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The "Necessary" History of Property and Liberty

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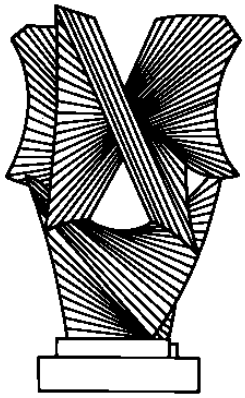

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I. INTRODUCTION

I am most pleased to have been invited by the editors of the *Chapman Law Review* to write the Foreword to a volume devoted to one of the hardy perennials of constitutional law: What level of protection, if any, is accorded to private property and economic liberties under the United States Constitution? There are a multitude of ways in which this vital question can be approached. It is possible for textualists to conduct a detailed, clause-bound interpretation in order to determine the extent to which these rights are protected, seriatim, under various clauses of the Constitution. That list is a long one, and includes the Takings Clause, both Due Process Clauses, the Equal Protection Clause, the Speech and Religion Clauses of the First Amendment, and the Commerce Clause in both its affirmative and (more controversial) dormant manifestations. None of these clauses uses exactly the same language, and it is possible to devote extensive discussion to the scope of each clause. One could ask why the Contracts Clause does not contain a "just compensation" component while the Takings Clause does, or why the Due Process Clause refers to property simpliciter, without adjective private, or most critically, why a police power limitation is found everywhere in the case law and the interpretive literature, but nowhere in the constitutional text itself.

Alternatively, these gaps in the text invite the diligent theorist to undertake a detailed historical exegesis into the original understanding of the Framers and of the early judges, both federal and state, who were charged with the overall interpretation and

implementation of constitutional guarantees. At this point, exhaustive reference could be made to secondary sources to establish both the ordinary meaning of terms and the specific understandings that surrounded the adoption of particular clauses. Often this learned search will lead us far afield. However, in most cases, my clear sense (not shared, I suspect, by professional historians) is that ninety percent of the relevant historical evidence is contained in the Federalist Papers, even after we try to discount for its own pro-ratification agenda. Both inquiries require extensive labor, which cannot be carried out in the confines of this short Foreword. But they do not exhaust the possible approaches to constitutional law.

In this Foreword I wish to look at the question of takings and economic liberties from what I like to call, only half-facetiously, "necessary history." The purpose of this exercise is to show that there are certain powerful principles to which any conscientious application of constitutional discourse or doctrine must turn if it is to meet the minimum standards of intellectual coherence and practical common sense. In my view, this form of history is not clause-bound in any strict sense of the term, but rather rests on the broader considerations of the proper relationship between an individual and the state, or, in some cases, the relationships between states in a federal system to each other and to the national government.

To be sure, the use of terminology will differ as we move from clause to clause, or indeed from era to era. There is good evidence, for example, that when John Locke spoke of the need for the state "regulation" of property,[1] the last thing he had in mind was

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[1] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 317 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690). *See also* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV.

some comprehensive mix of zoning and rent control laws. Rather, the word in all likelihood served two functions: first, it conferred on states the power to regularize transactions, much in the way in which the Statute of Frauds and recordation systems worked to regularize the transfer and protection of real property;[2] second, it prevented certain improper uses of property that trenched upon the like rights of other owners.[3]

Although the term "regulatory taking" is a creature of the 1970s or even the 1980s,[4] it is clear that the question of how to respond to government regulations that fell short of direct occupation was an issue that dominated much of the nineteenth and twentieth centuries—which spoke of "'invasions' of property rights" by some (but not all) regulation.[5] However much terminology may change, my thesis here is very simple. Anyone who is serious about the interaction between individual rights and state controls will gravitate toward the same set of principles no matter what their point of departure—historical or textual. The logic of the argument provides the critical impetus for particular discussions. History is necessary in the sense that any judge, dealing with any particular question, will happen upon the same solution. To understand the framework, therefore, is to grasp the history.

Note the caveat: this method will only work if the judges care about the rightness or wrongness of the outcome not only as a matter of fidelity to text, but also fidelity to principle. On this all too critical question of initial sentiment, the key variable is the level

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(forthcoming Sept. 2003) (on file with Chapman Law Review); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139 (2001).

[2] *See* Barnett, *supra* note 1, at 139-46 (providing an extensive discussion of the various meanings of "to regulate").

[3] *See* Claeys, *supra* note 1 (manuscript at 21-22). *See also* LOCKE, *supra* note 1, at 310.

[4] *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651 (1981) (first Supreme Court case recognizing the term "regulatory" taking). *See generally* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

of seriousness that is brought to the task in question. The regrettable legacy of the judicial deference that so influences the United States Supreme Court is intellectual incoherence and judicial irresponsibility.[6] Congress and the states will always be able to do whatever they choose because courts will turn intellectual cartwheels to elude substantive guarantees or jurisdictional limitations. As applied to the manifold manifestations of government taxation and regulation, the so-called "rational basis" test is the death knell of serious constitutional discourse. The question, then, is what greater level of scrutiny is needed to energize courts to engage in serious forms of review. Here the key insight is that the three flavors of constitutional review—strict scrutiny, intermediate scrutiny and rational basis, in descending order—are not equidistant. The gap between rational basis and intermediate scrutiny represents a deep chasm, while that between intermediate scrutiny and strict scrutiny presents only a manageable gulf.

To see why, note that the key inquiry under rational basis is whether a court can identify some significant advantage to any given piece of legislation, at which point it becomes no part of its duty to weigh that advantage against the correlative disadvantages. So long as there is one plus, no one may tote up the minuses. No major piece of legislation can pass through Congress or the state legislatures unless it has the backing of at least one significant constituency, at which point its private gains, suitably dressed up, supply all the justification needed to sustain the act. Intermediate scrutiny blocks off entrance into that safe-harbor. Instead, the court must now struggle to balance the advantages and disadvantages of the statute under an oft-implicit norm that

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[5] Claeys, *supra* note 1 (manuscript at 3). Claeys has the historian's eye for a good quotation and I borrow from his quotations liberally and without attribution.

[6] For the most recent illustrations of the intellectual breakdown, see *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

overregulation, either as to means or to ends, is of equal concern with underregulation. The full range of considerations thus come before the Court, even in the absence of any insistence that the state show the powerful and abiding state interest that strict scrutiny demands. The analysis of economic liberties and private property is made rigorous under the full range of considerations that both parties put before the Court.

My thesis is that once some level of intermediate scrutiny is imposed, the Court, no matter where it begins, will end up with the same basic framework that incorporates these familiar elements: the protection of some core individual right of liberty or property; the requirement of just compensation; the recognition of correlative and reciprocal duties; the nondiscrimination and disparate impact constraints on state action; the need to protect health and safety against nuisance and other externalities; and the ability to use public power only for public purposes. The exact way these leitmotifs interact will differ in detail: there is more room for a just compensation principle with property than with speech, but the principle will apply in both areas. One example of the difference might help here: the First Amendment makes it impossible to condemn all the shares of the *New York Times*, even though that taking would be for a public use, but it does not insulate the newspaper from the payment of local property tax (nondiscriminatory, of course) in exchange for the receipt of public services. The tax represents a benign form of forced exchange because it in no way impinges on the editorial discretion of the press.[7]

The ubiquity of these principles does not mean that the judges who embraced this form of analysis attached some magical force to the immutable baselines of the common law, as has been suggested by Cass Sunstein in his highly influential article Lochner's

Legacy,[8] most notably for the proposition that the common law baselines were treated as though they were the immutable baselines or "prepolitical" rules supplied by nature. To be sure, there has always been a substantial overlap between the basic outlines of the common law and the usual norms of constitutional law. How could the outcome be otherwise when the animating concerns behind both bodies of law deal with personal liberty and private property?

On all points of detail, however, there is enormous room for refinement and variation both within the common law and within the statutory rules that could be used to modify it. In one of its less distinguished moments, for example, the court (actually Lord Ellenborogh) in *Baker v. Bolton*[9] held that common law did not recognize any action for wrongful death. Yet no judge ever suggested that the overturning of this ill-conceived rule amounted to a violation of the rights of property or liberty of other individuals. Quite the opposite, the most vocal critic of the common law rule was Baron Bramwell, who had a strong libertarian bent.[10] The following year, Lord Ellenborogh also announced that contributory negligence was a complete defense in ordinary negligence actions.[11] Yet again, no one has ever seriously suggested that a general migration to comparative negligence could raise serious constitutional law difficulties. On this and on countless other points the common law was subject to withering criticism. Its rules on privity, proximate causation, assumption of risk, the fellow servant doctrine, contributory negligence, and *res ipsa loquitur* evolved within states and differed among states during the height of substantive due process. I am aware of no case, however, that treated any

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[7] *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983).
[8] Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 882 (1987).
[9] Baker v. Bolton, 170 Eng. Rep. 1033 (N.P. 1808).
[10] For my views on Bramwell generally, see Richard A. Epstein, *For a Bramwell Revival*, 38 AM. J. LEGAL HIST. 246 (1994).

one variation of the common law rules as so privileged that all others were condemned to constitutional oblivion under the relentless hammer of substantive due process. Here, as David Bernstein has recently documented with his customary thoroughness, constant judicial challenges to these fine points of tort law were routinely rebuffed in the Supreme Court.[12] In some cases the Court upheld statutory reforms of the common law rules, while in others it altered common law rules in its judicial capacity.[13] The explanation is simple. The justices said what they meant and meant what they said. They never once articulated a belief that all common law rules were immutable or prepolitical. But they did believe that tort rules typically fell within the state's police power to regulate health and safety, even when the Court abolished the contractual defense of assumption of risk.[14]

The ubiquity of these constitutional constants also decisively answers yet another common charge, namely, that the conceptual limitations of the English language prevents any powerful invocation of judicial authority. At root, the principles of economic liberty are no different from those that regulate relations under the First Amendment or relations

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[11] Butterfield v. Forrester, 103 Eng. Rep. 926, 927 (K.B. 1809).

[12] For Bernstein's relentless historical dissection, see David Bernstein, Lochner's *Legacy's Legacy*, 82 TEX. L. REV. (forthcoming Oct. 2003) (manuscript at 26-28, on file with Chapman Law Review).

[13] *See, e.g.*, Bowersock v. Smith, 243 U.S. 29, 34 (1917) (upholding a Kansas statute eliminating the fellow servant rule and the defenses of contributory negligence and assumption of risk); Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 574-75, 578-79 (1915) (upholding an Ohio statute abrogating the fellow servant rule and the defenses of contributory negligence and assumption of risk defenses for employers with greater than five employees); Chi., Indianapolis, & Louisville Ry. Co. v. Hackett, 228 U.S. 559, 563-64, 567 (1913) (upholding an Indiana statute eliminating the fellow servant rule in railroad cases); Mo. Pac. Ry. Co. v. Castle, 224 U.S. 541, 544-45 (1912) (upholding a Nebraska statute abrogating the fellow servant rule and the defense of contributory negligence in railroad cases); Louisville & Nashville R.R. Co. v. Melton, 218 U.S. 36, 53, 57 (1910) (upholding an Indiana statute abolishing the fellow servant rule for railroad employees); Wilmington Star Mining Co. v. Fulton, 205 U.S. 60, 71-74 (1907) (upholding an Illinois statute abolishing the fellow servant rule for mining accidents); Minn. Iron Co. v. Kline, 199 U.S. 593, 598 (1905) (upholding a Minnesota statute abolishing the fellow servant rule in railroad cases); Tullis v. Lake Erie & W. R.R. Co. 175 U.S. 348, 351, 353-54 (1899) (upholding an Indiana statute abolishing the fellow servant rule in railroad accidents).

[14] *See, e.g.*, Howard v. Ill. Cent. R.R. Co., 207 U.S. 463, 504 (1908) (striking down parts of the statute on Commerce Clause grounds but never once challenging the statutory elimination of the assumption of risk defense). The more sensible criticism of the case is that it gave the state *too* much power, not too little. *See also* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 797-800 (1982) (describing the evolution of private workers' compensation plans).

among states under the Dormant Commerce Clause, areas in which stable and successful doctrine has emerged. My purpose below is to outline what the common framework rightly entails, and how its ubiquitous presence structures so much of our constitutional law. I shall begin by noting the common philosophical frameworks brought to constitutional interpretation to show how they converge sensibly on a single model. I shall then take this standard-issue model and apply it to cases drawn from various doctrinal areas to show how they all make use of a common conceptual framework.

II. AN ABUNDANCE OF CONSTITUTIONAL THEORIES

One reason why constitutional law is so difficult is that there are, to all appearances, multiple philosophical approaches that can be taken on the critical issues of property rights and personal liberties.[15] Many of the classical writers gravitated to a system of natural law. Others preferred to use the language of social contract, or at least social compact. Still others stressed the importance of tradition and orderly evolution in the development of social institutions. Finally, other writers stress the instrumental, efficiency or functional justifications of property rights as part of a comprehensive utilitarian, or at least consequentialist approach to the basic subject. We can thus appeal to natural rights, social contract, traditionalist and utilitarian theories to first design a constitution, and then to interpret its constitutive positions.

There is a common delight among authors to stress the differences between these stances in the kinds of authority they appeal to and the sorts of rules that they are said to generate. But in fact the differences as they play out in practice are small curlicues on the same larger comprehensive structure. The writers in the natural tradition knew that

[15] For a summary of the various approaches, see MATTHEW H. KRAMER, ET AL., A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES (1998).

natural human tendencies could lead to both virtuous and destructive human behaviors. They therefore tended to favor those laws that brought out the best in human nature, and thus encouraged individual flourishing. The bare articulation of their position does not give clear indications as to what those laws might be, but surely their position has no bite at all if any arbitrary assemblage of rights and duties will satisfy the dictates of the theory. So the natural lawyer has to look for benchmarks for the particular constellation of rights and duties that he wants to defend in the name of human flourishing.

One obvious benchmark is the kind of legal arrangements that grow up naturally—that is without any conscious planning by some central government or agency. That is not difficult to do because, in the vast sweep of history, nation states with defined territories come relatively late in the game. Before then, there were a widespread set of customary practices and norms that evolved (naturally, of course) in order to keep the peace and to advance the ends of individual self-preservation. The natural lawyer looks to those biological imperatives and to the set of customary practices for inspiration. As early as Gaius and Justinian, natural law and common practice across nations are yoked together as part of a single conception.[16] But which of these practices count? Surely only those that lead to the purported end of a just and sustainable society. The practices of societies that do not endure cannot be the role model for the rest of us. So the exemplar becomes those societies whose rules promote the general welfare of the individuals involved. But why do they do this? Often it is because they agree that their overall success will be enhanced if they all agree to abide by certain rules that set up entitlements on the one hand and impose behavioral restrictions on the other. The social compact they wish to reach thus advances the utility of all the members of the group.

It is therefore very hard in practice to disentangle natural law from customary practice, from social contract, or from general utility. Custom becomes the proof of a natural arrangement. But that arrangement is a system of trial and error that advances the general welfare of the people involved. Social contracts may be fictions, but the terms that are likely to make sense in these contracts are only those that work for the benefit of the various parties to the agreements, which is just what some utilitarian interested in consequences would desire. In the end, much of constitutional law, and indeed of political theory, is like Roshomon: each person gets a bit of the elephant and tends to describe it from one perspective. But the excluded elements come back in some secondary way. The natural law may not be utilitarian, but it does look to the utility of certain arrangements to show that they are in accordance with human nature.

The real task here is to figure out what the synthesis looks like before going to particular cases. The clusters of observed relationships are, in one sense, easy to identify. It is hard to think of how to begin the analysis of any constitutional order without some presumption in favor of general liberty of action. Why bother with the entire chore of setting up a constitutional government if we are comfortable with anarchy on the one hand or with tyranny on the other? We undertake that enterprise because we need to escape from a state of nature (or original position) in which each person is beholden to someone without being certain to whom. Yet tyranny itself needs no principles of separation of powers, checks and balances, or individual rights. The unwillingness to accept any special hierarchy, such as that involved with the divine right of kings, introduces notions of equal or like liberty on the ground floor. But freedom of action is

[16] G. INST. 1.1-7 (Edward Poste trans.); J. INST. 1.1.4.

only a presumptive good until it is shown to be an evil, which happens when that action is used to limit the like liberty of other individuals.

It is of such naïve stuff that we can trace the origins of individual autonomy, which figures large in anyone's system. Forget the difficult debates over euthanasia: is there anyone who thinks that any of the four approaches could be invoked to limit the choice of all individuals to accept or decline medical treatment of their own free will? Or is there any system that holds that no individuals should ever be allowed to acquire property out of a state of nature so that all individuals would starve for want of a universal agreement that might legitimize their actions? There is, in fact, a remarkable convergence to the rule of occupancy (first possession) in both Roman and common law countries, coupled with recognition that some limitations must be placed on the principle in certain circumstances. But those limitations are not invoked when large numbers of ordinary individuals are allowed to act in an uncoordinated fashion to claim some portion of the commons for themselves. Some people stress that all others give their "implied consent" when one person takes property out of the commons. Others refrain from the use of consent language and prefer to say that necessity is the origin of property, by which they mean that all individuals will perish unless they can avail themselves of nature's abundance.[17] But no matter which way the point is put, free individuals must be allowed to acquire and to retain property in order to survive. Every version of legal theory reaches this same result.

By the same token, there is no legal theory that will treat all property rights as though they were absolute when real dangers may well come from their excessive protection. In most cases, two limitations must be respected in order for institutions of

liberty and property to survive. First, no one must be able to engage in actions that compromise the like liberty of other individuals. So long as self-preservation is the end of social organization, it will hardly do to allow one person to take steps that would maim or kill another. Hence the mutual renunciation of force becomes a hallmark of all natural law, social contract, and utilitarian theories of rights. In dealing with property, this proposition translates itself into the standard formula that no person is allowed to use his property to injure the property of another, which becomes the entering wedge for the common law of nuisance.

In some situations, moreover, the law of nuisance may well not suffice because there are system-wide social harms that can emerge even when one person does not invade the property of another, either by direct entry or by casting waste or fumes or other substances on his land. It is possible to think of limitations that could be imposed on all members of a given community for the benefit of all. The law thus has to respond to a variety of "prisoner's dilemma" games where the compensation given to each comes in the form of like restrictions imposed on the activities of others. For example, we have restrictions on the extent to which people can kill game or capture fish from the common pool in light of the risk that untrammeled access will reduce the stock on which all depend. We have developed a set of rules that limits access and seeks to guarantee fairness among the members by insisting that the rule hit as hard on one as it does on the other. We therefore use nondiscrimination principles as a way to limit state discretion when it is not quite clear just what form of restriction should be imposed in the first place.

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[17] For a clear statement of both views, see 1 WILLIAM BLACKSTONE, COMMENTARIES *6.

However, in some instances, as when land is needed for a fort, the nondiscrimination principle will not suffice because it makes no sense to take scraps of land from hundreds of people when what is needed is a compact parcel of land located at a single critical point. So one person has to bear the brunt of government action that works for the benefit of all, rendering the nondiscrimination principle useless for the task at hand. The natural lawyer claims that compensation is owed to the party or parties singled out to bear a disproportionate share of the social burden. The social contract theorist comes out the same way because no individual would agree to join society if his fellows could confiscate all that he owned, even for some public purpose from which everyone benefited. And the utilitarian sees compensation as the way in which we have some guarantee that the project in question will produce social value in excess of the costs to its members. But all agree that the state only has this power for the benefit of society at large. No one would agree, for example, to a system wherein an individual could pay the legislature a fixed sum of money to condemn property that it would then turn over to him.

So, in quick succession, we have all the elements: private property; police power controls; common pool risks; nondiscrimination rules; just compensation; and public use. Many of these elements were expressed quite succinctly by Chancellor Kent in his leading nineteenth century *Commentaries on American Law*: "Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order, and the reciprocal rights of others."[18] Similar sentiments were expressed in *Van Horne's Lessee v. Dorrance*: "The constitution is certain and fixed; it contains the

[18] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 265 (New York, O. Halsted 1827).

permanent will of the people, and is the supreme law of the land . . . ."[19] It "says to legislators, thus far ye shall go and no further."[20] Thus, while

> [e]very person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large.[21]

All the necessary ingredients are present in these quotations. The proposition that the Constitution is certain and fixed knocks out the ad hoc inquiries of the rational basis test. The rights of acquisition, use, and disposition capture the essence of property. The reference to good order is, albeit somewhat loose, a hint of the role of the law of nuisance. The reference to reciprocal rights and duties talks about the principle of equal liberty and works in tandem with the concept of proportionate contributions, which is the signal to a flat tax for the overall goods of the community at large, thereby negating any putative anarchist tendencies.[22]

In modern terms, the bottom line is that the presumption of liberty can be overcome only in those cases of a socially destructive "prisoner's dilemma" game or a genuine externality. Ordinary market competition does not fall into either of these categories. To be sure, all sellers in a given market face a prisoner's dilemma game, but the game is a virtuous antidote to monopoly power, which itself has always been regarded as an appropriate subject of regulation. This concept was made clear by Justice

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[19] 2 U.S. (2 Dall.) 304, 308 (1795).
[20] *Id*. at 311.
[21] *Id*. at 310.
[22] "'Tis true, Governments cannot be supported without great Charge, and 'tis fit every one who enjoys his share of the Protection, should pay out of his Estate his proportion for the maintenance of it." LOCKE, *supra* note 1, at 380. *See also* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), *reprinted in* 36 GREAT BOOKS OF THE WESTERN WORLD 401-49 (2d ed., Encyclopaedia Britannica, Inc. 1990).

Peckham in *Addyston Pipe & Steel Co. v. United States*,[23] who six years later wrote the Supreme Court's majority opinion in the much maligned case of *Lochner v. New York*.[24] The usual arguments against monopoly treated the single seller (like a common carrier) as though it had the power of coercion over individuals. That use of terminology creates the unfortunate impression that the refusal to deal is the same as putting a gun to someone's head, when no sane individual would be indifferent to those two possibilities. The point here is to express the uneasiness of putting any person in the position where he or she has no choices in obtaining goods needed for survival or convenience. That person-to-person view of matters dovetails neatly with the standard economic concern that output under monopoly is typically lower than it is under competition. Where monopoly is necessary (i.e., in cases of natural monopoly in which the costs of production decline over the relevant range of production), the forced break-up of a firm makes little sense, and rate regulation, fully tolerated in the nineteenth century, becomes the appropriate mode of attack on this social dislocation.

There is nothing about this approach that necessarily depreciates with time. When the affection for fixed and certain rules is articulated in modern cases, statutes are routinely struck down. Thus, the most famous blanket statement about property comes in a single sentence from Justice Black's opinion in *Armstrong v. United States*, which struck down an effort by the government to wipe out the superior ship liens (yes, a lien is property) by the simple expedient of taking the boat out of Maine waters. [25] The Court held that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing

[23] 175 U.S. 211 (1899).
[24] 198 U.S. 45 (1905).
[25] 364 U.S. 40, 48 (1960).

some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[26] But when the chips were down in *Penn Central Transportation Co. v. New York City*,[27] the Court abandoned any effort to articulate rules, and instead wrote:

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.[28]

Downgrade the core proposition of *Armstrong* into a dependent clause, and the Supreme Court can talk its way into the confiscation of air rights (for an admitted public use, to be sure) without a dime in compensation. We thus see in action one of the major techniques used to undermine the classical synthesis, a mixture of linguistic doubt and conceptual mushiness that translates itself effortlessly into a plea for legislative discretion. In making this defense of conceptual clarity, I do not wish to go on the fool's

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[26] *Id*. at 49. The Court recently reiterated *Armstrong*'s rationale in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002).

[27] 438 U.S. 104 (1978).

[28] *Id*. at 123-24 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)) (internal citations omitted) (alterations in original). The passage then continues:

> Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."
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> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 124 (citing United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)) (internal citations omitted) (alteration in original). I have argued at length for the intellectual coherence of this position in Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the* Lake Tahoe *Case*, *in* CATO SUP. CT. REV. 5-29 (2002).

errand of denying that this conceptual framework cuts out all wiggle room in particular cases. There are lots of marginal questions, as with any other legal framework: Just how many people must benefit for some use to be considered public? How does the nondiscrimination principle apply when all persons are not in quite the same place to begin with? How do property protections apply to water, where metes and bounds can establish boundaries between riparians? Or how does protection apply to the various forms of intellectual property? How does the police power apply when one statute both promotes health and blocks competition in different proportions at the same time? Such is life in the big city, for these doubts arise in connection with any area of law, including federalism and first amendment cases, where it has never been regarded as so serious an obstacle as to junk the entire apparatus. The differences in application, however, should not conceal the universality of the relevant building blocks.

III. THE THEORY APPLIED

In order to show how these pieces may be sensibly assembled, I shall examine cases drawn from four different substantive areas. Sometimes their doctrinal home—due process, property, contract, speech, religion—is difficult to pin down, but that is precisely the point. What matters is not the doctrinal pigeon hole, but the level of scrutiny and the concomitant willingness to apply the general framework. Here is how the analysis runs.

One of the most important economic liberties cases during the late nineteenth century was *In re Jacobs*,[29] which struck down a statute that made it illegal for individuals to manufacture tobacco products in tenement units located in cities whose population exceeded 500,000.[30] As befits the general thesis, the New York Court of

[29] 98 N.Y. 98 (1885).
[30] *Id*. at 115.

Appeals did not trouble itself unduly with the question of whether the case was best thought of as a case involving the deprivation of property or of liberty, because the same conceptual frame applied to both. On the property side, the statute did not, of course, dispossess Jacobs from his own premises but only restricted its use, so that today it would be analyzed under the rubric of a regulatory taking. But here the Court thought the loss of use (not all use, but this particular use only) constituted a taking and held: "[A]ny law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."[31] This language is indeed very tough because the attributes of property refer to the rights of possession, use, and disposition that have always been regarded as the essentials of property from Roman times forward. Further, there is no intimation that this rule only applies after the plaintiff is somehow deprived of "all" viable economic use of the property, to use the modern standard.[32] By the same token, we should be careful as to what is meant by "destroys its value," for here it is the removal of the incident of ownership that results in that loss of value. The case would have come out quite the opposite way if economic value had been lost because the construction of new buildings had reduced the value of Jacob's tenement. The line between competition and protectionism applies no matter what clause is at issue. Unless there is a restriction on use, the risks of any change in value, positive or negative, fall to the property owner.

The same analysis is also applied to the liberty side of the equation because the statute in question "arbitrarily deprives him of his property and of some portion of his

[31] *Id*. at 105.
[32] The standard is enunciated most forcefully in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). For its tortured application in connection with specific building restrictions, see *Bowles v. United States*, 31 Fed. Cl. 37, 46-49 (1994), and *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995).

personal liberty."[33] Here again it was sufficient that some aspect of liberty was lost, even if other aspects were retained. Consistent with that view, the Court rejected the proposition that liberty should be defined to cover only those cases of imprisonment or loss of motion:

> Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.[34]

The term "lawful" here is not a "weasel word," but was used in part to connote that the manufacture of tobacco had been traditionally allowed elsewhere, and continued to be allowed everywhere in New York State, except for New York City and Brooklyn.

At the first stage, therefore, *Jacobs* gives the terms property and liberty the same broad meanings that they have in ordinary common law. No compensation of any sort was offered to Jacobs, so the case turned on the question of whether the statute bore a reasonable relationship to health and safety.[35] On that point, the alarm bells once again sounded. Although smoking tobacco could easily be regarded as dangerous, why so its manufacture? And if its manufacture was dangerous, why only in two large cities (Brooklyn was then a separate city) and not everywhere in New York State? If allowed everywhere in workplaces, then why not in homes, especially if the odors could not be detected in the next room? If allowed in single-family homes, then why not in tenements with three or more units? Although the Court in *Jacobs* could not have been populated with trained public choice economists, the text of the statute itself gives clear evidence that strong factions sought to rig labor markets to frustrate competition from small

[33] *Jacobs*, 98 N.Y. at 105.
[34] *Id*. at 106.
[35] *Id*. at 115.

independent operations. The case thus impinges both liberty and property in circumstances where there is no particular reason to distinguish between them. Indeed, once the New Deal jurisprudence took hold, the Fair Labor Standards Act of 1938 did regulate home labor for just these anticompetitive reasons.[36] All that it took to change the worldview was to combine a narrow definition of the property taken with a capacious reading of the police power: a one-two punch that is devastating to any coherent account of economic liberties.

As should be evident now, the decision in *Lochner* sits comfortably within the mainstream when read in light of the decision in *Jacobs*. As everyone knows, Lochner was convicted under a New York Statute that forbade any employee from working in certain kinds of bakeries for more than ten hours a day. The initial question was whether the liberty of contract under the Due Process Clause was infringed. Here, there could be no barrier of substantive due process after cases like *Jacobs* because, as was often done in this era, the phrase "without due process of law" was construed to cover cases where losses were imposed without just compensation.[37] With that doctrinal point to one side, the first question involved the scope of liberty under the Due Process Clause. Here, in language that parallels the broad definition of property in *Jacobs*, Justice Peckham relied on the strong answer he gave in *Allgeyer v. Louisiana*:

> The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any

[36] 29 U.S.C. § 202 (West 1998).

[37] *See, e.g.*, Chi., Burlington, & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 235 (1897) (noting the equivalence between the requirements of due process and just compensation); Chi., Milwaukee, & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 458 (1890) (holding that depriving railroads of the right to charge reasonable rates under an administrative order was tantamount "in substance and effect" to a deprivation of property without due process of law).

> lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[38]

Once again, compensation is not in the picture, so everything turns on the police power. There was a close debate between Justices Peckham and Harlan, but the incomplete coverage of the statute (some but not all bakers, exempted employers, and self-employed individuals), coupled with the clear anticompetitive purpose (nonunion bakers worked longer shifts and slept on the job), made the anticompetitive element stronger. In addition, the removal of part time from the work place made it difficult to treat the case as one of *continuous* exposure with major cumulative losses, which is how Justice Harlan imagined the case to be. My point here is not so much to defend the particular result in the case, as to point out that it turns on the relative proportions of anticompetitiveness. This case comes close to the cusp. But it does not indicate that the line was not worth drawing. When all health aspects were removed from the case in *Adair v. United States*,[39] Justice Harlan switched sides and struck down a statute that authorized mandatory collective bargaining on the railroads.[40] All monopoly issues and no health issues removed the mixed motive issues under the police power.

Indeed, a unanimous Supreme Court sustained the workmen's compensation statute against constitutional challenge in a decision by Justice Pitney,[41] just two years after he *correctly* struck down a state statute that authorized collective bargaining in

[38] 165 U.S. 578, 589 (1897). The Louisiana statute struck down in *Allgeyer* prohibited any out-of-state firm from entering into a contract for marine insurance unless it was licensed to do business in Louisiana, even when the contract was concluded in New York. *Id*. at 579 (dead meat under the modern interpretation of the Dormant Commerce Clause).
[39] 208 U.S. 161 (1908). *See also* Coppage v. Kansas, 236 U.S. 1 (1915).
[40] *Adair*, 208 U.S. at 180.
[41] N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 209 (1917).

Coppage v. Kansas.[42] The point here has nothing to do with the immutable nature of the common law, for both of these statutes mark limitations on freedom of contract. Rather, this is a case where the judges said what they meant and meant what they said. They could see the connection between worker's compensation statutes on the one hand, and worker health and safety on the other. No such connection was discernible with the labor issue.

The broad definition of liberty given in *Allgeyer* is not only important for economic matters, but is capable of principled expansion into a range of other issues as well. Just that type of expansion took place in two key cases: *Meyer v. Nebraska*[43] and *Pierce v. Society of Sisters*.[44] The former case overturned a conviction for teaching the German language to schoolchildren.[45] The latter overturned a rule that prohibited the education of children in parochial schools.[46] Both of these statutes fell within the broad definition of liberty adopted by Justice McReynolds, who wrote:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[47]

Before dismissing those words as idle chatter, it is worthwhile to recall the forces that McReynolds, himself an anti-Semite, had derailed. The 1922 Oregon statute struck down in *Pierce* did not have a noble heritage.

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[42] *Coppage*, 236 U.S. 1, 26 (1915).
[43] 262 U.S. 390 (1923).
[44] 268 U.S. 510 (1925).
[45] *Meyer*, 262 U.S. at 403.
[46] *Pierce*, 268 U.S. at 536.
[47] *Meyer*, 262 U.S. at 399.

> The measure was supported by Masons, the Ku Klux Klan, and patriotic societies and vociferously opposed by Roman Catholic groups, Lutherans, and Seventh-Day Adventists, as well as much of the state's press. The purpose of the measure was to destroy nonpublic schools, which enrolled only 7 percent of the children in the state.[48]

Consistent with the general analysis, McReynolds did not ignore the role of police power justifications, but noted that the state had the power

> reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[49]

He did not go into the details of this explication, and had no occasion to address the genuine risk that state regulation pursuant to this mandate could be made so onerous and costly as to make it impossible for any private school to function—which is why the intermediate scrutiny standard must be maintained in the first place. However, it is painfully clear that this total ban had to fail under any police power justification, except for the autocratic claim that state security depends on state domination, which marred Justice Frankfurter's ill-starred marriage of safety and national security in *Minersville School District v. Gobitis*.[50]

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[48] Diane Ravitch, *American Traditions of Education*, *in* A PRIMER ON AMERICA'S SCHOOLS 12 (Terry M. Moe ed., 2001).

[49] *Pierce*, 268 U.S. at 534.

[50] 310 U.S. 586, 595 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Justice Frankfurter wrote in an indirect appeal to the safety element of the police power justification:

> Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom. Even if it were assumed that freedom of speech goes beyond the historic concept of full opportunity to utter and to disseminate views, however heretical or offensive to dominant opinion, and includes freedom from conveying what may be deemed an implied but rejected affirmation, the question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. *Id*.

The modern dislike of *Lochner* and substantive due process has not led to the repudiation of either *Meyer* or *Pierce*, but simply to their recharacterization.[51] They are now treated as involving First Amendment rights of speech, association, and religion. That shift cannot be justified on the ground that *Meyer* and *Pierce* misapplied their own conceptual framework. Rather, that opportunistic shift only makes sense for one reason: the level of scrutiny is higher so that the rational basis analysis is not allowed to eviscerate the basic protection through a broad reading of the police power, which in these areas is kept within the traditional boundaries it occupied for economic liberties elsewhere.

The Supreme Court has, to say the least, been inconsistent in applying this general framework in all religious contexts. In *Employment Division v. Smith*,[52] Justice Scalia took the position that the Free Exercise Clause of the First Amendment did not extend to illegal actions (here, the smoking of peyote under tightly controlled circumstances).[53] The resulting outcry is best explained by one simple reason. The health and safety justifications for the drug prohibition in this limited circumstance looks to be vanishingly weak, so much so that the state itself had not bothered to prosecute, so that collaterally the issue was raised on the question of whether Smith could be denied employment benefits because of the commission of this particular crime. Justice Scalia held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[54] Note what this formulation does to the general inquiry. It concedes that religious liberty is abridged, but

[51] *See* GERALD GUNTHER, CONSTITUTIONAL LAW 491 (12th ed. 1991).
[52] 494 U.S. 872 (1990).
[53] *Id*. at 878-79.

then avoids the negative implications of that position by holding that the police power requirement is satisfied so long as the rule, any rule, is one of generally applicability. In effect the decision relies on a formal account of nondiscrimination to insulate from a review a statute that has, to say the least, a disparate impact on the individuals subject to its commands. *Smith*, it must be recalled, does not raise the bogus claim that the free exercise of religion is so broad as to allow the members of Smith's tribe to smoke peyote (let alone cyanide) whenever and wherever they so choose. Nor is it, evidently, a case where the religious group defends its right to receive welfare benefits without having to contribute a penny in funding.

In some cases, however, the police power issues are a bit closer. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[55] the practitioners of the Santeria religion, brought by slaves from Africa to Cuba, engaged in widespread ritual slaughter which the City of Hialeah sought to prohibit by an emergency ordinance as "inconsistent with public morals, peace or safety."[56] An exception was made for slaughters undertaken by licensed establishments for slaughtering animals for ordinary consumption. In striking down the ordinance, Justice Kennedy hit on all the familiar themes in his analysis of the singling out of some religious groups for special treatment, noting how the animus directed to a particular group could taint an otherwise neutral ordinance.[57] As in *Pierce*, the Court noted that ordinances narrower than a total ban could achieve whatever legitimate goals it had, whether measured in terms of the protection of animals from unnecessary cruelty or the public at large from pollution.[58] Indeed in this case, the

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[54] *Id*. at 879.
[55] 508 U.S. 520 (1993).
[56] *Id*. at 526.
[57] *Id*. at 534.
[58] *Id*. at 538-39.

questions of fit were treated as especially urgent because the entire ordinance was subject to "the most rigorous of scrutiny."[59]

Perhaps, the analysis would have come out somewhat differently under a standard of intermediate scrutiny, which is in general appropriate for questions of property and liberty. But no matter. To be sure, it is easy to identify some cases that come close to the line. It is no surprise that no matter what standard is used, some cases will always be close to the line. But no matter how clear the *conceptual* judgment that certain laws limit the exercise of liberty, the matter of justification is not. Any use of intermediate scrutiny must balance two kinds of error. The process in turn invites a large amount of evidence that, when the dust settles, necessarily gives rise to a subset of cases that will be in equipoise, or nearly so. Equipoise is a fact of life under any legal regime. The key question is whether the right questions have placed the balance point at the right juncture.

IV. FEDERALISM QUESTIONS

Thus far I have shown how the same principles play out across the full range of property and liberty interests. It is equally important to realize that these principles give a good deal of information about the rules governing federalism as well. At first blush, it might be thought that the principles that deal with the coordination of activities among states bear little resemblance to those that organize the relationship of the individual to the state. But this conclusion is erroneous. The point can be made by looking at cases under the Dormant Commerce Clause. Here it hardly matters that the constitutional pedigree for the recognition of any Dormant Commerce Clause is most uneasy.[60] But for

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[59] *Id*. at 546.

[60] DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 173 (1985).

> The wording of the clause suggests no limitation on the states; it merely grants Congress the authority to "regulate Commerce." This language contrasts vividly with Congress's power of

these purposes, it hardly matters whether the clause exists or not. The basic point is that the success of the doctrine rests on the fact that the cases that seek to explicate the Dormant Commerce Clause all begin with the basic realization that the purpose of the clause is to preserve a competitive environment in which both in and out-of-state firms may compete on a level playing field. The distaste for special privilege is now carried over to condemn any advantages afforded in-staters at the expense of out-of-staters. Any barrier to trade, whether in the form of a tax, permit, or regulation, imposed on an outsider, is a form of economic protection for the insiders, just as the restrictions struck down in *Jacobs* or *Lochner* were understood to be anticompetitive "labor" statutes.

At this point we face problems that have an identical structure to those that deal with questions of individual rights. Does the state action constitute an interference with liberty? If so, what justifications may be offered for the restrictions imposed? Any articulation of the inquiry will involve the same cluster of concepts used to evaluate state restrictions imposed on individual rights, and the outcome will depend critically on the standard of review that is brought to these matters. On this issue the tenacious judicial commitment to free trade across state borders (unless Congress intervenes) has proven strong enough to create a durable body of state law that shows no deference to legislative intention.

To see how the difference in standards plays out, it is instructive to start with a contrast between individual due process and federalism claims. Consider the comparison of *Nebbia v. New York*[61] with *Baldwin v. G.A.F. Seelig, Inc.*,[62] both of which involved the

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"exclusive Legislation" over the District of Columbia and with the various provisions of article I, section 10, expressly forbidding states to invade such federal preserves as the making of treaties or the coining of money.

[61] 291 U.S. 502 (1934).

[62] 294 U.S. 511 (1935).

ongoing saga of monopoly regulation and protectionist practices in the dairy industry. In *Nebbia*, the question was whether the state acted beyond its power when it sought to set the minimum price that retailers could charge for milk. The Milk Control Board had set a price of nine cents per quart, and the defendant was subject to *criminal* penalties for selling two quarts of milk for eighteen cents because he threw a five cent loaf of bread into the bargain. The defendant argued that it was beyond the power of the state to set minimum prices for milk because the dairy industry was not "affected with a public interest" because that industry was not a public utility, and did not hold any monopoly power.[63]

In urging this position, the defendant appealed to a long tradition. Sir Matthew Hale[64] had first used the phrase "affected with the public interest" in the seventeenth century to explain why the rates charged for individuals who operated a public wharf—that is, a wharf to which all *must* come to load and unload—could not charge whatever rates they choose, but must charge rates that were only "reasonable and moderate." Hale supplied the decisive argument for *Allnutt v. Inglis*,[65] in which the state monopoly was a licensed customs house for goods bound for export free of local custom duties. Lord Ellenborough held that the licensee's monopoly power justified limitations on rates.

> There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms.[66]

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[63] *Id*. at 531.
[64] Sir Matthew Hale, De Portibus Mari (posthumously published in the 1780s).
[65] 104 Eng. Rep. 206 (K.B. 1810).
[66] *Id.* at 210-11.

In that case it meant that the licensed warehouse could charge only the rates that other warehouses, acting in competitive markets, could charge customers for goods bound for sale in England. The principle articulated in *Allnutt* was carried over to the United States in *Munn v. Illinois*,[67] which rejected a constitutional challenge to the maximum rates that Illinois set for grain elevators that operated along-side the railroad tracks on the grounds that they were "affected with a public interest."[68] In his *Munn* opinion, Chief Justice Waite quoted extensively from both Hale and *Allnutt*,[69] and included Hale's reference to legal monopoly.[70] Chief Justice Waite also alluded to some agreement among the grain operators, but stopped short of calling this "'virtual' monopoly" a cartel, only to conclude that any remedy for the operators lay at the polls and not with the Court.[71] Justice Field, a consistent libertarian, issued a stinging dissent to the effect that if grain elevators were affected with the public interest, then so, too, was every other business.[72] But Justice Field remained eerily quiet on the issue of monopoly power lurking in the background.[73]

Nebbia rejected the previous tests altogether by upholding New York's *minimum* prices for milk on the ground that the dairy industry, like every major business, was affected with the public interest solely in virtue of its size and importance to the public at large.[74] Thus, *Nebbia* neatly transformed a concept initially designed to limit monopoly

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[67] 94 U.S. 113 (1876).
[68] *Id*. at 130.
[69] *Id*. at 126-28.
[70] *Id*. at 128.
[71] *Id*. at 131.
[72] *Id*. at 141 ("there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion . . . .").
[73] For a detailed account of the economic arrangements that support the monopoly view, see Edmund W. Kitch & Clara Ann Bowler, *The Facts of* Munn v. Illinois, *in* 1978 THE SUPREME COURT REVIEW 313-43 (Philip B. Kurland & Gerhard Casper eds., 1979).
[74] *Nebbia*, 291 U.S. at 531-32. The Court stated:

power into one that propped up state-sponsored cartels, in part on the dubious public health ground that higher costs offered protection against contamination and spoilage.[75] The net effect is that the rejection of the older tests came from the unwillingness of the court to distinguish between the allocative effects of competition and monopoly. But the Court took quite a different attitude one year later in *Baldwin*, where the question was whether the Milk Control Board was within its rights to prohibit sales within New York of out-of-state milk that had been purchased at below the minimum prices set for buying milk within the state.[76] In effect, an outsider was not licensed to sell milk within the state unless it agreed to price its milk in accordance with the state regulation of imported milk. Justice Cardozo hit the nail on the head when he noted that the regulation in question was equal to a tax in the amount of the difference between the local and imported prices.[77] Accordingly, he held that the state could not insulate local sellers from competition from outside the state by adopting a tax that eradicated the outsider's price advantage. Now competition became the dominant motif:

> If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.[78]

> We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle.

Id.

[75] *Id*. at 516-17.

[76] 294 U.S. 511 (1935).

[77] *Id*. at 526.

[78] *Id*. at 522.

Clearly, this statement raises the issue of state retaliation not found in the internal regulation that one state imposes on the property and liberty of its citizens. From this difference, it might be inferred that consumer welfare in the abstract was not the touchstone of the Dormant Commerce Clause. No matter; the critical point remains the same regardless of the judicial motivations. Once the court cares about state competition, for whatever reasons, it then has the means in its power to see through the various schemes that could frustrate its operations. The indifference between competition and monopoly that was so evident in *Nebbia* was nowhere to be found in *Baldwin*, where a higher level of scrutiny led to the correct result.[79] The same conviction of the vital role for interstate competition led, in *H. P. Hood & Sons, Inc. v. Du Mond*,[80] to the invalidation of an effort by New York's Commissioner of Agriculture and Markets to refuse to issue a permit to an out-of-state distributor because of his fear that "destructive competition" would disrupt the stability of markets that were already "adequately served."[81] Once again, the decision struck down the operation of a state-run cartel. But locals would have no recourse against the same form of favoritism.

Cases like *Baldwin* and *Hood* did raise the theme of nondiscrimination against outsiders, but they did not raise the traditional tensions that arise in drawing the line between legitimate state police regulations for health and safety, and the suppression of competition—which is the precise issue in cases like *Jacobs* and *Lochner*. However, in this context, the Supreme Court did care about the outcome. The distinction the Court drew came from the same sensible level of scrutiny (more strict than intermediate in fact)

[79] *Id*. at 527, 528.
[80] 336 U.S. 525 (1949).
[81] *Id*. at 529.

that it could have brought to claims for the protection of individual rights. Here it is sufficient to refer briefly to two well-known cases.

In *Dean Milk Co. v. Madison*,[82] the City of Madison adopted an ordinance that required all milk sold within the city to be pasteurized at an approved plant near the city's central square. The state barred Dean from selling milk that had been pasteurized in Illinois or elsewhere in Wisconsin. Consumer safety was the purported justification for this local ordinance, but the entire issue was rightly dismissed as a sham when it was shown that Dean Milk had been processing its milk in conformity with Illinois and Wisconsin law, without visible adverse effects on consumers anywhere.[83] No one could object to the health ends of the statute, but it took only a few sentences to realize that the Madison ordinance had one purpose, "erecting an economic barrier protecting a major local industry against competition from without the State," a conclusion that was reached even though some in-state milk was caught by the prohibition as well.[84] To allow the restriction to remain simply because some in-staters were disadvantaged would not do, as that was the price the local merchants of Madison would have happily paid to achieve their own local cartel. Hence the tougher rule was properly applied, sparing the need to have the Wisconsin Court strike down the Madison ordinance as special legislation of the worst kind.[85]

Yet in *Maine v. Taylor*,[86] a ban on the importation of bait-fish was held justified, here under a virtual strict scrutiny standard, because of a clear showing of the possible

[82] 340 U.S. 349 (1951).
[83] *Id*. at 352.
[84] *Id*. at 354.
[85] *Id*. at 356.
[86] 477 U.S. 131 (1986).

dangers of parasites and nonnative species on local flora and fauna.[87] But the clear implication of all this is that the states could *not* keep out apples treated with alar on some supposed health ground. Because the Court cares about competition, it does not let purported health and safety justifications under the police power swallow the basic constitutional provision.

This affection for the competitive solution does not, however, carry over to laws that sanction the adoption of rules neutral on their face but with disparate impacts against out-of-state firms. The clear sign that the level of scrutiny has been reduced is the refusal to look with suspicion on facially neutral rules passed with strategic intent, which characterized Justice Kennedy's First Amendment decision in *Church of Lukumi Babalu Aye*.[88] The lower level of scrutiny allows the disparate impact and legislative motive to disappear from the judicial radar screen, so that results start to flip over.

Two examples illustrate this trend. In *Exxon Corp. v. Governor of Maryland*,[89] the Supreme Court sustained a Maryland statute that prohibited producers and refiners of petroleum products from operating retail establishments within the state.[90] There were no local producers and refiners, so the statute hit solely against out-of-state parties. Justice Stevens did not ask what circumstances could have justified this prohibition on entry, and he certainly did not argue that the vertical integration (commonplace in the industry) posed any antitrust problem. Rather, he contented himself with noting that much competition remained at the retail level even after the statute.[91] For Justice Stevens, it was

[87] *Id*. at 148.
[88] 508 U.S. 520 (1993).
[89] 437 U.S. 117 (1978).
[90] *Id*. at 119-21.
[91] *Id*. at 126.

enough that independent interstate dealers could enter the market.[92] But the implicit targeting of one segment of the market must distort competitive forces locally, so that using the higher standard of scrutiny, now reserved to *explicit* discrimination against out-of-staters, would have produced a different result. There is no discernible state interest to ban an entire class of entrants solely because some out-of-state refiners were alleged to have favored their own retail establishments during the massive oil shortages brought on by the price controls imposed in 1973 after the Yom Kippur War.

Judicial deference became a rout in *Minnesota v. Clover Leaf Creamery Co.*,[93] in which the Court upheld a Minnesota statute that banned the sale of milk in the plastic nonreturnable containers in common use everywhere in the country.[94] Only in Minnesota were nonreturnable containers required to be constructed out of pulpwood. The chief backer of the statute was the local paper manufacturer. The ostensible justification for the restriction was to prevent the adverse environmental impact of plastic containers on solid waste management. The statute was neutral on its face, but it was known at the time of its passage that its burdens would fall on out-of-state producers while its benefits would go to the instate firms that had supported the statute's passage. No matter. Without explicit discrimination, the out-of-state firms suffered only incidental burdens that were not "clearly excessive in relation to the putative local benefits."[95] Unlike *Taylor*, the purported environmental justifications did not receive close examination, but were taken virtually at face value even though no other state had adopted similar legislation. At no point did Justice Brennan, writing for the Court, recognize the dangers in evaluating this neutral rule as if it were a random output from the legislative process. Justice Brennan

[92] *Id*. at 125-26.
[93] 449 U.S. 456 (1981).
[94] *Id*. at 473.

turned a blind eye to the fact that the legislature knew the impact of passing the statute, and purposely chose a neutral rule that effectively advanced protectionist agenda. This greater deference to facially neutral statutes led to a reduction in scrutiny of the state's purported police power justifications. As a result, silly protectionist legislation was allowed to slip under the constitutional radar.

The imperfect levels of supervision under the Dormant Commerce Clause turns on the extent to which the Supreme Court is prepared to treat the protection of interstate competitive markets as a constitutional norm. When the discussion shifts from dormant to affirmative power under the Commerce Clause, the competitive ideal no longer informs any fraction of the legal analysis. With the disappearance of any normative objective, judicial review disappears under the waves as the Court resorts, first implicitly and then explicitly, to a see-no-evil version of the "rational basis" test.[96] The deleterious consequences are clear enough in connection with agricultural produce cases like *Wickard v. Filburn*,[97] where concerns with competition took a back seat as the Commerce Clause was read to allow the expansion of government sponsored nationwide cartels, here by preventing their erosion by a farmer feeding his own grain to his livestock.[98] The key lesson of the New Deal is that the Courts routinely yield to Congress on the question of whether it is best to preserve competition under the antitrust laws or to foster cartels under some explicit statutory scheme.

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[95] *Id*. at 471 (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
[96] *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (sustaining a federal conviction for "loansharking" under the Consumer Credit Protection Act); Maryland v. Wirtz, 392 U.S. 183 (1968) (holding the wage and hour requirements of the Fair Labor Standards Acts applicable under the Commerce Clause to state governments, hospitals, and school districts).
[97] 317 U.S. 111 (1942).
[98] For my views, see Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y 209 (1998).

The recent decisions of the Supreme Court in *Lopez v. United States*[99] and *United States v. Morrison*[100] should be praised, at least to the extent that they recognize that the doctrine of enumerated powers places some limitation on what Congress may do. But the entire treatment of the conservative majority is muddled because the Chief Justice goes to such enormous pains to indicate that the decisions in *NLRB v. Jones & Laughlin Steel Corp.*[101] and *Wickard* continue to meet with judicial approval.[102] The skin-deep nature of the concern for economic liberties is only made more evident by the frightful performance of the Supreme Court in its recent *Eldred v. Ashcroft*[103] decision that upheld the Copyright Term Extension Act[104] in an opinion replete with deferential rational basis language celebrating the power of Congress to do what it will. The obvious starting point for *Eldred* was to acknowledge that this case was in deep tension with the slender *Lopez* majority, for if the principle of enumeration places limits on Congressional power to deal with Congress, then why not with copyrights and patents as well? One could respond that the Commerce Clause deals with federalism while the Copyright and Patent Clauses do not. But that point is false to the extent that the federal power to grant copyrights and patents necessarily limits the power of the states to impose their own intellectual property regimes.[105] More to the point, with commerce, patents, and copyrights, the deepest questions concern the scope of Congress's power to create and foster monopoly for some end. How the Supreme Court thinks about this power is anyone's guess. Although the

[99] 514 U.S. 549 (1995).
[100] 529 U.S. 598 (2000).
[101] 331 U.S. 416 (1947).
[102] *See Lopez*, 514 U.S. at 627 (discussing the decision in Wickard v. Filburn, 317 U.S. 111 (1942)). *See also Morrison*, 529 U.S. at 608-09 (discussing the decision in NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416 (1947)).
[103] Eldred v. Ashcroft, 123 S. Ct. 769 (2003).
[104] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.). I have railed against this act from the beginning, see Richard A. Epstein, *Congress's Copyright Giveaway*, WALL ST. J., Dec. 21, 1998, at A19.

connection between the commerce, patent, and copyright issues was squarely raised in Judge Sentelle's dissent[106]—and was the centerpiece of the *Eldred* brief[107]—*none* of the three opinions (Ginsburg, Stevens & Breyer) sought fit to even *cite Lopez*, let alone resolve the issue. This constant willingness to allow the interpretive standards to shift with the wind from clause to clause will surely make it impossible to maintain any consistent constitutional regime that protects economic liberty or private property. A pity.

V. CONCLUSION

The major purpose of this Foreword is to show that the attitudes towards economic liberties are not the product of some random number generator. Once a court believes in the basic proposition that the purpose of government is to protect ordered liberty in all aspects of life, then there is only one way in which it can undertake constitutional interpretation. It must first begin with a broad presumption in favor of the protection of liberty and property, and then require the state to show some strong justification as to why that liberty ought to be limited or abridged. The justifications that most readily present themselves are the control of externalities, such as pollution, and the need to coordinate the activities of large numbers of individuals when high transaction costs preclude voluntary interaction among individuals.

Seen in this light, the question constantly before the Court is what health and safety needs can justify state regulation under the police power. The level of scrutiny brought to this question determines the fate of the entire inquiry. That level is not explicitly set in the Constitution, which, for that matter, also contains no reference to the police power arguments that are necessary to make it work. History on these subjects

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[105] *See, e.g.*, Bonito Boats, Inc. v. Thunder Craft Boats, 489 U.S. 141 (1989).
[106] *See* Eldred v. Reno, 239 F.3d 372, 380-84 (D.C. Cir. 2001).
[107] *See* Petitioner's Brief, Eldred v. Ashcroft, 123 S. Ct. 769 (2002) (No. 01-618).

therefore often takes the form of "necessary" history. Those people who subscribe to the classical liberal framework will, out of sheer intellectual necessity, use the same set of concepts to evaluate any proposed form of government regulation under intermediate or strict scrutiny. It makes relatively little difference what particular clause prompts the challenge. Those people who do not subscribe to the classical framework will side instead with Justice Holmes in *Lochner*, who managed to repudiate the entire tradition of American constitutionalism with a single sentence: "But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."[108] That may be true of "a" constitution, but it is assuredly not true of our own Constitution, which has succeeded precisely because it does articulate and implement a theory of government. That theory is not one of the organic relation between the individual and the state. Nor is it one of *laissez faire*, if that position is taken to exclude the possibility of police power regulation of health, safety, or taxation, at least in the forms that I have discussed here. Rather, the strength of our Constitution lies in the fact that the implicit tradition of classical liberalism that points the way to a middle road has been intuited and acted on by justices of all political persuasions.

The somber lesson of this inquiry is that the success of any constitution depends ultimately on the intellectual orientation that is brought to the interpretation of its central provisions. Seen in this light, the remarkable intellectual achievement of the late nineteenth century and early twentieth century is how well judges succeeded in the area of economic liberties in preserving the ideal of a free and open society. In the post-New Deal era, the Court has done well, by and large, in protecting individual liberties in areas such as speech and religion. It has a somewhat more mixed record in cases under the

[108] 198 U.S. 45, 75 (1905).

Dormant Commerce Clause. But its greatest failure has been the dissipation of a precious intellectual heritage in the preservation of private property and economic liberties.

The moral should now be clear. Where we end up depends heavily on where we begin. Anyone who is concerned with limited government will support a system that has strong property rights and limits government power to force, fraud, and monopoly. Competition through markets, within and across state boundaries, becomes a preferred conception. The case law will reflect that fundamental choice. Anyone who reads the Federalist Papers with an open mind will see that they are dominated by concerns with faction and political abuse, and by the desire to limit the scope of the public domain, and then to insure that deliberations within it take place in a responsible matter. No one with that orientation could rest easily with the rational basis gloss that the Supreme Court places on economic liberties and the Constitution. My hope is that the necessary history inherent in our Constitution once again becomes the actual history of the Constitution.

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