislature attempted to rescind the grant, but much of the land had already been purchased by other investors. The question before the Court was whether either the Ex Post Facto Clause or the "impairment of the obligation of contract" clause protected the rights of bona fide purchasers. Chief Justice Marshall wrote the Court's opinion holding for the subsequent purchasers.

> If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it.
>
> It is the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to all our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

Georgia's rescinding statute was declared unconstitutional in *Fletcher* on three grounds. First, the grant in question was akin to a contract and, therefore, the "Contract Clause" was violated. Second, "the rescinding act would have the effect of an ex post facto law." Finally, the legislation violated natural rights.

The transition from English to American law is certainly not without ambiguity. Lord Coke may have been correct in reading due process as preventing royal charters of unregulated monopolies but not have contemplated whether the clause would similarly constrain Parliament. Similarly, the early American case law reflecting natural rights or vested rights thinking may well have been jettisoned in

[93] 10 U.S. (6 Cranch) 87 (1810).

the course of the same social events that resulted in rejection of Justice Taney's property-based approach to persons in *Dred Scott*. But when *Slaughter-House* reached the Supreme Court, the Court was either ignorant or disingenuous to respond that no reading of the Due Process Clause was available that would protect the settled economic interests of New Orleans butchers from being wiped out in favor of a new, unregulated monopoly. There was ample precedent for a right of livelihood that the dissenting Justices accepted. Only four years later, the Court felt constrained to justify rate regulation, so it invoked the concept of a business "affected [or clothed] with a public interest,"[94] which was borrowed directly from the English rules on regulated and unregulated monopolies. And it was only another 20 years before the Court first invalidated a state business regulation.[95] The Court did not create new law in those 24 years, it merely incorporated existing law from elsewhere into the 14th Amendment's version of due process.

C. Property and Liberty at the Framing of the Constitution

There are two possible methods for incorporating an expansive natural law definition of property into the Constitution. One cites original intent and would need to find a consensus among United States leaders in 1787 on the function of the Due Process and Compensation Clauses.[96] The other utilizes a blend of utilitarianism and natural meaning in advocating an expansive reading of property and a restrictive reading of government.[97]

The first hurdle in gleaning the Framers' intent with regard to the property clauses is that the Bill of Rights was added after the adoption of the Constitution for a variety of reasons that were not much discussed in the Convention or the Federalist Papers. The original draftsmen focused on the structure of government out of a belief that diffusion of power among different organs would obviate the need for specific guarantees of individual rights.[98] When the state ratification debates made it clear that this view was politically unacceptable, the first Congress proposed and the states adopted the first ten amendments.[99] Limits on state powers did not come into existence until the Fourteenth Amendment was ratified in 1868. Thus, the legislative history of constitutional protections of private property cannot be found in the history of the original text.

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[94] Munn v. Illinois, 113 U.S. 27 (1877).
[95] Allgeyer v. Louisiana, 165 U.S. 578 (1897).
[96] It is intriguing, if not overly persuasive, that Blackstone had elaborated rights of life, liberty, and property but that Jefferson changed those to "Life, Liberty, and the Pursuit of Happiness" in the Declaration of Independence.
[97] EPSTEIN, *supra* note 63, at 28.
[98] *See generally* GOTTFRIED DIETZE, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT (1960).
[99] *See generally* RUTLAND, *supra* note 45.

1. The Text

A useful starting point might be the text itself. What did the terms life, liberty and property likely connote to a thinking person of the late 18th Century? "Life" we can understand readily enough; this part of the Due Process Clause assures that some procedural safeguards are observed before capital punishment is applied. "Liberty" probably meant not being put in jail absent good reason. The Bill of Rights added some specific activities that could not justify being put in jail (speech, religion, etc.), while the Due Process Clause addressed principally the methods of administering the punishment decision. "Property" to the 18th Century thinker also must have been relatively simple. Although a few pioneers may have wished to include intangible attributes, most people would have thought only of land and similarly physical holdings.

Jefferson's phrase "life, liberty, and pursuit of happiness" in the Declaration of Independence, was drawn from the pre-Revolution Virginia Declaration of Rights,[100] which had also included the "means of acquiring and possessing property."[101] It could be argued that Jefferson thought that "pursuit of happiness" was more encompassing than "means of acquiring and possessing property." It could then be argued that substituting property for pursuit of happiness in the Fifth Amendment narrowed the protected category. As we will see, probably the most that can be said of this history is that that Madison's Fifth Amendment language encompassed a narrower range than "pursuit of happiness" but retained some vagueness with respect to the content of property rights.

2. Ratification Conditions

The phrasing chosen by Madison in the first amendments seems to be an amalgam of suggestions made by the states during the ratification process.[102] After five states had ratified,[103] a movement began in early 1788 to require various amendments before ratification. Opponents of the Constitution were forced into suggesting amendments when they realized that ratification was likely anyway.[104] Massachusetts was the first to "recommend" amendments and did so without any specific mention of property.[105] Maryland then ratified without reservation.[106] South Carolina ratified with one reservation and asked only for three amend-

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[100] Virginia Declaration of Rights §1 (June 12, 1776) (claiming "inherent rights" to "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety").
[101] *Id.* Locke used a variety of terms in different places to complete the phrase "life, liberty, and . . . ," including estates, fortunes, and possessions. Hamilton, *supra* note 73, at 868 n.6.
[102] A good source for the state ratifying resolutions is the set of appendices to Madison's DEBATES IN THE FEDERAL CONVENTION OF 1787 (G. Hunt & J. Scott eds., 1970).
[103] The first five were Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut.
[104] *See* RUTLAND, *supra* note 45, at 146–47.
[105] February 6, 1788. The Massachusetts recommendations dealt with such matters as reserving powers to the states, apportioning representatives, taxation, jury trial, and diversity jurisdiction. *See* DEBATES, *supra* note 45, at 651.
[106] April 28, 1788. DEBATES, *supra* note 45, at 652–54.

ments.[107] New Hampshire recommended a list of twelve amendments without mentioning property.[108] At this point, the constitution could have gone into effect without any liberty or property language.

Virginia then ratified with the insistence that amendments were "necessary to the proposed Constitution." One of the twenty provisions recommended was protection for "life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."[109] New York chose the phrase "life, liberty and the pursuit of happiness," the same as in the Declaration of Independence.[110] North Carolina[111] and Rhode Island[112] then followed the precise language of Virginia in their recommendations.

Thus, when Madison sat down to draft a specific proposal for presentation to Congress, he had before him two versions, one of which used the language of property and the other pursuit of happiness. Neither explicitly required judicial process, a condition that we can assume to have been implied in the statements.[113] Madison and the state conventions were working from two British versions of the process guarantee, one of which flowed from the other. Magna Carta protected property and liberty through the "law of the land,"[114] which was statutorily converted to "due process of law."[115] These provisions deal with law in an early state, when it made sense to speak of putting a person out of his tenements or imprisoning him because there were few other options and certainly no regulatory process to worry about. Madison borrowed the "life, liberty, and property" phrasing from Blackstone and Locke and the "due process" phrasing from the English Bill of Rights. But these provisions did not have a history particularly relevant to the modern regulatory state.

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[107] May 23, 1788. The reservation stated that the states retained powers not "expressly relinquished by them." The three suggested amendments had to do with methods of elections, methods of taxation (using the language suggested by Massachusetts), and changing the "religious test" prohibition following the oath of office provision in Article VI to "no other religious test." *See* DEBATES, *supra* note 45, at 655–56.

[108] June 21, 1788. DEBATES, *supra* note 45, 656–59.

[109] Virginia Resolution (June 27, 1788). DEBATES, *supra* note 45, 660. The provision suggested was virtually identical to the 1776 Virginia Declaration of Rights.

[110] New York, showing its eclectic and pragmatic nature from the beginning, chose a non-religious phrasing:

> That the enjoyment of Life, Liberty and the pursuit of Happiness are essential rights which every Government ought to respect and preserve.

New York Resolution (July 26, 1788). DEBATES, *supra* note 45, 665.

[111] August 1, 1788. *See* DEBATES, *supra* note 45, 674.

[112] May 29, 1790. DEBATES, *supra* note 45, 681.

[113] This condition certainly can be inferred from the proposed amendments of those states that dealt explicitly with procedural safeguards in the judicial process. It is just as easily implied by the context of the other state ratifications.

[114] Magna Carta, c. 39 (1215); Magna Carta, 9 Hen. III, c. 29 (1225) (reissue by statute).

[115] Stat.Ch. 3, 28 Edw. III, c. 3 (1355).

3. Madison's views

There is some mention of the issue in FEDERALIST NO. 10, Madison's famous discourse on the virtues of a republican, as opposed to purely democratic, form of government. His argument is addressed to control of "factions," by which he means groups of people with common interests who act on those interests rather than for the good of the whole community.[116] He claims that "the most common and durable source of factions has been the various and unequal distribution of property."[117] He also asserts that the cause of faction is liberty, including the right to acquire and use property, and that "it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."[118]

Madison, presumably aware of Locke's views, did not say that protection of property was the first object of government. For him, it was protection of the diversity of abilities and interests, which would then produce diversity of property holdings. Then the problem became how to ameliorate the effects of this diversity. His answer was a representative system that would prevent direct action on self-interest.

Madison elaborated in his *Essay on Property*.[119] According to Madison, property included those personal attributes that deserved private autonomy from government action, such as opinions, religious values and practices, and choice of occupation. We protect some of these interests under the rubric of personal liberty. He identified them as property probably for strategic reasons because at the time property was a label for protected interests while the liberty concept had not yet fully developed.

The Due Process and Compensation Clauses seem in the Madison phrasing to become general expressions of the interest of an individual to live free of government interference. Neither FEDERALIST NO. 10 nor the *Essay* say that property, in the sense of rights in physical things, should be inviolate or even as important as it was to Locke. Indeed, Madison explicitly subordinates rights in things to rights in the person because property is a creature of positive law while liberty is natural.[120]

Madison was the ultimate structuralist. His believed that personal freedom would be best protected through the structure of government. The whole point of creating a government is to restrain personal autonomy. Unbridled personal auton-

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[116] THE FEDERALIST NO. 10, at 52 (James Madison) (H. Lodge ed., 1895).
[117] *Id.* at 54.
[118] *Id.* at 53.
[119] Madison, *supra* note 46, at 478. *Property* is one of a series of short essays written on divers subjects during 1791 and 1792.
[120] *Id.* at 479 ("Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that being a natural and unalienable right.").

autonomy would result in anarchy, so the people must be made accountable to government. To this extent, he could be described as a Lockean social compact theorist. The next step, however, is important. Madison thought it necessary that government be accountable to the people. The people for this purpose would be not just the evolving and changing majorities of different times, but a representative group paying due attention to the personal rights of individuals and playing off one faction against another. A simple majority should not be allowed to govern because government's major purpose is to prevent a single "faction" from exercising its unrestrained will on others.[121]

Thus, when Madison was persuaded to adopt a Bill of Rights, he included rights that could generate a dynamic interaction between government and people. One of the organs of the people's will would be a judiciary armed with the Bill of Rights and judicial review as checks on government excesses and the majority will.[122] The dynamic character of "rights" in the Madisonian scheme leads to the conclusion that courts should be guided by logic, experience, and policy in enforcing constitutional principles. The choice to use words such as "due" and "just" in the property clauses of the Fifth Amendment implies a sense of comparison and evolution in light of contemporary needs and values. They seem to be words carefully chosen to leave the definition of property to future generations and there is nothing in their history to belie that impression.

D. From the Civil War to the New Deal

1. The Pre-Civil War Understanding

Whether property and liberty had substantive dimensions to be protected from legislative interference was a hotly debated topic during the first half of the 19th Century. Natural rights gained a substantial degree of credence in American law during the first half of the 19th Century. The 1798 dictum of Justice Chase, declaring that a legislative act "contrary to the great first principles of the social compact" could not be law,[123] became an established norm in American state courts under the heading of "vested rights."[124] The most explicit use of the doctrine by the U.S. Supreme Court was the celebrated case of *Fletcher v. Peck*,[125] in which the Court struck down a state legislature's attempt to rescind land grants that the previous legislature had been bribed to make. Marshall's opinion for the Court relied not

[121] THE FEDERALIST NO. 49 (James Madison).
[122] 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 93 (1911); 1 Annals of CONG. 439 (Joseph Gales ed., 1789).
[123] Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798).
[124] Corwin, *supra* note 91, at 255 ("The Doctrine of Vested Rights . . . setting out with the assumption that the property right is fundamental, treats any law impairing vested rights, whatever its intentions, as a bill of pains and penalties, and so, void.").
[125] 10 U.S. (6 Cranch) 87 (1810).

only on the contract clause and the *ex post facto* clause but also on "general principles which are common to all our free institutions."[126]

Thus, even prior to adoption of the Fourteenth Amendment, there was authority for holding state legislation invalid if it operated unfairly against established interests.[127] Posited on the other side was the police power, which allowed the state to enact any regulation or limitation that could be deemed necessary for the protection of property or liberty of other persons. The combination of the two doctrines during the early 19th Century has been described in this fashion:

> The legislative power extends to the abatement of public nuisances, *i.e.*, things detrimental to the health, safety and morals of the public generally, and it is the exclusive prerogative of the legislative department to decide whether the public need is sufficient to justify the abatement. But property rights can be taken for this purpose only, and if the act obviously would not in any way tend to accomplish this result, it will not be judicially held valid merely because it is enacted under the guise of a police regulation.[128]

The tension in this statement between the "exclusive prerogative" of the legislature and the review function of the court is obvious. If the Due Process Clause means only procedural regularity, meaning that there are no substantive values embedded in the Clause, the tension is inherent in the nature of a written and limited constitution. This tension permeated the debates over adoption of the Fourteenth Amendment and today persists; it is the question of what decisions will be left to legislative judgment and which will be undertaken by the courts in the exercise of judicial review.

The adoption of the Privileges and Immunities Clause and the Due Process Clause of the Fourteenth Amendment signaled a potential for applying the vested rights doctrine to state activities. The doctrine instead met with initial rejection, then gradual accretion and eventual demise, followed in turn by slow resurrection.

2. The Fourteenth Amendment

The Civil War and its resulting statement of principles, the Fourteenth Amendment, occurred at the inception of the industrial revolution and the westward expansion of this country. The abolitionist movement's combination with other historical forces does not belie a moral content in the movement. As with most human endeavors, particularly those involving more than one person, there were no doubt many different factors behind the events of the antebellum and postbellum era.

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[126] *Id.* at 139.
[127] *See* Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583 (1930).
[128] *Id.* at 609.

Attempting to find any specific content for the property clause of the Fourteenth Amendment is probably a fruitless exercise. For one thing, the clause was borrowed wholesale from the Fifth Amendment, which had a vague history and little judicial gloss prior to 1870. For another, it was mixed up with two other clauses that were certainly aimed at rights of the recently freed slaves and maybe at much more. Some 20th-Century Justices looking back at the adoption of the Fourteenth Amendment declared that it is impossible to discern coherent themes with any specificity.[129] But there may yet be some themes that are worthy of respect despite the lack of specificity in their articulation.[130]

Professor Fairman's thorough treatment of the debates over the amendment concentrates mostly on the statements of the key sponsors, Congressman Bingham and Senator Howard, and the understanding of the ratifying "people," as reflected in newspaper accounts of the day.[131] The issue with which Fairman was most concerned, because it was the subject of Supreme Court debate at the time, was whether the amendment was intended to incorporate all the provisions of the first eight amendments.[132] He concludes that no such intent can be found in the amending process and that conclusions about what the amendment was intended to do are "hazy" at best.[133] Curtis challenges Fairman's conclusion about the intent to incorporate the first eight amendments but does not indicate that the property clause of the Fifth Amendment had any precise content at the time.[134]

Certainly, the amendment was designed at least to validate the philosophy of the Civil Rights Act of 1866,[135] which mandated equality of civil rights, meaning those rights granted by the state to appear in court, enter into contracts, and own property.[136] Equality of civil rights carries no federal substantive definition and could proceed from a purely positivist position that the state need not grant any rights, but once it does, those rights must be equally available to all.[137] Some framers and voters must have believed that the amendment was providing federal definition and protection to substantive rights belonging to citizens of all free governments.[138] Whether these fundamental rights were limited to political rights, as Pro-

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[129] *See, e.g.*, Brown v. Board of Education, 347 U.S. 483, 489 (1954) *and* Oregon v. Mitchell, 400 U.S. 112, 278 (1970) (Brennan, J., concurring and dissenting) (stating that the "record left by the framers of the 14th amendment" is "vague and imprecise," and "capable of being interpreted by future generations in accordance with the vision and needs of those generations").

[130] *See* Henry S. Commager, *Historical Background of the Fourteenth Amendment*, *in* THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 14 (B. Schwartz ed., 1970).

[131] Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

[132] *See* Adamson v. California, 322 U.S. 46, 74–75 (1947) (Black, J., dissenting); Duncan v. Louisiana, 391 U.S. 145 (1968).

[133] *Id.* at 138–39.

[134] M.K. CURTIS, NO STATE SHALL ABRIDGE (1986).

[135] 42 U.S.C. § 1981, 1982 (2005).

[136] H. BELZ, EMANCIPATION AND EQUAL RIGHTS 121–39 (1978).

[137] *Id.* at 119.

[138] Henry S. Commager, *Historical Background of the Fourteenth Amendment*, *in* THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 24 (B. Schwartz ed., 1970); Howard J. Graham, *Early Antislavery Backgrounds*

fessor Ely later argued,[139] or were more broadly cast to include some of the civil rights made subject at least to the equality principle, is a matter we need not resolve here. Suffice to say that even if the latter category was intended, the framers and voters did not have in mind creation of new definitions beyond what already existed as protection against the federal government. Of course, those definitions themselves need not have been frozen but may have been left to the creative minds of future generations of lawyers and judges.

3. The *Lochner* Era

The industrialization and expansion of the United States between the Civil War and the Depression produced a full flowering of due process protection for property and economic liberties.[140] Starting from Justice Field's dissent in *Slaughter-House*,[141] which would have found the granting of a monopoly to certain butchers in New Orleans a violation of due process in terms reminiscent of Coke's language, the Supreme Court moved steadily to invalidate state-granted limitations on business practices. The individual's need for protection from industrial conditions and society's need for spreading economic opportunity drove the late 19th Century regulatory movement. The responses to regulatory controls combined the entrepreneur's argument for personal wealth with individual claims for autonomy. The autonomy claims prevailed in *Lochner*[142] to a degree that eventually became recognized as invalid in an industrial state.

When *Lochner* collapsed in the Revolution of 1937, it did so under the weight of a different claim for autonomy, that of the individual's right to be free of industry oppression and the right of collectives to restructure their economic lives.[143]

The rights involved in the *Lochner* era were generally described as "liberty of contract" rather than property interests, although property-like notions drove many of the arguments. *Lochner* collapsed so completely that the loss of substantive due process as a check on government action then had an impact in the property field. Between the New Deal and *Kaiser-Aetna*[144] in 1979, the Supreme Court did not invalidate a restriction on the use of property. Of course, even during the *Lochner*

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of the Fourteenth Amendment, Part I, 1950 WIS. L. REV. 610, 659; E. CORWIN, LIBERTY AGAINST GOVERNMENT 118 (1948).

[139] J.H. ELY, DEMOCRACY AND DISTRUST (1980); *see* BELZ, *supra* note 136, at 116.

[140] The story of *Slaughter-House* to *Lochner* to *Nebbia* has been told many times. For this author's version, see Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397 (1994).

[141] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[142] 198 U.S. 45 (1905).

[143] *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (finding statutory protection for the right of collective bargaining); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (approving minimum wage legislation).

[144] 444 U.S. 164 (1979).

era, the Court upheld almost all property restrictions brought before it except for the Pennsylvania coal-mining statute.[145]

During this time, there was no explicit attention paid to the difference, if there is any, between due process and takings claims, or between procedural and substantive due process. The two most significant land-use cases during the *Lochner* era, *Pennsylvania Coal Co. v. Mahon*[146] and *Euclid v. Amber*,[147] presented some anomalies that contributed greatly to the doctrinal confusion of later years.

Justice Holmes' opinion in *Mahon* actually dealt with two very different challenges to the Pennsylvania coal-support statute. The first part of the opinion applied a substantive due process test—the reasonableness of the regulation in light of the competing interests of the owners—to invalidate the statute despite Holmes' own general distaste for substantive due process doctrine. This part of the opinion dealt with the requirement of leaving support in place below the residences of people who had sold the subsurface to the coal companies, thereby explicitly bargaining away the right of support that they had under state law. Changing the rules of these transactions after they had taken place violated due process.[148] The second part of the opinion dealt with the requirement of leaving support in place under publicly owned facilities and found that the legislature was trying to accomplish by legislation what should have been done through eminent domain proceedings, the transfer of a private right that otherwise would exist under state law to a public entity.[149] Much of the later confusion about this case arose from its blending of substantive due process and takings concepts. Although the two concepts appear in distinct parts of the Holmes opinion, they were not separated neatly because the doctrine of the day did not call for separation.

Euclid, the case on the validity of zoning laws, contained some of the same anomalies. Justice Sutherland, a proponent of substantive due process, found without mentioning due process or taking that the zoning law on its face was not unconstitutional.[150] The opinion was carefully aimed at the facial challenge to the law and held only that the purposes of residential zoning could rationally warrant some legislative imposition on the preferences of owners.[151] Ironically, Sutherland's opinion used virtually the same language as courts did later to deny their power of judicial review over legislative judgments.[152] A fair reading of the opinion is that it was devoted almost exclusively to the concepts embodied in the then-fashionable

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[145] One specific application of a zoning ordinance was held invalid in Nectow v. Cambridge, 277 U.S. 183 (1928).
[146] 260 U.S. 393 (1922).
[147] 272 U.S. 365 (1926).
[148] Mahon, 260 U.S. at 414.
[149] *Id.* at 415–16.
[150] Euclid, 272 U.S. at 386.
[151] *Id.* at 395 (citing substantive due process cases).
[152] *Id.* at 393 (quoting State v. City of New Orleans, 154 La. 271, 283 (1923)).

substantive due process doctrine. There is hardly a hint of takings anywhere in the opinion.[153]

Mahon and *Euclid* were driven almost entirely by the due process thinking of the *Lochner* era. It is unfortunate that some of their language, particularly portions of *Mahon*, have later been taken as precedent on the takings issue. As we will see in the next section, the loss of substantive due process after 1937 had a doctrinal impact that could have resulted in starting from scratch on the takings problem rather than borrowing language from a discarded doctrine and applying it to another doctrinal issue.

There was no delineation between "substantive" and "procedural" due process until the Court abandoned its practice of inquiring into the reasonableness of legislative judgments on social and economic matters. Then, when the Court began to enforce procedural norms with respect to economic interests, phrases were needed to distinguish what it would do from what it would not do under the heading of due process.[154] The first use of the phrase "substantive due process" in a majority opinion was in 1965,[155] the same year in which the Court decided that married couples had a constitutionally protected right to the use of contraception[156] and the same year in which Professor Charles Reich published the second of his influential articles on the nature of property in the modern state.[157] With the adoption of Reich's demand for procedural protection of government benefits in 1970,[158] the distinction between substantive and procedural due process was complete.

The "procedural" due process cases make a couple of significant points at this stage. First, there is no bright line between procedural and substantive aspects of state treatment of claims that the Supreme Court will review for fairness and rationality. There is no way of determining what procedures are due without determining what content of the private claim may be recognized by state law. Second, the link between definition of the claim and due process protection is becoming more firmly established, solidifying the presence of judicial review over substantive state law decisions.[159] Finally, federal courts must recognize and protect core intangible property rights regardless of how the state defines the claim of right.

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[153] The exception is some slight suggestion that failure to grandfather existing uses when enacting a new zoning provision might be a problem.
[154] McCormack, *supra* note 140, at 406–07.
[155] Swift & Co. v. Wickham, 382 U.S. 111, 127 (1965).
[156] Griswold v. Connecticut, 381 U.S. 479 (1965).
[157] Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); *see also* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964); Charles Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).
[158] Goldberg v. Kelly, 397 U.S. 254 (1970).
[159] Alternatively, Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984), suggest that the question is "whether the defendant's conduct has passed the boundary of acceptable governmental behavior toward individuals."

The embedding of enduring values into the Constitution requires judges to exercise judicial review over the legislative will according to general precepts drawn from history. The functions of rights (whether denominated property or liberty) in both economic and personal interests are relatively enduring, if we can discover what they are. The protection of function-based rights at any given time requires judges to assess a legislative enactment in terms of its impact on those functions, using different tools of analysis as the realities of society change. The result is an ever-dynamic process of asking questions about institutional competence and individual interests as underlying societal facts shift underfoot. At the due process stage, even using an updated version of "substantive" due process, rights in property are only "relatively enduring" and not fixed. Therefore, finding more firmly fixed points in the Takings Clause will be critical.

E. The Substantive Due Process Case Law

The origins of substantive due process in "natural rights" rhetoric of the pre-revolutionary Western heritage have been traced by many scholars.[160] The Supreme Court's early flirtation with the concept[161] came under several doctrinal headings, including an overt derivation of substantive rights from the compact origins of the Constitution. Through the early part of the 19th Century, state courts often protected "vested rights," although they acknowledged some role for the state's police power in limiting vested rights.[162] The road from *Slaughter-House* to *West Coast Hotel* has been similarly well traveled.[163] It is only necessary here to set out a brief chronology while concentrating particularly on the underlying themes.

Slaughter-House[164] was a challenge to a state-granted monopoly over the trade of butchering within the surroundings of New Orleans. The public health justification involved the effects of butchering meat in a hot city before the days of refrigeration. Legislation deprived a number of persons of their livelihood and denied others entry to the trade, to the benefit of the favored monopoly. Thus, the tension between vested rights and the police power of the state was cast in concrete terms for resolution by the Court, which denied that the tension was found in the Constitution.

The challenge was brought under all three clauses of the first section of the Fourteenth Amendment—Privileges and Immunities, Due Process, and Equal Protection. The Court dismissed the privileges and immunities challenge, asserting that the Fourteenth Amendment version of the Clause covered only the relation-

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[160] *E.g.*, Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 507–08 (1908); Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 363 (1916).
[161] Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).
[162] Corwin, *supra* note 91; *see also* Howe, *supra* note 127.
[163] *See, e.g.*, ELY, *supra* note 13, at 167–79; A. MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM 61–62 (1968); Walton Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269, 294–95 (1938).
[164] Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

ship between citizens and the federal government.[165] As for equal protection, the Court held that it applied only to the recently freed slaves and other racial minorities. The Court tossed aside the due process challenge, as no definition of either property or liberty had ever included the right to work as a butcher.[166]

The majority opinion in *Slaughter-House* thus stands as a triumph of positivism over natural law. If the written word did not create a right to function as a butcher, then the Court could not protect that right. By contrast, the dissents were full of natural law thinking. Justice Field cited prior language of the Court to find protection for "those privileges and immunities which are fundamental, *which of right belong to the citizens of all free governments*. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."[167] Field thus saw equal protection as a necessary part of the natural rights of citizens. Justice Bradley found that the "fundamental rights [which] belong to the citizens of every free government" were protected by the Due Process Clause.[168] For Bradley the right to pursue a calling was protected from government interference and once exercised became a part of the citizen's property. He did not elaborate what due process required once the right was found to exist. Finally, Justice Swayne baldly claimed that the national government would be "glaringly defective" if it lacked the authority to "secure . . . rights and privileges . . . which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy."[169] Swayne's recourse to the social compact and reason foreshadows much of the economic rights thinking of today.

The regulatory movement of the late 19th Century took impetus from *Slaughter-House* and began to move against businesses that were invested with a "public interest."[170] As society industrialized, particularly in the rapidly westward-expanding United States, many businesses were seen by legislators to share the now-familiar attributes of a public utility:[171] necessity of the service being provided, limited prospects for entry into the market, declining unit costs when one supplier could meet all demand for a particular product or service, externalities (external consequences to a transaction which are not likely to be redressed by the parties to the transaction),[172] and a resulting potential for either financial or physical abuse. Early reform efforts focused on the potential for abuse and sought either

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[165] *Id.* at 77.
[166] *Id.* at 410.
[167] *Id.* at 418 (emphasis in original).
[168] *Id.* at 421.
[169] *Id.* at 425.
[170] *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1876); Allgeyer v. Louisiana, 165 U.S. 578 (1897).
[171] *See generally* S. BREYER, REGULATION AND ITS REFORM (1982); J.W. HURST, LAW AND MARKETS IN UNITED STATES HISTORY (1982).
[172] *See* TOM RIDDELL, JEAN SHACKELFORD & STEVE STAMOS, ECONOMICS: A TOOL FOR UNDERSTANDING SOCIETY 184 (2d ed. 1982); RALPH T. BURNS & GERALD W. STONE, ECONOMICS 767–72 (2d ed. 1984).

to regulate the prices charged by a "public interest" company[173] or to limit entry to entities that could be controlled.[174] In the latter instance, an entrepreneur obtained a publicly enforced monopoly in return for regulation of prices and service quality.[175] The Supreme Court resolved the debate over the constitutionality of rate regulation by holding that a fair return was necessary on the utility's investment, which resulted in the now familiar exercise of defining the rate base.[176] Thus was born the system of public regulation, against which we are now experiencing the conservative backlash.

That some legal legerdemain was needed to create the notion of a business "affected by the public interest" shows that the *Slaughter-House* dissents and the vested rights heritage of the early 19th Century had overtaken the positivism of the *Slaughter-House* majority. The Supreme Court, in terms reminiscent of both "vested rights" and of Madison's description of property, recognized a "right to make a contract" protected by the Fourteenth Amendment.[177] Then *Lochner*[178] challenged a state maximum hour statute for bakers, and the Court added the "right to purchase or to sell labor" to the category of liberty.[179] The Court recognized that "[b]oth property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state,"[180] but held that it was the court's job to determine when a government regulation was "an unreasonable, unnecessary, and arbitrary interference with the right of the individual."[181] After rejecting the argument that the health of the employee and the quality of bread sold to the public might be affected by long hours, the Court ventured to lecture the legal profession and state legislatures on the "illegal . . . and . . . meddlesome interferences" that labor laws represented.[182]

The *Lochner* era was not exactly a heyday for the anti-regulatory movement.[183] Over the next thirty years, the Court rejected more substantive due process attacks than it accepted.[184] But it continued to strike down laws setting minimum

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[173] Munn v. Illinois, 113 U.S. 27 (1877); Ex parte Young, 209 U.S. 123 (1908).
[174] Allgeyer v. Louisiana, 165 U.S. 578 (1897).
[175] *See* Glenwood Light & Water Co. v. Mutual Light, Heat, & Power Co., 239 U.S. 121 (1915). *See generally* Walton H. Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089, 1097 (1930); Edwin C. Goddard, *The Evolution and Devolution of Public Utility Law*, 32 MICH. L. REV. 577, 591 (1934).
[176] Missouri ex rel. S.W. Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276 (1923); Smyth v. Ames, 169 U.S. 466 (1898).
[177] Allgeyer v. Louisiana, 165 U.S. 578 (1897). *See* Madison, *supra* note 46, at 478 ("property in the free use of his faculties, and free choice on which to employ them").
[178] 198 U.S. 45 (1905).
[179] *Id.* at 53. Why the Court chose to use the concept of liberty rather than property when describing the purchase and sale of something is buried in the political economy of the times. *See* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 400–01 (1988).
[180] *Lochner*,198 U.S. at 53.
[181] *Id.* at 56.
[182] *Id.* at 61-64.
[183] *See generally* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922); BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW (1942).
[184] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1344 n. 4 (3d ed. 2000).

wages[185] or legitimating collective bargaining over terms of employment.[186] The Court more readily accepted maximum hour laws than laws setting minimum wages after Brandeis famously demonstrated some health effects from excessively long working hours.[187] During this time, the Court upheld a number of laws and regulatory schemes that had the effect of excluding persons and businesses from various portions of the marketplace[188] while striking down others.[189]

The Great Depression, the New Deal response, and the collapse of the Court's substantive due process doctrine are thoroughly familiar. *Nebbia v. New York*[190] invoked a new way of looking at economic policy. It was the first price regulation case to reach the Court in which the industry involved did not fit into the traditional "public interest" category of a regulated monopoly. The state was setting prices for milk in an effort to ensure an adequate return to the farmer and arguing that the consumer would be protected from bad milk by having financially stable farms. After reviewing and accepting, the Court again lectured the legal profession on the same theme as *Lochner* but with the opposite focus.[191]

The contrasting opinions in two cases that involved Congress' power under the Interstate Commerce Clause, *Carter v. Carter Coal Co.*[192] and *NLRB v. Jones & Laughlin Steel Co.*,[193] put these developments into more complete context. In *Carter*, which struck down the collective bargaining requirements of the Bituminous Coal Conservation Act of 1935, the majority opinion refused to recognize sales in various states as demonstrating the interconnected nature of transactions.[194] By contrast, in *Jones & Laughlin* the Court considered macro-economic concepts in holding that activities which would be intrastate if viewed separately might well have a cumulative effect that is interstate in character.[195] The interlocking nature of 20th Century

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[185] Connally v. General Const. Co., 269 U.S. 385 (1926); Adkins v. Children's Hospital, 261 U.S. 525 (1923).
[186] Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).
[187] Muller v. Oregon, 208 U.S. 412 (1908) (maximum hours for women justified by the Brandeis brief on the basis that the health of women was important to survival of the species); Bunting v. Oregon, 243 U.S. 426 (1917) (Frankfurter's brief on behalf of maximun hours law for men; legislation upheld without even a citation of *Lochner*).
[188] *E.g.*, Lehon v. City of Atlanta, 242 U.S. 53 (1915) (licensing of private detectives); Heim v. McCall, 239 U.S. 175 (1912) (citizen-only employment rule challenged on due process grounds); Rosenkrans v. Rhode Island, 225 U.S. 698 (1910) (licensing of dentists).
[189] *E.g.*, Adams v. Tanner, 244 U.S. 590 (1917) (employment agencies); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (licensing of ice manufactures and vendors).
[190] 291 U.S. 502 (1934).
[191] *Id.* at 537–39.
[192] 298 U.S. 238 (1936).
[193] 301 U.S. 1 (1937).
[194] 298 U.S. at 308. *See also*, Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (stating that "the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce "among the several States" and the internal concerns of a State").
[195] For at least two generations of law students, *Wickard v. Filburn* has epitomized the triumph of macro-economic theory. 317 U.S. 111 (1942) (holding that Congress can regulate the wheat grown by a farmer for his own consumption because it affects interstate commerce).

labor and capital markets meant that a one-sided look at the property-like interests of the employer or the producer would no longer suffice.

Economic substantive due process suffered a lethal blow in *Nebbia*, lost its brain waves in *West Coast Hotel v. Parrish*,[196] but was not pronounced clinically dead until much later.[197] At that point, the Court no longer had a doctrine with which to test the reasonableness of legislative limitations on business enterprises. Instead, it developed a potpourri of doctrines under other constitutional clauses and federal antitrust laws.[198]

III. A Human Rights Future for *Lochner*

A. What Was Wrong With *Lochner*

Today's backlash against regulation echoes the one that occurred around the turn of the 20th Century, which built on themes in the *Slaughter-House* dissents. It emphasized (1) the freedom of each individual to make his or her own decisions about the use of time, energy, and talent in the economic world, and (2) the propriety of allowing a fair return on that use. Unfortunately, those two themes are not always consistent, a thought unacknowledged during the development of the *Lochner* doctrine. For example, the Court gave weight to the argument that the entrepreneur was entitled to a fair return on investment without recognizing the entitlement of fair return to other parties to the transaction. Despite early warnings that lack of any return might constitute a taking, the Court began applying an arbitrary and capricious standard to rate regulation.[199] They also, however, accepted the argument that the worker was entitled to work as many hours as he wished at as low a wage as he (but not she) wished, ignoring the countervailing theme of a fair return on time, energy, and talents. Apparently, so long as another "private" party, not the government, was depriving one of a fair return, it was none of government's business.

Similarly, when government attempted to remove impediments to the bargaining power of private parties by legitimating collective bargaining for workers, the Court viewed this as an imposition on the freedom of contract of both worker and employer.[200] The Court allowed action only when there were imperfect markets or when there was a need to ensure that the market gave participants a fair return on their time, energy, and talents. The Court was willing to treat business regulations as modern counterparts of fraud and theft laws only when the state demonstrated specific defects in the unregulated market.

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[196] 300 U.S. 379 (1937) (upholding statute setting minimum wages for women).
[197] Ferguson v. Skrupa, 372 U.S. 726 (1963); *see* Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952).
[198] *See* McCormack, *supra* note 61.
[199] Munn v. Illinois, 94 U.S. 113 (1877) (regulation of grain elevator rates); Smyth v. Ames, 169 U.S. 466 (1898); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).
[200] *See e.g.*, Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Carter v. Carter Coal Company, 298 U.S. 238 (1936).

Many frivolously ridicule the Court's lack of perception in *Lochner*.[201] The doctrine, and its exceptions, were in fact within the mainstream of American thinking.[202] If this is true, then we need to take a more sophisticated look at the doctrine itself. Writers about *Lochner* tend to belabor some single defect in the economic substantive due process doctrine. There are more likely a number of explanations for and problems with the doctrine as it was applied in the early part of the 20th Century. There was really nothing wrong conceptually with the doctrine. The Court was not wrong to ask the questions in *Lochner*; it simply reached the wrong answers.

Let us start with the explanations for what happened. There are basically two categories of explanations: those that emphasize institutional competence (or judicial process) and those that emphasize economic theories or values.

The most common form of the institutional competence explanation relates to the judicial activism-restraint dialogue. Justice Holmes' classic dissent in *Lochner* advocated the "right of a majority to embody their opinions in law."[203] The rise and abandonment of substantive due process was explained frequently at the time as depending on the Court's willingness to second-guess the legislature on questions of economic policy[204] or on the rationality of means chosen to meet an objective.[205] If this were the sole explanation, then the Court would be acting inconsistently, in abandoning judicial review of legislation in the business field but employing stringent review in the personal field.[206]

A variant on the judicial process theme is the argument that the judges in the *Lochner* era were being formalistic.[207] But others have shown that the *Lochner* result was hardly formalistic; it adopted a set of economic policies based on classical economic values.[208]

A third type of institutional competence argument is that the federal courts under *Lochner* were interfering with the process of federalism and preventing state experimentation in social arrangements.[209] A degree of state autonomy does pro-

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[201] Ridiculing other institutions, however, can be more fun. Corwin's description of the origins of the American Bar Association in the late 19th Century as "a sort of juristic sewing circle for mutual education in the gospel of laissez-faire" is both humorous and instructive. EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 138 (1948).
[202] Hamilton, *supra* note 163, at 294–95; Hovenkamp, *supra* note 179.
[203] 198 U.S. at 75.
[204] Robert E. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 748–50 (1922).
[205] Edwin C. Goddard, *The Evolution and Devolution of Public Utility Law*, 32 MICH. L. REV. 577, 591–92 (1934).
[206] Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 828-30 (1986); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 937–43 (1973).
[207] Cushman, *supra* note 204, at 750; *see* Hovenkamp, *supra* note 179, at 382.
[208] Hovenkamp, *supra* note 179, at 386.
[209] *See New State Ice Co.*, 285 U.S. at 309–11 (Brandeis, J., dissenting).

vide a "laboratory" of diverse social and business arrangements.[210] But this story fails to consider *Lochner* holdings against the federal government and *Lochner*-style reasoning in federal Commerce Clause cases. These rulings actually enhanced the ability of states to engage in experimentation. If there was something wrong with these cases, it certainly was not interference with state autonomy.

A fourth type of institutional competence argument is that judges during the *Lochner* era were doing what their legal background required until they reached a point at which a super-majority demanded a different approach. Under this view, the post-1937 Court simply bowed to the will of a super-majority as if the Constitution had been amended.[211] But this explanation is not sensitive to the content of the decisions. If this were the Court's objective, it would have bowed to super-majorities no matter what the subject. The Constitution's ability to provide both stability of judicial decisions and a judicial role in building new consensus would be lost. Standing alone, this would be a very unsatisfactory situation.

None of this proves that the judges of the *Lochner* era were not second-guessing the legislature or that subsequent judges have not been extremely deferential to legislatures on economic issues. Nor does it deny that federal judges should be sensitive to federalism concerns or to the will of a super-majority. It merely says that the judicial process model alone cannot explain the results.

The second category of explanations is economic. The most common example says that substantive due process was tied up by several existing strands of thought that emphasized autonomy of the individual in the natural order.[212] This emphasis on the individual and the increasing use of the scientific method combined to produce what we now recognize as classical legal reasoning. The classical reasoning process divided areas of private and public concerns into separate rigid categories and insisted that neither could invade the other.[213] Judicial implementation of the resulting laissez-faire economic philosophy produced the appearance of formalism. Both the classical reasoning process and its economic philosophy broke down under the pressures of the New Deal because the areas of private and public concern simply would not stay within their compartments.[214] But even if both the method and philosophy are historical relics, they may still reflect values or concerns that are relevant today. Many a discarded theory of operation has resurfaced in a new form that preserves many of the same values. Individualism in economic

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[210] *See* HERBERT WECHSLER, POLITICAL SAFEGUARDS OF FEDERALISM: PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW (1961). Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 918–20 (1985).
[211] Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1056 (1984).
[212] *See, e.g.*, Hamilton, *supra* note 163, at 294–95.
[213] *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (1868); CHRISTOPHER G. TIEDEMANN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES (1886). A sympathetic critique of this influence is CLYDE E. Jacobs, Law Writers and the Courts (1954).
[214] *E.g.*, Richard A. Epstein, *The Classical Legal Tradition*, 73 CORN. L. REV. 292 (1988); Gary Peller, *The Classical Theory of Law*, 73 CORN. L. REV. 300 (1988).

life might be a value to be desired even if we recognize that it is not commonly achievable or judicially enforceable.

A related set of doctrine and thought was the emphasis on equality of opportunity in the late 18th and mid 19th Centuries. Some of the ratifying conventions pressed for Congress to adopt a version of the property clause that would have guarded the "means of acquiring, possessing and protecting property."[215] These versions would have made explicit what may have been implicit: that one of the law's purposes must be to make everyone equal with regard to the legal opportunity to acquire rights. The abolitionist movement dwelt on this theme and applied it not just to the Due Process Clause but also to the Equal Protection Clause of the Fourteenth Amendment.[216] Liberty of contract was not just a natural right; it was also a method of ensuring that every person had the same right to participate in the economic system.[217] Under that view, differing degrees of wealth could hardly be attributed to any fault of government, whose responsibility is only to protect their equality to contract with whatever they do have.

Both the individualism and the equality arguments suffer from the same inability to explain all the results of the *Lochner* era. The Court frequently sustained police power enactments when it was persuaded, either through Brandeis brief, intuition, or tradition, that the particular measure was necessary to promote some public interest. Thus the autonomy arguments needed a boost from one of the institutional competence arguments to overcome judicial inertia.

Closely related to the autonomy arguments is the "existing distribution of wealth" argument. Professor Sunstein describes the *Lochner* doctrine as an effort to build a baseline with respect to which government must be neutral.[218] The baseline enforced by the Court was the existing distribution of wealth and resources under the common law. That distribution could be disturbed only if the legislation had a sufficiently broad base of effects to be characterized as "public" in character. Otherwise, it would be seen as mere special interest legislation benefiting one identifiable group at the expense of another. As an exercise of raw political power, the regulation would then be a violation of the Due Process Clause's command of neu-

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[215] Virginia Ratification Resolution, 2 Documentary History of the United States 377 (1894). The language originally appeared in the Virginia Declaration of Rights.

[216] *See* JACOBUS TEN BROEK, EQUAL UNDER LAW 116 (1965); Henry S. Commager, *Historical Background of the Fourteenth Amendment, in* THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 24 (B. Schwartz, ed. 1970); Howard Jay Graham, *Early Antislavery Background of the Fourteenth Amendment*, 1950 WIS. L. REV. 610, 659 (1950).

[217] *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

[218] Cass Sunstein, *Lochner's Legacy*, 87 COL. L. REV. 873 (1987). Sunstein points out that the *Lochner* premise of neutrality finds modern expression in a variety of settings including first amendment, equal protection, and procedural due process adjudications. A *Lochner*-like insistence on government neutrality is appropriate in some settings depending on the history and text of a particular constitutional phrase.

trality above the baseline.[219] *Lochner* was wrong, according to Sunstein, mainly because it was based on the wrong clause. Due process should not imply neutrality toward existing wealth and resources, but the Takings and Contracts Clauses could require such neutrality.[220] Sunstein believes that the latter two clauses can be more easily confined to protection of the "backdrop set by independent theories of entitlement and an appreciation of the social functions of private ownership."[221] This assertion does not flow from either text or history,[222] but it is right in identifying the proper bases of economic rights. Theories of entitlement and functional theories of property are a much more solid base than abstract history or theory.

A third economic view of the *Lochner* era is that the judges simply drew on the prevailing theories about political economy, which is the study of "how resources should be divided among conflicting claimants."[223] Under this view, the doctrine of substantive due process was correct because it reflected the norms of the legal profession dominant in the early part of this century and only became wrong when the political-economic climate changed.[224] Professor Hovenkamp asserts that this explanation is inconsistent with both the usual judicial activism explanation and the various economic explanations that have been offered, including the Sunstein "preservation of existing resource distribution" explanation.[225]

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[219] *Id.* at 878–79. Today there can be little question that government was just as much involved in establishing distributions of wealth and resources through the common law as it has been when acting through legislation.

[220] *Id.* at 913.

[221] *Id.* at 913. Sunstein asserts that others have argued for reading the Takings and Contract Clauses in this fashion. He may be right, but it is not entirely clear that the works cited stand for that proposition. He cites BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986); *and* Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981). Ackerman only proposes that we must tell courts whether they are supposed to protect property interests. Baker analyzes property extensively in terms of economic functions that it might serve and concludes that strict recognition of property interests is not necessary to enhance individual autonomy. Michelman argues for strict protection of existing property interests, pointing out that property is protected as a primary right under the constitution.

[222] The assertion that due process was the wrong clause for carrying out the purpose of protecting economic interests flies in the face of the history of the clause, which carried precisely the implication of judicial solicitude for the social functions of property and liberty. On the other hand, it is true that the Court's attempt to set a permissible legislative agenda demonstrates the futility of trying to use due process as a limit on the "public purposes" for legislation generally. Given the fertile imaginations of post-1937 advocates and their ability to spell out the macroeconomic consequences of any legislation, we might just as well conclude that there must be some public purpose behind a legislative enactment or else it would not have been enacted. As we will see, the question is not so much the existence of a public purpose behind a particular enactment, but the degree of imposition on protected rights justified by that public purpose.

[223] Hovenkamp, *supra* note 179, at 384.

[224] *See* EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 447 (1948).

[225] The argument is that, rather than maintaining existing resource distributions, the Court actually gave laborers, immigrants, and the poor increased access to established markets by striking down protectionist legislation. Hovenkamp, *supra* note 179, at 390.

Hovenkamp attempts to refute the "resource distribution" argument by pointing to Supreme Court decisions that upheld price controls on public utilities[226] or struck down regulations that would have benefited existing businesses by restricting entry to the market. But this response to the argument misses the point. The argument is not that the judges were trying to protect the vested interests of specific businesses or persons, but that they were protecting an existing wealth distribution or class structure.

None of these arguments casts doubt on the proposition that the judges of the era were committed to a "laissez faire" philosophy, which Justice Holmes called an outdated economic philosophy. Were they wrong to be so committed? Their error may involve the subject of commitment, the depth of the commitment, and the outdated-ness of elements of the philosophy. The Holmes dissent touted the majority's right to express its opinions in law in the economic area without mentioning some possible limitations in other areas. His view that the Constitution "does not enact Mr. Herbert Spencer's Social Statics" says nothing about whether the Constitution might enact some other set of policies with regard to economic rights or personal liberties.

The economic explanations of *Lochner* and its demise would be incomplete without the suggestion that the judges embarked on proper courses without all the necessary tools of navigation. In the public utility field, they seemed to have what they needed. But in simple regulatory matters, the techniques of macro-economics were not yet fully developed. When the Depression showed what could happen when millions of seemingly individual decisions were aggregated into a social pattern, the Court was able to analyze economic and business regulation through the lens of social organization rather than the microscope of individual autonomy. The *Lochner* Court may have been asking the right questions but getting the wrong answers due to the lack of information and analytic tools.

It is puzzling that so many authors have limited themselves to a single explanation for the *Lochner* phenomenon. Is there a single explanation for the modern judge's protection of other interests, such as free speech or sexual privacy? No, judges are human beings. The many sources of judicial decision-making include the text and judicial precedent as well as institutional concerns and economic theories. The same must have been true of the *Lochner* era judges. If there was no one reason for their actions, then there was likely to be no single consequence of those actions.

The complete answer lies somewhere in a combination of the institutional and economic arguments. As Justice Holmes said, the Constitution does not adopt any economic theory and render it immune from legislative change by the majority,

[226] But he recognizes that price controls were actually sought by industry itself as a means to restrict competition and produce legal monopolistic pricing. Hovenkamp, *supra* note 179, at 390.

at least not when a super-majority has made its policy choices felt in reasonably concrete terms. A single economic theory cannot answer all questions because the economic conditions on which the theory operates will change, and new tools of economic analysis will be brought to bear on new conditions. As an easy example of the relationship between theory and fact, the meaning of the Interstate Commerce Clause did not change in 1937, rather the nature of commerce changed, so the old theories either did not fit the new facts or produced new results because of changed circumstances. The better conclusion is that the Constitution has not been changed by judicial fiat, but its significance has changed in light of changed conditions.

B. Liberty as an Umbrella for Human Rights

We have already seen James Madison's link between property and rights of conscience. Madison's thoughts could be linked to the writing of Charles Reich, who argued that incorporeal property rights should be protected by procedural due process.[227] From Reich the rights of expression and conscience are only a small step away. For example, although Justice Stone may have thought that First Amendment rights would occupy a "preferred position" over property claims,[228] later Supreme Court cases argued that

> the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.[229]

That rights of expression could not exist without rights of property might not be intuitively obvious, but a few examples will illustrate the point. If there were no protection for printing presses or other means of communication, it would be difficult for a speaker to transmit effective expression. If there were no protection for books and other means of receiving information, it would be difficult for the other end of communication to take place. As another illustration, the American Constitution grants Congress the power to protect creativity without using the term "intellectual property," but the equation of creative products with property is now familiar. More generally, protection for property rights in some degree supports an overall inclination to limit government involvement in the affairs of the citizenry.[230]

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[227] *See* Goldberg v. Kelly, 397 U.S. 254 (1970), *citing* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964); Charles Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).
[228] Jones v. Opelika, 316 U.S. 584, 608 (1942).
[229] Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).
[230] "An economic system resting on private property ownership tends to diffuse political power and to strengthen individual autonomy from governmental control." ELY, *supra* note 13, at 155.

As stated at the outset of this essay, the US Supreme Court has used a cycle of phraseology regarding human rights. In the *Lochner* era, the Court employed a generalized notion of liberty that incorporated contract and property rights as if the right to abuse others were a guaranteed element of Anglo-American citizenship. When *Lochner* collapsed under the New Deal, the Court began to concentrate on the enumerated rights of the first eight amendments but soon found them inadequate to express all the legitimate demands of individual freedom in the modern era.

"Fundamental rights" became the language in which the Warren Court anchored unenumerated rights that it implied from the "concept of ordered liberty," or the rights of "citizens of all free governments," or the "traditions of English-speaking peoples." Now the Court is abandoning fundamental rights language in favor of a generalized notion of liberty. The fundamental right language was convenient as a method of associating them with recognized sources of law. Doing so erected a buffer against the charge of unaccountable tyranny by a minority. An unfortunate side-effect of this language was the rigidity of the three-tiered levels of scrutiny, although the categories are much more malleable than might appear on the surface.

Justice Marshall first articulated a substitute "sliding-scale" approach in *San Antonio v. Rodriguez*,[231] Justice O'Connor incorporated a revised version into the description of liberty in *Casey*,[232] and Justice Kennedy stated a succinct model of liberty for the *Lawrence* opinion.[233] Recognition of a generalized liberty, however, does not by any means imply the end of specific rights. Certainly those enumerated rights of the first eight amendments, and those that can be specifically implied from the text, will protect against all but "compelling state interests" or the equivalent. But the US Supreme Court has apparently stopped searching for textual anchors for unenumerated rights.

Now that the Court has begun relying directly on the liberty of the individual, the next step will be determining how that liberty will fare against claims of need from the community. *Lawrence* spells it out rather clearly in terms that would have been quite familiar to Locke and Mill, recognizing a private realm of autonomy in which the community has no legitimate interest in the morality of his or her actions.

With this broad stroke, the Supreme Court has incorporated more than four centuries of Anglo-European personal liberty thought. How will this fare in the international development of human rights?

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[231] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).
[232] "Only where state regulation imposes an undue burden on a woman's ability to make [the abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." Planned Parenthood of SE Penn. v. Casey, 505 U.S. 833, 874 (1992) (joint opinion).
[233] "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Lawrence v. Texas, 539 U.S. 558, 562 (2003).

As Western Euro-American values seek to find root around the world, questions arise about the conflicts among a variety of claims of right. To what extent can individual values co-exist with communal values? For example, religious beliefs and practices may conflict with individual rights of conscience[234] or with claims of nondiscrimination.[235] Most importantly for the themes of this essay, economic reforms will probably present the *Lochner* issue directly, as when a claim for individual autonomy such as the right to work[236] or the right of property[237] clashes with claims of a right to sustenance.[238]

Conclusion

The principal burden of this article has been to review the history of economic rights in American law and show a link between economic rights and personal liberty. This link will be instructive as global legal developments struggle with human rights issues in general. Although it is beyond the scope of this article to delve very far into issues of genocide and crimes against humanity, it is worth noting that American and international tribunals are interacting at increasing levels.

The International Criminal Tribunal for Rwanda has had two occasions to address the degree to which universal rights to be free of violence and discrimination may collide with rights of free expression. These are cases of prosecutions for "incitement to genocide." In *Akayesu*, the Tribunal considered the extent to which speech could be criminalized, noting some slight differences in how common law and civil law systems approach the issue but concluding that "direct incitement" could be found in the context of imminent violence.[239]

Akayesu was not a terribly difficult case on the precise incitement issue because the speech in question occurred in the immediate presence of an angry mob. The issue became much more problematic, however, when newspaper and radio station owners were prosecuted. In *Nahimana*, the Tribunal engaged in a very extensive discussion of "hate speech" cases from the ICJ, ECHR, and the US courts to conclude that international law was congruent with US law in providing less protection for the speaker when promoting violence or intimidation of minority

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[234] *See, e.g.*, Prakash Shah, *International Human Rights: a Perspective from India*, 21 FORDHAM INT'L L.J. 24 (1997).

[235] *See, e.g.*, Pamela A. Jefferies, *Human Rights, Foreign Policy, and Religious Belief: An Asia/Pacific Perspective*, 2000 B.Y.U.L. REV. 885, 900 (2000).

[236] International Covenant on Economic, Social, and Cultural Rights, article 6.

[237] Universal Declaration of Human Rights, article 17.

[238] International Covenant on Economic, Social and Cultural Rights, article 11.

[239] Prosecutor v. Akayesu, ICTR-96-4, Trial Chamber Judgment, ¶¶ 555–560 *at* http://www.ictr.org. Compare with Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions").

groups than when the speaker's attacks are directed against the majority or the government itself.[240]

The accuracy of the Tribunal's characterization of US law is less important than the effort to harmonize US and international norms. Reciprocally, Justice Kennedy relied heavily on the ECHR to demonstrate in *Lawrence* that international norms were relevant to the substantiality of "the claim put forward" for individual liberty.[241]

Although the specific language of the US Constitution as well as the language of international conventions and declarations will continue to be parsed for protection of enumerated rights, the generalized claim of liberty will likely become a significant part of how specific provisions are connected to each other. The international definitions of genocide and crimes against humanity are still changing, and now they must be read against competing claims for freedom of expression. As international tribunals and national courts continue to rely on each other's case law, other norms, such as inchoate crimes (attempts and conspiracies) will generate additional clashes between criminal prosecutions and individual liberties. In those cases, human rights documents will be less important sources than the manner in which other courts have dealt with similar claims. A generalized notion of human dignity and liberty will ease the task of importing those claims across cultures and documents.

Similarly, protection of religious freedom will require judicial interpretation, which may be guided by general claims of liberty. Just as the Religion Clauses of the US First Amendment can sometimes clash, freedom of religion and individual liberty can clash in international protection of human rights. This can occur whenever a majority exercises its "freedom" to establish an official religion without protecting adequately the rights of others. A converse of that clash would be the exercise of a religious practice that conflicts with majority secular goals, such as Muslim head coverings in French public schools. Centuries of Anglo-American experience with claims of liberty may prove helpful in the international context, and a similar explication of history with these competing claims in civil law systems will also be instructive.

It is not necessary to glorify *Lochner* to recognize the validity of its origins and the implications of its future. *Lochner* was bad in the result it reached. The problem, however, was not so much doctrinal as factual; the Court simply did not understand the facts of the economic world in which legislation was being developed. One result of the condemnation of *Lochner* was the development of "fundamental rights" to explain the source of unenumerated rights, a development that recently has been curtailed in favor of a generalized claim of liberty. That general-

[240] Prosecutor v. Nahimana, ICTR-96-11, Trial Chamber Judgment, ¶ 1010 *at* http://www.ictr.org.
[241] Lawrence v. Texas, 539 U.S. 558, 573 (2003).

ized claim is consistent with Anglo-American history and with the development of human rights in the emerging global community.

Liberty may well be a convenient term for summarizing much of the content of human rights. If so, then the *Lochner* experience may prove helpful to decision-makers across the globe.