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Economic Substantive Due Process and the Right of Livelihood

BY WAYNE MCCORMACK*

INTRODUCTION

Economic substantive due process has been resurrected or, perhaps more accurately, born again in a slightly altered state. Many commentators have expressed interest in reviving the doctrine ever since it became moribund in the constitutional revolution of 1937. Recently, the

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1 Voodoo religions contain a useful juristic concept known as the "undead" or "zombies." These beings are persons who have died but have not done so fully. The zombie's death is quickly followed by reanimation and an existence between life and death. See WEBSTER'S NEW COLLEGIATE DICTIONARY 1354 (8th ed. 1981). Unlike these undead, economic substantive due process appears capable of true resurrection. Perhaps the posture of substantive due process from 1937 to the present has been something like the chrysalis state in which some species exist between larva and adult. Substantive due process is now waking up.


Ever since the New Deal revolution, occasional commentators have considered the desirability of having some judicial review of the area of economic legislation. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 578-86 (2d ed. 1988) (describing
doctrines have been reborn in a number of guises other than the Due Process Clause and may now lead to recognition of some limited economic rights, particularly the right of livelihood and perhaps the broader right of competition.

Many authors have made strong arguments for an intensified review of legislation affecting economic and property interests. In recent years, a growing number of authors from the left side of the political spectrum have recognized that some economic functions, at least those without which it is difficult for an individual to be whole in modern society, ought to receive protection from government interference. It has not yet been demonstrated, however, that the vehicle to provide such protection, substantive due process, has already been resurrected by the U.S. Supreme Court.

The principal objective of this Article is not to review the arguments in terms of what interests ought to be protected. The Article is not meant to praise substantive due process so much as to disinter it. More precisely, the Article sketches the history of the courts' resurrection of economic substantive due process and the limits on its operation that will likely prevail in the predictable future.

3 See Charles A. Reich, The Individual Sector, 100 YALE L.J. 1409, 1409-17 (1991) (discussing the need to define a constitutionally protected sector of individual power); Tushnet, supra note 2, at 273-84.
This Article highlights three historical points. First, substantive due process comprised part of the received body of English law in 1791; as such, it included at least some protection against a government’s creation of unregulated monopolies. Second, prior to the New Deal, substantive due process was an accepted part of a unified doctrine of due process; the separate concepts of substantive and procedural due process came into existence only later to describe what the Court believed that it was no longer doing. Third, the Court has in fact reinvented the doctrine under various, different names and based these new doctrines on different sections and clauses of the Constitution. The final section of this Article deals with how the Court might shape this new version of the doctrine into a useful and well-contained judicial tool. The Article concludes that the Supreme Court’s recognition of substantive due process as the source of a protected right of livelihood would have value, provided that the Court limits the operation of the right to narrowly circumscribed uses. The time has not come to recognize a general right of competition, as some have urged, and no reason exists to infer a general freedom from regulation out of the Due Process Clause.

I. THE PRE- AND POST- NEW DEAL CHALLENGES

Long before *Lochner*, indeed long before the adoption of the Fourteenth Amendment, British and American courts protected many

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5 This point has been developed at length in Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 941-63.


7 *See infra* note 43 and accompanying text.

8 Professor Wonnell developed some of the first and third points ten years ago. Christopher E. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 Hastings Const. L.Q. 91 (1983). There are several reasons for publishing a new analysis now. One reason is that much has happened in the intervening ten years. Another is that most of Wonnell’s analysis was couched in economic and political theory rather than in historical terms. The historical flavor provides some reasons for both recognition and limitation of the claimed rights. Finally, my analysis of the judicial process leads to some different conclusions than his. *See infra* notes 181-95 and accompanying text.

9 *See infra* notes 342-55 and accompanying text.

10 *See* Wonnell, *supra* note 8, at 134.

facets of the individual's right to pursue a gainful occupation against encroachment by the government.\textsuperscript{12} The \textit{Lochner} Court went further and purported to scrutinize virtually all social legislation and economic regulation for the "reasonableness" of the legislative decision.\textsuperscript{13} The rise of the regulatory-welfare state was probably impossible under the \textit{Lochner} Court's regime because of the rigid \textit{Lochnerian} separation of the private and public spheres of action.\textsuperscript{14} Certainly, the lack of substantive judicial review of government regulation and subsidization during the post-New Deal era has made imposition of social programs and economic regulation much easier.\textsuperscript{15} But despite the occasional judicial protestations of abstinence from the review of our government's economic programs, a total judicial abstinence would not have been appropriate and has, in fact, never been the rule.

Government intervention into the markets operates in a variety of ways. Ours is a government designed to implement public choices in a controlled fashion. We have an understandable tendency not to trust government blindly with social and economic decisions because government can be subverted by social and economic pressure groups.\textsuperscript{16} In our federal system, this potential for capture may become particularly acute as a result of the ability of economic pressure groups to concentrate energy and resources on a relatively short legislative session, giving them undue influence on a given state legislature.\textsuperscript{17} Substantive due process is an important, but disregarded, method for preventing distortion of the process of socio-economic choice making. In the pre- and post-New Deal periods, there have been two particular categories of protected activity: restrictions on entry into markets and restrictions on public employment. These two categories present the most convincing cases for substantive review because they reflect the historic concern over governmental restrictions on what this Article will call the right of livelihood,\textsuperscript{18} a right that has historic corollaries in the freedom from unregulated monopolies.

\textsuperscript{12} See Wonnell, \textit{supra} note 8, at 128.

\textsuperscript{13} See \textit{Lochner}, 198 U.S. at 56 ("In every case that comes before this court, ... the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State. ...?").

\textsuperscript{14} See \textit{Lochner}, 198 U.S. at 57; Tribe, \textit{supra} note 2, at 580.

\textsuperscript{15} See Phillips, \textit{supra} note 2, at 274; see also Growitz, \textit{supra} note 3, at 34 ("The New Deal required judges to turn their backs on 150 years of interpretation and ignore the text's protection of economic rights.").

\textsuperscript{16} Wonnell, \textit{supra} note 8, at 100-11.

\textsuperscript{17} See Paulsen, \textit{supra} note 2, at 117.

\textsuperscript{18} See generally infra notes 309-25 and accompanying text (discussing the right to livelihood).
A. The Textual and Historical Basis of Economic Substantive Due Process

As an initial matter, we need to deal with the propriety of implying unenumerated rights from the Due Process Clause. The phrase "substantive due process" itself has an oxymoronic sound to it—how can process have a substantive branch as well as a procedural branch? In 1934, Professor Corwin urged that the commonsense reading of the phrase was probably 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.

Yet a reading of the history different than that of Corwin is possible. According to this differing view, the phrase "due process" derives from the "law of the land" clause of Magna Carta, which was later modified into the "due process" clause. This "law of the land" concept included a variety of nascent, unenumerated rights. Lord Coke believed that among these rights was the right of Englishmen to be protected against unjustified restrictions on market entry. Coke went as 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."

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19 For a more complete treatment of this history, see Riggs, supra note 5, at 947-48, 987-99.


21 "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land." Magna Carta para. 39, reprinted in JAMES C. HOLT, MAGNA CARTA app. IV (1965). See also ch. 3 of 28 Edw. III (1354) (quoted in Riggs, supra note 5, at 954): "No man of what state or condition he be, shall be put out of his lands or tenements, nor taken nor imprisoned, nor disinherrited, without being brought to answer by due process of law." This assurance was reaffirmed in the Petition of Right, 1627 reprinted in POUND, supra note 6, at 167.

22 See Riggs, supra note 5, at 988.

23 Coke's discussion of the concept is worth more detail: This word, libertates, liberties, hath three significations:

1. First, as it hath been said, it signifieth the laws of the realme, in which respect this charter is called charta libertatum.
Referring to decisions of Lord Coke and Lord Holt, as well as other British decisions, and asserting the heavy reliance of the American revolutionaries on these sources, Roscoe Pound made a strong argument in 1945 that the American protection for liberties under due process included unenumerated rights against monopoly, as part of the "law of reason." Although the British courts eventually developed the doctrine of Parliamentary Supremacy, under which even the Magna Carta may be amended by the omnipotent parliament, Lord Coke and Lord Holt both viewed even Acts of Parliament as being subject to the established rights of Englishmen. The extent to which the doctrine of Parliamentary Supremacy had won over the law of reason by 1776, 1789, or 1791 is unclear. Pound claimed that the law of reason still prevailed during that time period. Blackstone's Commentaries of 1765 seem to point in the direction of parliamentary supremacy, but he still listed three "absolute rights" assured by the common law: personal security, personal liberty, and property.

Fears of some forms of protection for property and vested rights that were viewed as perpetuating the aristocracy constituted a major concern of some of the populist-oriented Antifederalists and resulted in an early distrust of vested rights. In rebuttal to the Antifederalist's attacks, James Madison argued that the right of property included "the free use of [one's] faculties and free choice of the objects on which to employ them." Whatever the

2. It signifieth the freedomes, that the subjects of England have; . . .
3. Liberties signifieth the franchises, and priviledges, which the subjects have of the gift of the king, . . .

So likewise, and for the same reason, if a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that graunt is against the liberty and freedome of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter.

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.

Edward Coke, 2 Institutes of the Lawes of England (1642), reprinted in Pound, supra note 6, at 150.

24 See, e.g., Bagg's Case, 77 Eng. Rep. 1271 (1616) (refusing to allow a citizen to be disenfranchised for breach of peace).
25 See Pound, supra note 6, at 53 (discussing the opinions of early English judges concerning Parliamentary Supremacy).
26 Id.
27 Id. at 53-54.
28 Id. at 54.
30 See Siegel, supra note 2, at 190-91.
original scope of the constitutional protection of economic rights from legislative attack, the later development of this protection is said by Corwin to have

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.\(^3\)

Thus, due process review had become intertwined with the "natural rights" concepts of the pre-revolutionary war period.\(^3\) While the Supreme Court initially flirted with the concept under such doctrinal headings as the "social compact" origins of the Constitution,\(^4\) state courts developed protections for "vested rights."\(^5\) With the adoption of the Fourteenth Amendment Due Process Clause, many observers believed that the Court would import reasonableness review into its newly obtained powers of review over state legislation.\(^6\) This expectation was thwarted by *The Slaughterhouse Cases*.\(^7\) The dissents from *Slaughterhouse*, however, would later become the majority in *Lochner*.\(^8\)

\(^{33}\) See, e.g., Rodney L. Mott, *Due Process of Law* §§ 81-82 (1926).
\(^{34}\) See Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798) (Chase, J.) (striking down a statute setting aside a decree of a court that had disapproved a will); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) (Marshall, C.J.) (holding that a state may not pass a statute declaring its own obligations void).
\(^{35}\) The most significant state case was Wynehamer v. People, 13 N.Y. (3 Kernan) 378 (1856) (striking down a statute prohibiting the sale of intoxicating beverages). Throughout the early part of the nineteenth century, protection for "vested rights" became well-established in the state courts, although the police power of the state was acknowledged as having some role in limiting vested rights. See Corwin, *supra* note 32, at 257, 275; Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 Cal. L. Rev. 583, 601, 604 (1930) (explaining how the interplay of the police power with the vested rights doctrine created an extra-constitutional basis for judicial review).
\(^{37}\) 83 U.S. (16 Wall.) 36 (1873) (upholding the right of state legislatures to grant exclusive rights, in this case a franchise to slaughter-houses in New Orleans, when doing so serves the public interest).
\(^{38}\) See Arthur S. Miller, *The Supreme Court and American Capitalism* 61-62 (1968) (discussing *Lochner* and the development of law in this area); Walton H.
In light of this history, particularly that of our British heritage and the pre-Fourteenth Amendment cases,\textsuperscript{39} it is plausible that both the Fifth Amendment and the Fourteenth Amendment concepts of due process included some unenumerated rights, such as vested rights and the English proscriptions on unregulated monopolies. This amalgam justifies the implication of what will be described below as the right of livelihood. Why would a constitutional principle, which has to do with the formation of governments, be concerned about the right of livelihood, which is more a matter of good policy than a matter of the political relation of the individual to government? One argument is that of group theory, which poses that unregulated monopolies often result from group pressures that create a perversion of the political process and can easily extend to a perversion of the process on other fronts.\textsuperscript{40} In the attempt to create a limited government, it was only realistic to anticipate some of the government’s abuses and try to guard against them.\textsuperscript{41}

B. Post–New Deal Unlinking and Linking of Procedural and Substantive Due Process

No recognized distinction between procedural and substantive due process existed until after the New Deal eliminated the substantive protections.\textsuperscript{42} During the \textit{Lochner} natural law era, the courts employed Fourteenth Amendment due process and natural law concepts, using due process as a unitary concept, without the substantive descriptor, for the Court’s weighing of the reasonableness and fairness of the government’s actions.\textsuperscript{43} The only use of what we now know as procedural due process was in the judicial supervision of other courts, an area in which due process was not a strong concern because judicial rules usually embodied the concepts of reasonableness and fairness without need for resort to external concepts such as due process.\textsuperscript{44}

\textsuperscript{39} Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Wynehamer v. People, 13 N.Y. (3 Keman) 378 (1856).
\textsuperscript{40} Wonnell, \textit{supra} note 8, at 103-08.
\textsuperscript{43} See TRIBE, \textit{supra} note 2, at 664-66; MOTT, \textit{supra} note 33, at 437.
\textsuperscript{44} Following the Civil War amendments, during the \textit{Lochner} era there was some mention of due process when federal courts began to exercise supervisory authority over
The separation of procedural and substantive due process followed a rather hesitant path. During the 1930s, the unitary concept of due process began to divide into three different meanings in addition to the concept's reasonableness aspect. First, through the Fourteenth Amendment, due process became the vehicle for use of the criminal procedure safeguards of the Bill of Rights against the states. Second, due process became the vehicle for incorporation of the "substantive" values from the Bill of Rights, particularly the First Amendment, against the states. Third, when the New Deal's administrative agencies appeared, due process formed the basis for judicial controls on administrative action.

courts not within their direct control, the state courts. See Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (due process as one alternative for requiring personal service prior to state court judgment), overruled by Schaffer v. Heimer, 433 U.S. 186 (1977); Earle v. McVeigh, 91 U.S. 503, 507 (1876) (using due process language to find that the statute of a state that allowed notice by posting was inadequate). But see Ray v. Norseworthy, 90 U.S. (23 Wall.) 128 (1875) (no mention of due process when requiring notice and hearing in federal bankruptcy court).


47 See United States v. Morgan, 307 U.S. 183, 190-91 (1938) (directing disposition of funds impounded by a district court); Amistad Mfg. Co. v. Davis, 301 U.S. 337, 356 (1936) (administrative hearing scheme met requirements of due process); West Ohio Gas Co. v. Public Util. Comm'n of Ohio, 294 U.S. 63, 70 (1934) (holding that utility's cost distribution scheme violated due process); see also Note, Constitutional Law–Judicial Review of Administrative Determinations, 24 GEO. L.J. 1008, 1008-10 (1935) (discussing the extent of judicial review). The shift away from review of utility rates for their "substantive" validity (i.e., whether they permitted a fair return on investment) to review only for procedural regularity, though not accompanied by an express declaration, was a clear delineation of procedural and substantive review. See American Toll Bridge Co. v. Railroad Comm'n of Cal., 307 U.S. 486, 492-96 (1939) (holding that toll rates did not deprive plaintiff of property without due process); Railroad Comm'n of Cal. v. Pacific Gas & Elec. Co., 302 U.S. 388, 393-94 (1938) (holding that setting gas rates did not result in confiscation); Chicago, M. & St. P.R. Co. v. Minnesota, 134 U.S. 418, 456 (1890) (allowing commission to fix rates conclusively violated due process).
The Court's decision in *Nebbia v. New York* that there would be no protectable liberty interests in economic matters created the need for a label to distinguish those areas of judicial review that were permissible from those that were no longer permissible. At first, a few minority opinions and arguments of counsel began to use language that distinguished the permissible functions of due process from the "substantive" values of "liberty" that had been protected under the *Lochner* doctrine.

Thus, the notion was born that a difference existed between procedural and substantive due process.

The first use in the Supreme Court of the phrase "procedural due process" occurred in a dissent to a criminal procedure case in 1934. Procedural due process showed up once in 1937, three times in 1938 and twice in 1939, by which time it was reasonably well-accepted.

The first use of the phrase "substantive due process" occurred in a dissent to a land regulation case in 1948. Substantive due process showed up in two more dissents before it finally appeared in a 1954 majority opinion involving the power of Congress to enact certain deportation rules. A Supreme Court majority did not use the phrase

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48 291 U.S. 502, 538-39 (1933) (upholding a statute fixing the price at which store keepers could buy and sell milk).

49 See infra notes 51-54 and accompanying text.

50 The wonders of computerized legal databases allow us to make confident statements about precise phrasing in court opinions. The statements that follow are based on repeated searches of both Lexis and Westlaw, searching for specific phrases and for use of words within certain proximities to each other.

51 Snyder v. Massachusetts, 291 U.S. 97, 100 (1934).


55 Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting) (arguing in favor of a limitation on pumping from an underground reservoir although the majority felt it placed an impermissible burden on the owner).

56 Shaugnessy v. United States ex rel. Mezey, 345 U.S. 206, 222-24 (1953) (Jackson, J., dissenting) (concluding that detention of an alien does not violate substantive due process provided that procedural due process is met); Beauharais v. Illinois, 343 U.S. 250, 277 (1952) (Reed, J., dissenting) (referring to incorporation of the First Amendment into the Fourteenth Amendment through the Due Process Clause).

57 Galvan v. Press, 347 U.S. 522, 530 (1954) (affirming congressional power to
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“substantive due process” to describe Lochner-style judicial review until 1965. In the meantime, the Court stated on several occasions that it no longer used “due process” to inquire into the reasonableness of legislative judgments and rules.

C. Anticompetitive Regulations

The demise of economic substantive due process opened the path for legislatures not only to regulate in the public interest, but also to regulate for the private benefit of a select few; the path was also open for the government to restrict access to specified trades or professions. Since the demise of economic substantive due process, due process challenges have been made to legislation that restricts entry into a profession, but the only one that has been successful thus far was based on a rationale that resembled procedural due process. Some outrageous examples can be found, such as state river pilot apprenticeship requirements that operated to the benefit of relatives and friends of incumbent pilots. Less deport aliens with ties to the Communist Party). As used in Galvan, the phrase may have referred to the limits on Congress’ power implied from the grants of power in Article I. The majority opinion by Frankfurter, however, is a masterpiece of obscurity and seems to misstate the holding of the case it cited. The reference to substantive due process reads, “In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 155 [1919] . . . .” The discussion at page 155 of Hamilton, which does not mention the phrase “due process” but relates to Congress’ power to adopt reasonable rules under the war power, is the basis of the argument of plaintiff’s counsel and is squarely rejected by the Court.

58 Swift & Co. v. Wickham, 382 U.S. 111, 127 (1965) (holding that the three-judge court decision does not apply to federal-state statutory conflicts).

59 Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1951); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949) (law providing that workers could not be denied employment because of failure to join union did not violate rights of unions or employees); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937) (upholding state law setting minimum wages for women).

60 See SIGEL, supra note 3, at 184-203; Walter Gelhorn, The Abuse of Occupational Licensing, 44 U. CHI. L. REV. 6 (1976) (discussing licensing regulations that restrict entry into certain trades or professions).

61 Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (ruling that Alabama licensing procedures were subject to challenge because the licensing board members had a pecuniary interest in the proceedings).

62 Kotch v. Board of River Port Pilots Comm’r, 330 U.S. 552, 562-63 (1946); see McCloskey, supra note 2, at 46.
extreme examples include the operation of state-granted monopolies, regulations limiting product innovation, restrictive actions by professional cartels such as peer certification boards in the medical profession, and city franchising of "quasi" utilities such as cable television companies, many of which have been challenged under federal antitrust laws as well as constitutional theories.

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64 See Allied Tube & Conduit Corp. v. Indian Head, Inc. 486 U.S. 492, 495 (1988) (effort to limit use of new products under the guise of state standards).

65 Pinhas v. Summit Health, 111 S. Ct. 1842 (1991) (ruling that peer review board's attempts to exclude a physician from practice because he did not follow an unnecessary, costly procedure were not protected from antitrust immunity).

66 Los Angeles v. Preferred Communications, 476 U.S. 488, 488 (1986) (holding that Los Angeles' refusal to grant franchise rights because petitioner did not participate in an auction for a single franchise and the utility company's refusal to grant conduit space violated First Amendment rights); Community Communications v. City of Boulder, 455 U.S. 40, 48 (1982) (holding that a city's moratorium ordinance restricting the expansion of a cable television company is not exempt from antitrust laws).

67 Arguments challenging state regulation of public utility rates are being made in a more sophisticated fashion than they were during the New Deal era. See Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) (using eminent domain and jurisdictional arguments). As the Court said in Duquesne:

One of the elements always relevant to setting the rate . . . is the return investors expect given the risk of the enterprise. The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions. But the instant case does not present this question.

Id. at 314 (citations omitted).

Justice Scalia's concurring opinion, joined by Justices White and O'Connor, indicated that there may be some limits on the methodology that a state can use in setting rates: [W]hile "prudent investment" (by which I mean capital reasonably expended to meet the utility's legal obligation to assure adequate service), need not be taken into account as such in ratemaking formulas, it may need to be taken into account in assessing the constitutionality of the particular consequences produced by those formulas. We cannot determine whether the payments a utility has been allowed to collect constitute a fair return on investment, and thus whether the government's action is confiscatory, unless we agree upon.
The river pilot case presents the best argument for resurrection of some form of economic substantive due process. Today, the Court might decide the case differently under the heading of equal protection, although nominally the rubric of "rational basis" would be the same under either equal protection or substantive due process. The "rational" basis that the state would put forward is that a river pilot is well suited to select his apprentices from those close to him, because they, by relation or association, have some understanding of the profession. One who asks even the most trivial questions about this rationale, however, can see that the understanding of the duties of a riverboat pilot provides no assurance of skills and that there are innumerable ways of providing training for those who do not possess the proper association or relation to an existing pilot. The restriction in this case would thus be both over-inclusive and under-inclusive, and one might conclude that the legislature has performed an irrational act. The act is quite rational, however, when viewed from the perspective of existing river pilots and their families. Thus, the river pilot statute is an example of special interest legislation masquerading under the guise of protecting the public interest. While this fact alone does not seem to make the Supreme Court believe that a statute is unconstitutional, special interest legislation that invades a protected area might be declared unconstitutional. Were the right of livelihood recognized as constitutionally protected, then the case could be decided on due process grounds.

Many other restrictions on entry into markets have more plausibility than the river pilot example. Licensing requirements in many professions depend not only on passage of a test, but also on certain educational requirements. Many states disqualify a person from practicing law, even

what the relevant "investment" is. For that purpose, all prudently incurred investment may well have to be counted.

Id. at 620. See generally John N. Drbak, From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation, 65 B.U. L. Rev. 65 (1985) (discussing Supreme Court ratemaking cases).


See TRIE, supra note 2, § 6-7 (discussing the Supreme Court's tolerance of state restrictions that purport to enhance transportation safety, even if the restrictions in reality boost local economies).

See id. § 6-25 (explaining the doctrine of preemption by stating that any state legislation in an area where federal legislation has "occupied the field" is deemed invalid).
if he has passed the bar examination, if his law school has failed to receive American Bar Association approval. The rationale is that the bar examination cannot measure all of a person's necessary skills and knowledge, so the school must be relied upon to screen for the rest. The claimed rationality is stretched to the limit, however, in the case of two people who both graduate from unapproved schools, take the bar, and then wait while one school gains approval, but the other does not.

Even apprenticeship requirements in some professions, such as medicine and architecture, arguably could be a means of obtaining cheap labor and limiting access to the profession. Yet, apprenticeships in these professions are at least available for all who meet the educational requirements. Some less "learned" professions require apprenticeships that can be served only by someone lucky enough to land a job with an existing licensee to work virtually for free for the requisite period of time. Proving that these apprenticeships serve the same function as an explicit training or educational program is as difficult as proving that they do not serve such functions.

The public purpose behind a market entry restriction in the form of professional licensure should be the protection of the public from incompetent practitioners of the art. Therefore, river pilots should be required to know the river in the same way that lawyers are required to know at least some of the law, because the public relying on the services of these professionals cannot be expected to determine for themselves if the professionals are competent. Indeed, passengers on a riverboat, even if they could gauge the relative competence of available pilots, are not in a position to choose the pilot. One difference among these various market

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72 Application of Thomas J. Courtney for Admission to the Bar, 294 A.2d 569, 570 (Conn. 1972). But see Bennett v. State Bar of Nev., 746 P.2d 143, 147 (Nev. 1987) (permitting students of unaccredited law schools to take the bar upon a showing that the education received was "functionally equivalent" to that received at ABA accredited schools).

73 The ABA approval process is then adopted by the states as a measure of the quality of the education received. In re Application of Nort, 605 P.2d 627, 630 (Nev. 1980) (refusing to waive bar requirements of attending an ABA accredited school).

74 See Bennett, 746 P.2d at 147 (graduates of Old College may take bar examination but cannot be sworn in until school receives ABA approval).


77 UTAH CODE ANN. § 58-9-5 (funeral service); KY. REV. STAT. ANN. § 316-90 (Michie/Bobbs Merrill 1990) (funeral service); UTAH CODE ANN. § 58-12-60 (acupuncture); UTAH CODE ANN. § 58-5a-302(5) (Supp. 1993) (podiatrists).
entry restrictions, from river pilot nepotism to electrician apprenticeships, is the degree to which the requirement can actually be expected to perform the function of protecting the public from an incompetent practitioner. Another difference is the degree to which the restriction limits the aspirant's opportunity to meet the requirements of the restriction, thus thwarting one's expectation of entering that trade or profession and affecting one's right of livelihood. Some substantive due process analyses focus on interest group theories to demonstrate that the perversion of the political process creates the necessity for judicial protections. Preservation of the political process may be a value underlying substantive due process, but this value is not easily translated into judicial review because the interest group's activities are irrelevant to the public interests.

The public purpose behind market entry restrictions to commercial entities such as public utilities is more complex, dealing both with the prevention of the waste that might result from the competition for a "natural monopoly" and with the quality of service to the public. Technological developments have made some "natural" monopolies no longer natural, particularly in the communications industry, and federal antitrust laws have resolved some of the anticompetitive issues in this arena. Other related issues have been approached under the rubric of federalism by speaking of state interference with interstate commerce, typified by state regulation that either seeks to benefit local industry at the expense of the rest of the nation or unduly burdens interstate commerce. Finally, some regulations require certain behavior on the part of a regulated utility that is wholly unrelated to the reasons for the

78 See Wonnell, supra note 8, at 105-11.
79 See infra notes 343-51 and accompanying text.
81 On the opposite side of the coin, rate regulation of public utilities is being challenged once again on the ground of interference with "free enterprise," although the arguments are much more sophisticated than they were 100 years ago and tend to emphasize a putative public interest in competitive pricing. Drobak, supra note 67, at 106, 111.
82 See Southern Pac. Co. v. Arizona, 325 U.S. 761, 781 (1945) (discussing the disallowance of safety regulation that would have local employment benefits); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (stating that local economic boosterism, while an acceptable state objective, must be measured by whether it unduly burdens interstate commerce).
regulatory process, such as attempted controls on billing inserts. While an overt attention to substantive due process might not work better than the current hodgepodge of doctrines, at least everyone would then understand the level of scrutiny that the Court would apply.

D. Public Employment and Benefits

It is now commonplace to speak of property interests in public employment and benefits, although the definition of the property interest has undergone some transformation under the Rehnquist Court. The basis for recognition of the "new property" is essentially the degree of reliance that modern society places on individual relationships with government. Jobs, licenses and financial benefits that take the place of income are deserving of procedural protection in order both to minimize the risk of governmental error and abuse as well as to provide a vehicle for judicial review of agency decisions.

When a court reviews agency action to guard against arbitrary or capricious action on the part of an agency, that court is exercising a function that is somewhere between procedural and substantive due process. The typical levels of inquiry by the reviewing court will proceed from insisting on an adequate basis of evidence to meet the relevant statutory standard, to checking the appropriateness of agency interpretation of its statutory mandate, and, finally, to insisting on a coherent reasoning process by the agency. Although these steps can be concept-

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87 See, e.g., RICHARD S. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS § 7.5, § 8.3.3d (2d ed. 1985) (discussing review of agency reasoning process); BERNARD SCHWARTZ, ADMINISTRATIVE LAW §§ 10.2, 10.4, 10.6 (2d ed. 1984) (discussing the
ualized as a form of procedural due process review and some courts have in fact used substantive due process as the descriptor, the usual characterization of this type of review is mere statutory enforcement.

Yet, what if the statutory standard itself is capricious? If the standard is dictated simply by the need to conserve public resources for other purposes—for example, by raising the threshold for eligibility in a welfare program—the court is not in a good position to make a different determination. If, at the other extreme, the statutory or regulatory standard punishes people for exercising their protected political rights, the First Amendment and related values provide substantive protections. In between these extremes are instances in which the statutory or regulatory standard unjustifiably intrudes upon someone's ability to earn a living or pursue a chosen profession. At least one such case has resulted in the striking down of an employment restriction on due process grounds.

The flip side of a public benefits problem is the impact on the public whose resources are taken to provide the benefit. While many view the power to take resources through taxation and redistribute them through so-called entitlements programs as raising no fundamental constitutional problem, some types of distributions are troubling. When government provides limited access to a finite, publicly owned resource, such as public lands, the redistribution excludes the nonrecipient of the benefit from access to the publicly owned resource. On this basis, federal subsidies in the form of timber contracts, grazing permits, and mining claims offend many economists because they are inefficient uses of a limited resource, often resulting in waste of the resource itself and lacking a concomitant return to the public owner. Yet, as Judge Posner urges, the constitutional task is interpretation, not construction of someone's ideal economic kingdom.

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88 Wood v. Strickland, 420 U.S. 308, 308 (1975) (reviewing a lower court decision that characterized the expulsion of students without a showing of evidence as violative of the students' right to "substantive due process"); Gibson v. Berryhill, 411 U.S. 564 (1972) (reviewing a lower court decision that characterized its procedure for agency review as "substantive due process").

89 There have been a few challenges to governmental distribution decisions on the ground that they are simply irrational and arbitrary, but thus far the Court has been able to come up with a rationale to explain the legislative determination. Schweiker v. Wilson, 450 U.S. 221, 236 (1981).

90 Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 646 (1974) (striking down employer's requirement that a teacher leave her job due to her pregnancy). Even if this case had been decided on equal protection grounds, the review by the Court would have been identical to the rationality review of the Lochner era. See infra notes 171-77 and accompanying text.

91 Posner, supra note 41, at 20 (noting that the "first task of interpretation is
E. Dimensions of the Post-Lochner Problem

There are both institutional and economic policy reasons for the Court’s abandonment of substantive review. The institutional reasons relate to the judiciary’s inability to enact rules dealing with the variety of relationships that might be affected by its ruling that a single regulatory measure is invalid. The Court realized in 1937 that each aspect of economic life is necessarily interlocked and intertwined with a host of others and that overturning one regulation could upset many others in a fashion that the Court could neither predict nor cure. The economic reasons track the same phenomenon. The Court may not have been wrong in asking the questions that Lochner prompted, but it certainly did not have sufficient information upon which to reach the conclusions that it did in some of the cases that followed. Today, we understand much more about the degree to which one person’s exercise of “freedom” affects others and gives rise to the state’s interest in protecting the freedom of those others. Thus, the complexity of the interlocked twentieth century economy provides clues to both the institutional and the economic reasons for the Court’s reversal in 1937. We might now, however, conclude that the Court’s abdication was too complete.

The rise of substantive due process review was associated with the individualism and laissez-faire philosophies of the nineteenth century, although its origins border on being ancient. The heart of the doctrine was the belief that the state had no business interfering in the decisions of the individual, including individual employer or employees, absent a showing of harm to someone else flowing from the individual’s decision. In applying the doctrine, the Supreme Court distinguished between decisions made by businesses “affected with a public interest,” in which the impact on others was obvious, and other business or commercial decisions, which were thought to affect only the individuals involved.

interpretation, rather than the choice of optimal policies”).

92 See Tribe, supra note 2, § 8-6.
93 See id. § 8-6 to 8-7.
94 See id. § 8-1; see generally Edward S. Corwin, The “Higher Law” Background of American Constitutional Law, 42 Harv. L. Rev. 149, 365 (1928-29) (discussing the origins of judicial review in light of Lord Coke’s writings and the Magna Carta).
96 Budd v. New York, 143 U.S. 517, 533 (1892) (ruling that use of state police power to regulate a business does not violate the Constitution).
The demise of the doctrine was associated with the growth of collective action and welfare economics of the twentieth century. As economic life expanded and became more interlocked, it became obvious to the judges of the 1930s that individual actions in the economic arena necessarily affected others who were apparently unconnected to the transaction being regulated. For example, when wage and hour laws were first promulgated, the Court looked only at the relationship between employer and employee, concluding that there was not a sufficient threat of harm to the employee to warrant governmental interference in the personal liberty of either.\(^7\) During the Depression, it became clear that the wages and hours of one employee significantly impacted others outside the employer-employee relationship,\(^8\) creating what the economists began to call externalities.\(^9\) Broadening the focus from employer and employee to include others, such as out-of-state banks that make loans to farmers who sell goods to the employee, justified regulating the wages and hours of the employee regardless of whether the employer's actions represented a threat to the employee.

In examining the reasonableness of a restriction on the individual in favor of a collective goal, such as licensing of a medical practitioner, the court must ascertain the public benefits sought by the regulation and determine whether the method chosen (means) fairly accomplishes a public objective (ends).\(^10\) This judgment by the Court has both factual and political elements. In the 1940s, courts purported to abandon the protection and pursuit of inherent economic rights out of a claimed sense of institutional incompetence for the political judgment.\(^11\) The next section of this Article deals with how courts immediately began reinstituting that review when more particularized expressions of individual liberties seemed to require it.\(^12\)

A quick review of the post-Lochner period reveals at least two levels of the post-Lochner problem. One is the need for constitutional tools to

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\(^7\) Miller, supra note 95, at 33; 1 Ronald D. Rotunda & John E. Norwak, Treatise on Constitutional Law: Substance and Procedure § 4.6, at 384 (2d ed. 1992).

\(^8\) See Tribe, supra note 2, at 239.

\(^9\) "Externalities are costs imposed on or benefits conferred on others as a result of an individual's activities that he is not required to (in the case of costs) or able to (in the case of benefits) take into account in his decision-making." David W. Barnes & Lynn W. Stout, The Economic Analysis of Tort Law 22 (1992).

\(^10\) Tribe, supra note 2, § 5-5 (discussing the "cumulative effect" principle and how Congress has used it to justify certain regulatory legislation).

\(^11\) See Siegan, supra note 60, at 185-88.

\(^12\) See infra notes 106-80 and accompanying text.
deal with the anticompetitive effects of unregulated monopolies. One possible answer to this problem would have been to say that there is nothing unconstitutional about the unregulated monopoly. Because the unregulated monopoly was considered a violation of basic rights of liberty even prior to the Constitution, however, the Supreme Court has felt compelled to derive protections against it from sources in the Constitution other than substantive due process. The second level of the problem is the need for substantive definitions of property and liberty in the context of public employment and benefits. This need leads to defining rights that will receive some degree of protection from legislative invasions under the Due Process Clause—a form of substantive due process. Although a potpourri of doctrines has arisen to meet these needs, the assortment obscures the basic need for a substantive definition of economic rights and perpetuates the dichotomous separation of personal from economic liberties.

II. THE POST–NEW DEAL RESURRECTION OF SUBSTANTIVE DUE PROCESS

After articulating its abandonment of what came to be known as substantive due process, the Supreme Court began to develop protections for similar interests through the use of other doctrines. The two principal areas in which this occurred were the protection of the rights to public employment and benefits and a more diffused area, the protection of employment-related interests. Looking at these two areas permits one to see how far the Court has gone in resurrecting the substantive due process scheme. There is at least one unenumerated economic right, which can be denominated the "right of livelihood," that seems to emerge in all of these divergent areas.

A. The Procedural Need for Substantive Definitions of Economic Rights

The Supreme Court’s handling of a variety of “procedural” due process cases shows that there is some need for a federal substantive definition of rights of property and liberty. The Court, despite frequent protestations to the contrary, does review substantive state law decisions

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103 See infra note 270 and accompanying text.
104 See infra notes 156-79 and accompanying text.
106 See Miller, supra note 95, at 32-34.
for fairness and rationality and, in the course of that review, determines 
the adequacy of state definitions of economic rights.

1. Public Employment

Public employment cases both illustrate the difficulty of defining 
property and liberty interests and articulate a judicially recognized right 
to pursue a trade or occupation. The two 1972 teacher cases, Board of 
Regents v. Roth\textsuperscript{107} and Perry v. Sindermann,\textsuperscript{108} held that the existence 
of a property interest initially turned on whether the underlying law, state 
law and practice in this instance, created a claim of entitlement that could 
be argued at a proceeding equipped with due process.\textsuperscript{109} If state law had 
made it clear that the applicant had, at best, a “mere expectancy” or, at 
worst, no expectation at all, then there would be no claim to present and 
thus no need for due process.\textsuperscript{110} The presence or absence of a legally 
cognizable claim is roughly the same question as whether an issue is 
committed to agency discretion and thus not reviewable under the 
Administrative Procedure Act.\textsuperscript{111} The question in both instances is 
whether there is law to apply to the dispute before the court.

The claimant also has a liberty interest protectable by due process 
when an institution takes action affecting the claimant’s “good name, 
reputation, honor or integrity.”\textsuperscript{112} This limitation arose from earlier 
cases in which the claimant was denied an opportunity for a hearing 
before being fired unless the reasons for firing would have operated to 
prevent employment opportunities in the future.\textsuperscript{113} The only apparent 
reason for labelling current expectations as property and future employ-

\textsuperscript{107} 408 U.S. 564 (1972) (ruling that “[t]he Fourteenth Amendment does not require 
opportunity for a hearing prior to the nonrenewal of a nontenured state teacher’s contract 
unless he can show that the nonrenewal deprived him of an interest in ‘liberty’ or that he 
had a ‘property’ interest in continued employment.”).

\textsuperscript{108} 408 U.S. 593 (1972) (holding that a nontenured teacher dismissed for criticizing 
the administration must show loss of a liberty or property right before he can have a 
Fourteenth Amendment claim).

\textsuperscript{109} Roth, 408 U.S. at 578.

\textsuperscript{110} Sindermann, 408 U.S. at 603.

\textsuperscript{111} 5 U.S.C. § 701(a)(2) (1988) (nonreview if “agency action is committed to agency 
discretion by law”).

\textsuperscript{112} Roth, 408 U.S. at 573.

\textsuperscript{113} See Cafeteria & Restaurant Workers Union Local 473, AFL-CIO v. McElroy, 367 
U.S. 886, 896 (1961) (reasoning that petitioner’s employment at military installations, 
rather than her interest in employability, was denied).
ability as liberty is the simplicity of understanding created by the distinction.

How did the Court find the definition of employability to be a liberty interest? The answer is a familiar, if not a terribly satisfying, one. The liberty interest stems from the shared values that influential thinkers have held concerning our political structures and resides in the Constitution because the Court, through its powers of interpretation, says that it does. The interest’s path to acceptability has followed a familiar course. First, the Court mentioned the right of employability in the dictum of an unrelated case. Then, in Roth, the Court stated that if the right had been violated in that case, the holding of Roth would have been different. Curiously, no case has been presented in which the Court could take the explicit step of holding that a specific governmental act had violated the right of employability. Imagining in this day and age that the right would not be protected through the requirements of procedural due process is difficult. Protecting the right of employability in this fashion places the right in much the same position as the right to pursue a trade or occupation, which is protectable against legislative policy judgments through substantive due process.

The other feature of Roth and Sindermann that bears on the problem of protecting the plaintiff’s economic rights is the difficulty of defining the property interest. In Roth and Sindermann the Court took pains to emphasize that the entitlement on which the constitutional values then operated was created and defined by the underlying law of the state.

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114 Liberty includes “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 conscience.” Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

115 Roth, 408 U.S. at 578; see McElroy, 367 U.S. at 896.

116 A potential case was presented in Dep’t of Navy v. Egan, 484 U.S. 518 (1987), but the claimant alleged no restriction on future employability from the denial of a security clearance. The issue here was whether a denial of a security clearance was reviewable by a Merit Systems Protection Board. Id. at 520. The Court held that it was not reviewable. Id. at 534.

117 Arguably, the Court enforced the right to a “name-clearing hearing” in backhanded fashion. Owen v. City of Independence, Mo., 445 U.S. 622, 622 (1980) (holding that a city did not have good-faith immunity from a damage action for violation of the right).

118 The Court in Roth, 408 U.S. at 577, stated:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.
A number of commentators decried the possibility of rendering the constitutional protection a nullity by allowing the state to define the entitlement out of existence. Some writers pointed out that because the greater power to define the entitlement must also include the lesser power to define the procedures by which it is protected, the Court had produced a nonresult. Approaches for solving this dilemma include requiring the government to state judicially reviewable reasons for every detrimental action, leaving state law out of the formulation entirely, and abandoning the field by allowing the legislature full rein to define both claims and the procedures for their protection.

The latter approach was attempted by a plurality of the Court in *Arnett v. Kennedy*, in which a federal employee threatened with dismissal for cause was found not to have a right to a pre-termination hearing. Justice Rehnquist's plurality opinion expressed the view that Congress could have left the employee dismissible at will. In choosing to confer the benefit of employment security, Congress could leave the employee to enforce the benefit through judicial, rather than

See also Sindermann, 408 U.S. at 603 (Burger, C.J., concurring) ("The relationship between a state institution and one of its teachers is essentially a matter of state concern and state law.").


120 See infra note 119.


122 Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 262-63 (discussing the "new" rights that should be recognized as a method to use in the Court's analysis).

123 Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 108 (discussing the rationale for allowing the courts to retain the ability to determine the procedures while letting the legislature determine the substantive rights).


125 Id. at 163.

126 Id. at 148.
administrative, proceedings. Otherwise, Congress might very well decide not to create the benefit at all.

The Rehnquist pure positivist approach to the definition of property interests would render the Due Process Clause a nullity just as the same approach would render the takings clause a nullity if applied to real estate. Nevertheless, Rehnquist’s approach seemed to command a majority of the Court in Bishop v. Wood, in which the Court upheld the dismissal of a “permanent” city employee without a hearing on the ground that state law created a claim of entitlement only to the procedures specified and thus did not require a hearing. The Arnett positivist position was squarely rejected, however, in Cleveland Board of Education v. Loudermill, when a majority of the Court “explained” that state law defines the claim but federal law determines the procedures to be followed in terminating the claim.

Loudermill restores the conundrum that Arnett attempted to eliminate. A sensible argument for the Arnett “bitter with the sweet” approach is

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127 Id. at 149-50.
128 “[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet.” Id. at 153-54.
129 Redish & Marshall, supra note 120, at 467-68 (discussing the legislature’s ability to define the substance of a right as well as the procedure for due process). If applied to life and liberty, the pure positivist approach would immunize even the death penalty from due process requirements by defining life as forfeitable at will to the state. Laycock, supra note 120, at 881.
130 426 U.S. 341 (1976) (holding that dismissal of a city employee did not violate a property interest).
131 Id. at 347.
132 470 U.S. 532 (1985) (holding that where a state statute defines a property interest in employment, a terminated employee has a right to a hearing under the Due Process Clause).
133 [I]t is settled that the “bitter with the sweet” approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. “Property” cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process “is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.” Id. at 541 (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974)).
that allowing the state complete latitude in the defining of employment claims is not likely to be detrimental so long as the state must grant some definitional security in order to attract employees. Even if one accepted this line of factual premises, however, the Arnett holding would still constitute a doctrinal dilemma—allowing the state to determine whether a property interest exists by defining a benefit to exist at will. To avoid the dilemma, either of two approaches is possible. First, the Court could hold that willy-nilly granting of benefits without any substantive definition is itself a violation of due process. The second and far more straightforward approach—to make the method of terminating a claim of entitlement a matter of federal substantive definition—is where the Loudermill result should lead. The next set of cases bears on whether this is what the Court has actually adopted.

2. Termination of Claims

Closely related to the definition of claims and procedures is the “procedural” due process challenge to termination of existing claims. In Logan v. Zimmerman Brush Co., the Illinois Supreme Court interpreted state law to deny a state agency of jurisdiction to hear an employment discrimination claim that had not been heard within 120 days after presentation to the agency without any regard for any fault on the part of the claimant. The United States Supreme Court held that this rule was a violation of procedural due process because it failed to provide the claimant with an opportunity for the claim to be heard. The termination issue, however, does not fit neatly within the category of procedural due process.

Assume that the state legislature had defined the claim and stated that the claim existed for 120 days and no longer. The state would have

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134 A corollary to this holding would be that the granting of benefits on the basis of an unreviewable judgment triggers only the question of whether improper standards have been employed and not the question of whether a claim of entitlement could be supported at a hearing. Webster v. Doe, 486 U.S. 592 (1988) (holding that a CIA employee’s constitutional claim, which was not the entitlement to the job but the invasion of a protected interest in an alleged privacy of lifestyle, was entitled to judicial review in the face of a statute barring judicial review).

135 455 U.S. 422, 427 (1982) (holding that allowing a state agency to deprive itself of jurisdiction through its own fault violated the complainant’s due process rights).

136 The Court was careful to note that not every civil litigant is entitled to a hearing on the merits in every case and pointed out permissible state barriers predicated on actions within the control of the claimant, such as statutes of limitations and procedural and evidentiary rules. Id. at 437.
placed the burden on the claimant to get his or her claim processed within the 120-day limit just as the "procedural" rule in Logan did, but the state's limitation would have been contained within the very definition of the claim itself. Surely, there would be no distinction between this approach and the approach of the state agency in Logan. The defect in Logan was actually one of defining the claim more than the procedure by which it was adjudicated or, actually, not adjudicated. The Court in Logan hinted that while termination of an existing remedy, such as by diversion of current malpractice cases to an administrative agency without adversary process, might be a violation of due process, the redefinition of the claim itself ordinarily would not be.  

The Court has also allowed challenges to state statutes of limitations for terminating paternity claims of illegitimate children after an unreasonably short period of time. The Court's analysis in these cases purports to be based on equal protection, but there is no group being treated differently from another group on the basis of the statute of limitations. Children born to married women need not bring paternity actions; it is the underlying distinction, not the statute of limitations, that creates the different treatment. The period of limitations is being examined for reasonableness, not differentness. Thus, the question asked by the Court is the same one that would be asked under due process analysis, namely, whether the state has needs that outweigh the needs of the child.

When the legislature itself redefines a right, as happened in Martinez v. California, the result is not reviewable by the courts, though arguably not

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137 455 U.S. at 432-33. The Logan Court explained Martinez v. State of California, 444 U.S. 277, 282 (1980) (holding that a legislative provision for state tort immunity for parole board members did not violate the due process rights of a girl murdered by a parolee), as upholding a California statute granting officials immunity from certain types of state tort claims. We acknowledged that the grant of immunity arguably did deprive the plaintiffs of a protected property interest. But they were not thereby deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels. In each case, the legislative determination provides all the process that is due. . . .

Logan, 455 U.S. at 432-33 (citations omitted).


139 Clark, 486 U.S. at 463 (failing to state whose equal protection rights were violated in striking down Pennsylvania statute).

140 See id. at 461.

141 Martinez, 444 U.S. at 277 (holding that a legislative provision for state tort immunity for parole board members did not violate the due process rights of a girl.
for the reason given by the *Martinez* Court. *Martinez* involved a claim by the parents of a fifteen-year-old girl, who had been murdered by a parolee, against the California parole board.\(^1\) The Supreme Court held that a bill subsequently passed by the California State Legislature granting immunity to the board was not a violation of the decedent's due process rights.\(^2\) The *Martinez* Court explained the situation as an instance where the legislature had given all the process that was due;\(^3\) this rationale would make all legislative judgments exempt from substantive review no matter how damaging they might be to a substantively protected interest. Perhaps the real reason for the outcome of *Martinez* was that no substantive claim existed following the legislative redefinition that created the state immunity. When legislative redefinition is carried out after the claim arose, then a variation on the "vested rights" doctrine\(^4\) of the nineteenth century would produce an invalidation under the Due Process Clause.

The Court has built a bridge between substantive and procedural due process that, at the least, does not allow the state to define a claim in a way that makes it impossible for the claimant to achieve adjudication of the claim. Whether the bridge accomplishes anything more remains to be seen, but at least we know that the procedural and substantive compartments are not as watertight as prior Court language might have suggested.

In the modern positive state, the assurance that benefits will receive some degree of definition from the state is present in a number of other settings. In welfare and licensing, for example, mandating an administrative agency to grant a benefit without providing at least some definition of the criteria under which the license or benefit is to be granted would leave the agency no guidance as to what to do with its largesse. In such a situation, at least the agency, if not the legislature, will develop criteria to govern the exercise of discretion. Those criteria will then become the definition of the property interest held by grantees.

3. *Postdeprivation Process and the Takings Issue*

The main difficulty in administering due process is that of identifying some type of curtailments in the level of process due. In a backwards fashion, murdered by a parolee).\(^1\) *Id.* at 277.

\(^2\) *Id.* at 281.

\(^3\) *Id.* at 283-85; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982) (noting that the legislative determination concerning creation of official immunities satisfied due process).

\(^4\) See generally WILLIAM G. MYER, VESTED RIGHTS 1-56 (1891) (providing a general discussion of vested rights).
this phenomenon produces a reduction in the level of property interest. For example, in *Parratt v. Taylor*, prison personnel lost a prisoner's item of personal property somewhere in the prison mailroom. The Supreme Court held that while there was a clear taking of the property involved, all that due process required was an opportunity for the convict to present his claim somewhere within the official structure of the prison.\(^{147}\) The existence of a post-taking remedy was held to satisfy due process because the random and unauthorized nature of negligent acts by state employees makes it difficult for the state to provide a meaningful hearing before the deprivation takes place.\(^{148}\) The Court subsequently extended the rationale of *Parratt* to intentional takings by government officials when the Court perceived that the defendant was the state rather than the miscreant officer.\(^{149}\) The Court then held that the state could not predict and provide predeprivation redress for the intentional wrongdoing.\(^{150}\) In *Zinermon v. Burch*, however, the Court reached a different result when faced with an intentional evasion of an existing state procedure regarding post-confinement mental illness commitment. The Court in *Zinermon* held that the intentional conduct was state action because the state could, and indeed had, forecast the possible need for summary action and had created a mechanism for protecting the individual's interest even after the initial confinement.\(^{152}\)

An interesting question that remains is, What happens when the state postdeprivation remedy is pursued but results in a denial of relief to the claimant? If the federal constitutional guarantee does not afford a judicial


\(^{147}\) *Parratt*, 451 U.S. at 540-41.

\(^{148}\) *Parratt*, 451 U.S. at 541.

\(^{149}\) Hudson v. Palmer, 468 U.S. 517, 533 (1984) (holding that an opportunity to have the claim heard within the prison structure satisfied due process in cases of intentional taking of property by prison officials).

\(^{150}\) The Court stated:

The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. . . . The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. *Hudson*, 468 U.S. at 533.

\(^{151}\) 494 U.S. 113, 125-27 (1990) (challenging the admission of the allegedly medicated and disoriented respondent under the voluntary commitment statute as a violation of due process because committing officials knew or should have known that respondent was incapable of giving consent).

\(^{152}\) Id. at 127.
remedy for the taking, then it is as if the property interest were redefined to consist only of the opportunity to present a claim. If the Court means that it will not entertain an additional lawsuit after the state denies a claim for money damages, then the Court has defined the underlying substantive property out of any separate constitutional existence because the Court is saying that the opportunity to make the claim is all the right that exists. On the other hand, it may well be that a denial of relief by the state triggers a subsequent federal action because the Court merely held that "the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." The difficulty is that we cannot be sure that a "suitable postdeprivation remedy" would not consist of the opportunity for adjudication even if the claimant lost. The Court's holdings on preclusion of claims presented to the state would make it difficult to adjudicate the federal claim after presentation of the state claim in the state system.

These cases, which might be called the postdeprivation process cases, run the risk of recreating a conundrum in which state law can define the property interest out of existence by defining the conditions under which the interest will be redressed. Giving the state the opportunity to provide process after the taking occurs appears to make sense and should have been the Court's approach to the "temporary takings" in First English Lutheran Church v. Los Angeles. Ending the constitutional protection at the mere providing of process, however, does not make sense. The providing of process only eliminates the federal damage claim by allowing the state to provide redress, either in the form of damages or invalidation. If the state fails to provide adequate redress, for either substantive or remedial reasons, then the federal court must make a determination of whether a compensable taking of property has occurred.

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153 Hudson, 468 U.S. at 533. The Seventh Circuit has held that intentional takings may not be the basis for a claim for relief until after the state has denied relief for their return, but has not indicated that provision of an opportunity for presenting the claim was itself a complete satisfaction of due process. Kimbrough v. O'Neil, 545 F.2d 1059, 1060-61 (7th Cir. 1976).


155 482 U.S. 304, 310 (1987) (holding that "temporary takings," those regulatory takings which are ultimately invalidated by the courts, require compensation under the notion of eminent domain).
4. "Substantive Procedural" Due Process

_Gibson v. Berryhill_\(^{156}\) involved a challenge to practices of the Alabama State Board of Optometry, which was established by statute to license optometrists. An Alabama statute authorized the Board to suspend or revoke licenses for "unprofessional conduct,"\(^{157}\) a term which included "any acts in his profession declared by the Alabama Optometric Association to be unethical or contrary to good practice."\(^{158}\) The Board was required by statute to be composed of members of the Association.\(^{159}\) The Association would not accept as members any optometrists employed by corporations and declared that it was unprofessional to work for a corporation.\(^{160}\) When the Board moved to revoke the licenses of optometrists employed by Lee Optical Co., the Supreme Court, holding that the effort violated due process because of the economic bias of the Board members, stated: "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes."\(^{161}\)

The "procedural" defect in _Gibson_ was palpably de minimis. The only issue that the Board was assigned to adjudicate was the question of corporate employment, an easily verifiable historical fact.\(^{162}\) The offensive part of the state program was the substantive prohibition, and the self-serving enforcement mechanism merely served to illustrate for whose benefit the rule operated.\(^{163}\) Following _Gibson_, it might have been easy to take the next step and decide that regulations excluding qualified persons from the practice of a profession, particularly persons attempting to practice that profession in the least expensive fashion, were a substantive denial of some protected right.

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\(^{156}\) 411 U.S. 564, 566 (1973).

\(^{157}\) ALA. CODE § 206 (1965).

\(^{158}\) _Gibson_, 411 U.S. at 568 n.3.

\(^{159}\) _Id._ at 570 n.7.

\(^{160}\) _Id._ at 578. The complaint charged the optometrists with unprofessional conduct for being employed by a corporation. _Id._

\(^{161}\) _Id._ at 579.

\(^{162}\) See McCormack, _supra_ note 86, at 1271. The thrust of my earlier article is that the bias of the Board seemed an inappropriate rationale and that the Court's real concern must have been that of providing a vehicle for judicial review of the decision. That analysis still stands to some degree, although now I am adding the standards that a court would use in reviewing the substantive state rules.

\(^{163}\) See _Gibson v. Berryhill_, 411 U.S. 564, 578 (1973) (noting that because the Board was composed of optometrists in private practice, the Board's actions could serve to benefit the Board's members).
The appropriate challenge was presented the very next year, but the Court declined to take the opportunity. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc. involved a challenge to a state statute prohibiting a corporation from applying for a pharmacy permit unless a majority of the corporation's stock was held by registered pharmacists actively engaged in the business itself. The Court explicitly overruled an earlier case striking down a similar law, stating that the earlier case "belongs to that vintage of decisions which exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise." The Court reiterated that it no longer adheres to substantive due process as a working doctrine.

Both Gibson and North Dakota Pharmacy involved the same basic problem, the limitation of a profession to unincorporated proprietors. The argument in favor of the limitation has to do with oversight of the professional activities by members of the profession rather than managers and shareholders divorced from the profession itself. The countervailing argument is that corporate ownership can reduce costs by increasing volume and bringing more efficient management practices to bear. If this were all that were involved, then the Court should have left the choice between these competing economic and professional issues with the legislatures in Alabama and North Dakota. More is involved, however, because the regulations touch upon the important interest of pursuit of a trade or profession. It is this aspect of the enforcement mechanism and the Court's desire to protect the right to pursue a profession that most plausibly explain Gibson and North Dakota Pharmacy.

The cardinal difference between the two schemes relates directly to the substantive rationale for the regulations. North Dakota allowed the corporate

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145 Liggett Co. v. Baldrige, 278 U.S. 105 (1928) (holding unconstitutional a Pennsylvania statute forbidding a corporation from owning a pharmacy or drug store unless all of its stockholders were licensed pharmacists).
146 North Dakota Pharmacy, 414 U.S. at 164.
147 "The due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business...they regard as offensive to the public welfare." Id. at 165 (quoting Lincoln Union v. Northwestern Co., 335 U.S. 525, 536 (1949)).
148 Liggett, 278 U.S. at 114 (Holmes, J., dissenting) ("[A licensed pharmacist] would be more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market.").
149 North Dakota Pharmacy, 414 U.S. at 166.
150 "Those two opposed views of public policy are considerations for the legislative choice." Id. at 167.
form of practice so long as a majority of stock were held by active practitioners, while Alabama prohibited the corporate form entirely. The Court found the former restriction substantively acceptable as a limit on the right of livelihood, while the latter was struck down on an almost irrelevant procedural ground. The procedural problem simply served to highlight the degree to which the Alabama structure was a self-serving framework for one interest group. If these observations accurately describe what the Court was doing, it is classic substantive due process analysis in which one case is decided by failure of proof of a public purpose.

The most solid bridge between procedural and substantive due process lies across the "irrebuttable presumption" channel. In Cleveland Board of Education v. LaFleur, the Supreme Court struck down the employer's requirement that a school teacher leave her job upon becoming pregnant. The school board attempted to justify its rule on the ground that most women become incapable of handling the duties of teaching at some point late in the pregnancy. The Court looked upon this as imposing an irrebuttable presumption of unfitness to which the teacher should have been allowed to make a contrary showing. Although the case could have been handled as an equal protection problem, involving treatment of similarly situated people differently on the basis of an irrelevant criterion, the Court instead treated the case as a due process problem. The problem was not a procedural defect in failing to give the teacher an opportunity to prove her capacity, but a substantive defect in making the judgment of unfitness on the basis of inadequate evidence.

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172 Id. at 640-42.
173 Id. at 644.
174 Id. at 646.
175 Another case which attempted to bridge the gap between procedural and substantive due process was Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 62 (1978), which involved a challenge to the federal statutory cap on liability of federally licensed nuclear power plants. The challengers argued that the cap should be subjected to a "more elevated" scrutiny than business regulations because the interests "jeopardized" by the act were very important. Id. at 62. The Court's response was that this was "a classic example of an economic regulation" subject to the bare rationality test. Id. The procedural leg of the argument related to Congress' substitution of a limited fund for recovery in lieu of state tort law remedies. On this part of the challenge, the Court found the fund to be a fair and reasonable substitute for less certain remedies. However, Duke Power was not a good vehicle for attempting to make the bridge, since nobody was being excluded from a trade or business; the interests of the challengers were somewhat confused between the current impact of having a nuclear power plant in their backyard and the future possibility of catastrophic losses. In the more typical case of a
LaFleur is an almost natural outgrowth of the protection provided by procedural due process for public employment. One of the requisites of due process, whether labeled procedural or substantive, is that the decision-maker must make a rational decision on the basis of available evidence.\textsuperscript{176} If this rule were applied to legislative judgments, then we would have substantive due process with respect to public employment. Actually, the same analysis was applied to public regulation of the professions through Gibson,\textsuperscript{177} although the Court denied it in North Dakota Pharmacy.\textsuperscript{178} The Court need only recognize that the case for due process invalidation in Gibson was made on the substantive rules, rather than the procedural defect, and that the case simply was not made adequately in North Dakota Pharmacy. The North Dakota case came out as it did not because of a lack of any substantive due process review, but because there was substantive review and the Court was not persuaded to abandon the deferential review standard for legislative judgments on economic and professional issues.\textsuperscript{179} Further, the impact on the right of livelihood simply was not sufficiently demonstrated.

5. Concluding Thoughts on Procedural Definitions of Property

The “procedural” due process cases make several significant points. First, no bright line exists between procedural and substantive aspects of state treatment of the claims that the Supreme Court will review for fairness and rationality. Second, the link between definition of the claim and due process protection is becoming more firmly established, solidifying the presence of a judicial review over substantive state law decisions.\textsuperscript{180} Finally, there is a need for recognition of some core intangible property rights protected by federal law regardless of how the state defines the claim of right.

\textsuperscript{176} See LUCIUS P. MCGHEE, DUE PROCESS OF LAW 40-41 (1906).
\textsuperscript{177} Gibson, 411 U.S. 564, 579 (1973).
\textsuperscript{178} North Dakota Pharmacy, 414 U.S. 156, 163 (1973).
\textsuperscript{179} See id. at 164-65.

A different sort of substantive due process approach is suggested in Michael Wells & Thomas A. Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 GA. L. REV. 201, 235-36 (1984). They suggest that the question to be decided in these cases is whether the defendant's conduct has passed the boundary of acceptable governmental behavior toward individuals.
The right of livelihood is one right that is protectable, not because the state defines the claim, but because the Constitution protects it regardless of how the state defines it. While the state may be able to justify a sharply limited form of an entitlement, such as "employment at will" in a public agency, such a justification should be made on substantive grounds, meaning that the court would need to be persuaded that the substantive values put forth by the state outweigh the substantive values of the right of livelihood.

B. Responses to AntiCompetitive Regulations Under Other Doctrines

In the absence of substantive due process, imaginative litigators have attacked anticompetitive systems on other grounds. A number of these have been successful, but the doctrinal fabric is far from complete. One doctrinal theme that could bring together what seems to be a number of disparate holdings is a return to the disfavoring of unregulated monopolies. The unregulated monopoly threatens entry to markets, thus threatening what Lord Coke believed to be a fundamental liberty of the citizen. 8 In the absence of substantive due process, the right of access to a vocation might make a great deal of sense in today’s world.

1. Equal Protection

The Court’s approach to state economic regulation challenges under the Equal Protection Clause parallels the Court’s deferential approach under the Due Process Clause. 182 Nevertheless, the Court has begun to breathe some life into the Equal Protection Clause, at least in the area of interstate business.

When the state of Alabama taxed out-of-state insurance companies at a higher rate than domestic companies, the Court held that the practice was a violation of equal protection. 183 The state’s purpose of promoting

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81 See generally Sir William Holdsworth, Some Makers of English Law 111-32 (1938) (discussing Lord Coke’s views and contributions to English law).

82 In New Orleans v. Dukes, 427 U.S. 297, 303 (1976), the Court said: [T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

investment in domestic facilities was held to be impermissible.\textsuperscript{184} Although the state’s desire to promote the formation of new domestic companies was permissible, this desire could not be accomplished by discriminating against foreign companies.\textsuperscript{185} The dissenters claimed that both purposes should be permissible and that the Court should defer to the legislative policy judgment.\textsuperscript{186}

An extension of the approach of the insurance company tax case from interstate commerce to economic regulations that distinguished among persons and companies within the state might serve as a vehicle for review of anticompetitive regulations. The Court would then need to ask whether there was a rational basis for excluding someone from, while allowing others to enter, a trade or business practice. Subjecting the legislative and administrative judgments of public safety and protection to judicial review would result in the question of how stringent the rational basis test allows that review to be. As explained below,\textsuperscript{187} rational basis is a problematic phrase for a judicial analysis, but the analysis that it could identify would be apt when properly described and applied.

Many commentators have noted that the modern three-tiered equal protection analysis is a thinly disguised substitute for substantive due process.\textsuperscript{188} The analysis of reasonableness, however, usually takes place in the context of groups of people who can be logically separated according to some legislative classification. When the legislation touches an interest entitled to special constitutional protection, the Court has cautiously applied the same analysis regardless of whether the legislation actually divides people into differently treated groups.

The clearest example of such an analysis to date is \textit{Clark v. Jeter},\textsuperscript{189} which dealt with a six-year statute of limitations for paternity actions. The Court employed the “heightened, intermediate” scrutiny rather than the compelling interest or rational basis test because the state action impacted could not challenge the tax as an imposition on commerce because Congress had ceded all control over insurance to the states in the McCarran-Ferguson Act and because, as corporations, they were not citizens of any state for purposes of the Privileges and Immunities Clause.

\textsuperscript{184} \textit{Id.} at 876-80.
\textsuperscript{185} \textit{Id.} at 879.
\textsuperscript{186} \textit{Id.} at 883 (O’Connor, J., dissenting).
\textsuperscript{187} See \textit{infra} notes 189-95 and accompanying text.
\textsuperscript{189} 486 \textit{U.S.} 456, 461-63 (1988).
on a classification based on illegitimacy.\textsuperscript{190} The problem was that the legitimate or illegitimate classification was not for purposes of the statute of limitations; the state had not given legitimate children more time in which to file paternity actions. What the state had done was to classify according to whether the mother was married at the time of birth\textsuperscript{191} and to decree that children of unmarried mothers would not be owed legal duties, such as support, from their fathers until the fact of fatherhood was proved in a judicial proceeding.\textsuperscript{192} The groups of legitimate and illegitimate children were not treated differently according to a statute of limitations; no statute was appropriate for the legitimate group. Therefore, the Court applied a straightforward reasonableness test to the statute without concern for whether the legislature had a rational basis for the classification.\textsuperscript{193} The outcome of the reasonableness test was negative,\textsuperscript{194} and the statute was held to be a violation of equal protection. There can hardly be a more clear example of substantive due process masquerading under another name.\textsuperscript{195}

\textsuperscript{190} Id. at 461. Other cases on illegitimacy might have come to a similar conclusion had the Court continued the analysis begun in Levy v. Louisiana, 391 U.S. 68, 71-72 (1968). Levy invalidated a state statute preventing an illegitimate child from sharing in a wrongful death recovery. The Court later extended the same holding to state workers' compensation recoveries in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 174-76 (1972). However, when it came to the question of inheriting from an intestate father, the Court held that the father's choice, rather than state law, was the determinative factor. Labine v. Vincent, 401 U.S. 532, 555-57 (1971) (involving an illegitimate daughter who claimed an interest in the estate of the decedent, whom she claimed was her father. Louisiana's intestate succession laws denied an illegitimate child the ability to inherit if the father had not acknowledged him as his child). If the Court had viewed Labine as involving an irrebuttable presumption of the father's choice not to bequeath, then the case might have run afoul of due process guarantees. As an equal protection case, however, the Court need not impose strict scrutiny. In any event, these cases all involve aspects of personal liberty usually identified as fitting within the special family relationship.

\textsuperscript{191} Other tests of legitimacy, of course, can be used. For example, the state may use the father's attestation on a birth certificate or other evidence of acknowledgment instead of, or in addition to, marriage.

\textsuperscript{192} Clark, 486 U.S. at 462.

\textsuperscript{193} Id. at 463.

\textsuperscript{194} The Court in Clark stated:

Even six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child. . . . We are, however, confident that the 6-year statute of limitations is not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims.

\textit{Id.} (alterations in original).

\textsuperscript{195} Two other "equal protection" cases from the 1987 Term could be described as substantive due process cases, although each involved, to a degree, a classification related
2. Commerce Clause

The Commerce Clause, unaided by congressional legislation, operates to prevent a state from enacting regulations that are "discriminatory" or "unduly burdensome" to interstate commerce.196 In recent years, the Supreme Court has indicated that to examine state rules more closely for "undue burdens" on commerce than for "irrational" impacts under the Due Process Clause would be inconsistent.197 Nevertheless, on a case-by-case basis, the Court will find that a particular regulation unduly burdens a particular business.198

Regulations that burden interstate commerce certainly impact on constitutional values, but whether the judiciary is the appropriate branch for defining and implementing these particular values is questionable. Congress was given authority to regulate commerce among the states for the explicit purpose of preventing "balkanization" of trade.199 One of the two principal objectives of the Constitutional Convention was to find a method for ending or preventing trade restrictions among the states.200 This objective has been redefined in this century to be an objective of amalgamating the United States into one open market, a stronger version to the challenged substantive provision. Lyng v. International Union, UAW, 485 U.S. 360 (1988) (challenging the exclusion of striking labor union members from the food stamp program); Kadrmass v. Dickinson Pub. Sch., 487 U.S. 450 (1988) (challenging the imposition of user fees for school bus transportation in some, but not all, school districts within the state).

196 Martin H. Redish & Shane U. Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 DUKE L.J. 569, 598 ("Under the Dormant Commerce Clause, the Supreme Court invalidates state regulations when they either discriminate against out-of-state residents or when they unduly burden interstate commerce. . . .").

197 Id.

198 See generally Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977) (holding that North Carolina labeling regulations unduly burdened the sale of Washington apples, which had to meet a higher standard); Pike v. Bruce Church, Inc., 397 U.S. 137, 146 (1970) (holding that packaging regulations were unfair to a producer whose packing plant was located across the state line).


The words of the Commerce Clause—"the Congress shall have power . . . to regulate Commerce . . . among the several states. . . ."—reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization. . . .

Id.

200 THE FEDERALIST NO. 22 (Alexander Hamilton). The other objective was to create a taxing power on the part of the federal government.
of the same objectives that have motivated the European Economic Community.

The Supreme Court has fallen into a logical bind because of nineteenth century constructs involving the exclusivity of the categories of commerce. In determining the limits on Congress' power under the Commerce Clause, the Court held that some commerce was interstate and subject to federal power while other commerce was intrastate and subject solely to state control. The exclusive nature of the categories meant that the grant of power to Congress excluded any state power to regulate in the field of interstate commerce. When the Court realized that the categories were not watertight and the category of interstate commerce expanded almost without restraint, the Court could hardly exclude the states from regulating any economic activity. Rather than choosing the corollary that the category of intrastate commerce similarly lacked judicially enforceable constitutional limits and was subject to restraint only by Congress, the Court continued to assess the desirability of state regulation against updated versions of the nineteenth century limits, resulting in the "undue burdens" test.

The result of the application of the "undue burdens" test is a line of cases utterly inconsistent with each other and often protecting commerce at an

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201 See, e.g., Cooley v. Board of Wardens of Phila., 53 U.S. 299, 306 (1851) (requiring that the Court determine whether a subject was of a nature requiring uniform national regulation or diverse local regulation). The Court had earlier talked about exclusive spheres in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 60-64, 74-75 (1824) (opining that the power to regulate commerce is exclusive with respect to the objects of the power), but changed its mind in Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829) (holding that measures calculated for the benefit of the state, if not conflicting with the powers of the federal government, are reserved to the states).

202 Cooley, 53 U.S. at 318 ("If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power.").

203 Two different approaches with similar results have been advocated. One is to assert that divisions of power between state and federal government present nonjusticiable issues. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175 (1980). The other approach is to adjudicate the question and hold that the Commerce Clause itself sets no limits on the power of the several states to regulate interstate commerce, but that Congress can limit the states' ability to regulate the same subject. Redish & Nugent, supra note 196, at 573.

204 Cooley, 53 U.S. at 314 (examining the necessity of conforming regulation of pilotage to the local peculiarities of each part of the country in contrast to the possibility of uniformity throughout the United States). Those limits were set by an assessment of the need for national uniformity versus the need for local control.

205 See Daniel A. Farber, State Regulation and the Dormant Commerce Clause, 3 CONST. COMM. 395 (1986) (discussing the "undue burdens" test).

almost palpable risk to public safety.\footnote{207} Although the Court purports to apply "federalism" principles, which limit the degree to which one state can interfere with the processes of others, the Court has, in reality, created a set of economic rights protecting the enterprise of business itself. Were this set of economic rights to survive at all, it might be better framed under the heading of "due process," thereby recognizing the special concerns of federalism and interstate commerce. The test itself, using the term "undue," reflects a conscious, substantive review of the wisdom of particular regulations.

The "undue burden" cases illustrate many of the same problems that were encountered by the old substantive due process doctrine. In two cases involving the permissible length and configuration of trucks, the Court has overruled legislative judgments of safety necessities.\footnote{208} Because the state was unable to come forward with evidence showing that larger trucks were unsafe, the Court held that the safety concern did not justify the burden on commerce.\footnote{209} Of course, the state would not be able to provide that evidence until the larger trucks were allowed onto the highways to kill people. To one who must now fight triple behemoths loaded with flammable products on the highways, the Court's solicitude for some business interests\footnote{210} seems particularly reprehensible.

\footnote{207} See Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 678-79 (1981) (striking down an Iowa law that generally prohibited use of sixty-five foot, double trailer trucks within the state); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447-48 (1978) (holding that Wisconsin regulations restricting the operation of trucks over fifty-five feet long and of double-trailer trucks traveling upon interstate highways violate the Commerce Clause).


\footnote{209} Kassel, 450 U.S. at 671 ("Here ... the State failed to present any persuasive evidence that sixty-five foot doubles are less safe than fifty-five foot singles.").

\footnote{210} It is interesting to speculate how the Court would have responded had the state argued the truck limit as an economic regulation designed to encourage more investment in trucks and to spread business among more trucking companies. Under the hands-off approach, an economic rationale might have fared better.
The vagaries of the undue burdens test are legion and even less capable of rational explanation than the old substantive due process cases. For example, the Court repeatedly condemns economic protectionism and frustration of out-of-state competition, and yet has upheld some explicitly protectionist regulations when the burdens on commerce did not strike the Court as being undue. In addition, when the state can be described as a “market participant,” the Court grants almost a blanket exemption from the restraints of the Commerce Clause. The Court grants this exemption in spite of the fact that the effects of the state’s practice are unchanged regardless of whether tax money rather than regulation is the vehicle for accomplishing the state’s objectives. For example, no practical difference exists between requiring a “private” company to supply products to state residents and buying the company so that the state itself can distribute those same products to state residents. Nor is it clear why a cardboard-producing state can exclude plastic milk cartons but cannot exclude less desirable items after they become garbage. Nor is there any reason why the state should be constrained from enacting a resident-preference rule for employers purchasing state-owned resources considering that it can enact the same rule when the employer is carrying out a services contract with the state (although the rule might be invalid under the Privileges and Immunities Clause).

211 See generally Redish & Nugent, supra note 196 (analyzing the Court’s justifications for striking down state regulations under the Dormant Commerce Clause).
213 E.g., Pike v. Bruce Church, 397 U.S. 137, 146 (1970) (balancing state and national interests even when the state’s motivation is strictly economic).
214 Reeves, Inc. v. Stake, 447 U.S. 429, 446-47 (1980) (holding that the Commerce Clause did not prevent the state of South Dakota from discriminating in favor of its residents with respect to sales from a state-owned cement factory); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 814 (1976) (holding that the Commerce Clause did not prevent the state of Maryland from imposing more stringent documentation requirements on out-of-state scrap processors than on in-state processors).
217 South-Central Timber Dev., Inc. v. Wumnicke, 467 U.S. 82, 100-01 (1984) (holding that an Alaskan requirement that timber taken from state lands be processed in Alaska was subject to the Dormant Commerce Clause doctrine).
218 White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 210 (1983) (holding that the Dormant Commerce Clause Doctrine does not apply to an executive order requiring that all city construction projects be performed by a work force at least half of which reside in the city).
A strong argument can be made that the entire field of interstate commerce regulation is committed to Congress and that the Court has no business making determinations of what constitutes an unreasonable burden on commerce. This argument relies heavily on the difficulty in finding judicially manageable standards to apply and on the power of Congress to make such determinations through a political process in which the states have their own role. The Supreme Court has left the area in a confusing state, but that does not mean that there are no discernible standards. If the Court focused squarely on discrimination and balkanization as the sole bases for invalidating a state regulation, then it could apply articulable standards to the issues. These standards, however, would have little to do with reasonableness or any other substantive due process approach. This seems to be an area particularly unsuited for due process reasoning, and the Court’s tendency to use such reasoning has gotten it into much trouble. This is an area to be left alone by our new economic substantive due process.

3. Privileges and Immunities

Although the privileges and immunities of federal citizenship have not expanded after their restrictive reading in the Slaughterhouse Cases, the privileges and immunities of state citizenship protected by Article IV have taken on increased significance in recent years. The Court now uses this clause in Article IV as a guarantee of equal protection on behalf of outsiders. In two cases involving very high licensing fees for out-of-staters as compared to much lower fees for residents, the Court invalidated a shrimp fishing fee and upheld an elk hunting fee. The Court saw the difference between the two fees

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20 Redish & Nugent, supra note 196, at 569-72.
21 Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 82 (1873).
22 U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).
23 Toomer v. Witsell, 334 U.S. 385, 403 (1948) (holding that shrimp fishing license fees that discriminated on the basis of residency violated the Privileges and Immunities Clause).
24 Baldwin v. Montana Fish & Game Comm’n, 436 U.S. 371, 388 (1978) (upholding a statute which prescribed fees for nonresidents’ elk hunting licenses that were several times higher than fees for residents).
to be the degree of impact on a person's occupation and livelihood.\footnote{Id. at 387-88.}
In virtually identical cases of employment preference laws for local residents, the Supreme Court upheld one against an attack under the Commerce Clause\footnote{White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 214 (1983).} and held the other to be an affront to the privileges and immunities of citizens of other states.\footnote{Id. at 281.}

Supreme Court of New Hampshire v. Piper\footnote{Id. at 288.} illustrates the dominant role of the right of livelihood as a protected interest. The Piper Court designated the opportunity to practice law as a "fundamental right"\footnote{Id. at 284.} under national law and thus subject to the "substantial reason" and "close relation" level of review.\footnote{See supra notes 18-40 and accompanying text (discussing the Lochner period and Lochner doctrines).} As with most other claims given this intermediate type of "means-ends" treatment, the right of a profession prevailed over the state's purported interest of having knowledgeable and locally involved attorneys. A scrutiny that forces the state to justify its chosen method by showing that it is needed to accomplish an important objective\footnote{U.S. CONST. art. I, § 10, cl. 2 ("No [s]tate shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts. . . .").} is nothing other than the old rational basis test of the Lochner period.\footnote{For example, Hamilton discussed the contract clause in the context of national unity, indicating that citizens of various states ought to be able to contract in other states without fear that legislative action will interfere with contractual rights. The Federalist No. 7. Madison included the contract clause in a general discussion stating that the contract clause, along with the ex post facto clause and the clause prohibiting bills of attainder, prevented retroactive legislative interference with items of "personal security

4. Contract Clause

The Framers almost certainly intended the Contract Clause\footnote{470 U.S. 274, 288 (1985) (holding that a New Hampshire requirement that only residents could be admitted to the state's bar violated the Privileges and Immunities Clause).} for the narrow purpose of preventing state legislatures from passing legislation forgiving debts.\footnote{4 Id. at 204, 214 (1983).} While this was the clause's first
use, the Court in *Fletcher v. Peck* relied on the Contract Clause as a source of natural rights in state grants. Moreover, *Dartmouth College v. Wood* expanded the clause’s reach to prevent the unilateral amendment of state-granted corporate charters. The philosophy of the Contract Clause was often invoked during the heyday of substantive due process as a bolstering point for the liberty of contract. When due process suffered its demise, the Contract Clause also fell into desuetude. The clause’s brief revival more than a decade ago has not been pursued, and the clause today seems to stand only for the limited proposition that only rarely can a state retroactively create new liabilities for actions that were not unlawful when committed or, conversely, excuse debts that were legitimate when created.

5. First Amendment

Protection of corporate and commercial expression could be viewed as a mild rebirth of judicial protection for economic interests. In recent years, the Court has struck down state regulatory attempts to force public utilities either to exclude certain types of inserts from their billing and private rights.” *The Federalist* No. 44.


26 10 U.S. (6 Cranch) 87, 139 (1810) (holding that a state legislature could not constitutionally rescind land grants to individuals who had purchased the land in good faith).

27 17 U.S. (4 Wheat.) 518 (1819) (holding that an act of the state legislature of New Hampshire to alter the Charter of Dartmouth College without the college’s consent was a violation of the contract clause).

28 Roscoe Pound, *Liberty of Contract*, 18 Yale L.J. 454, 457-58 (1909) (describing the development and the Courts’ treatment of the doctrine of “liberty of contract”). Actually, the rhetoric of contract began to fall away as the rhetoric of substantive due process gained ascendancy. Note, *The Contract Clause of the Federal Constitution*, 32 Colum. L. Rev. 476, 478 (1932) (“However, the last fifty years have witnessed a decline in the importance of the contract clause. The limelight has shifted to due process.”).

29 See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 447-48 (1934) (upholding a state statute extending the redemption period following a mortgage foreclosure sale).


31 See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (striking a New Jersey statute that retroactively repealed a bond covenant limiting the power of the Port Authority of New York and New Jersey to use bond proceeds to fund unprofitable mass transit systems).
envelopes  and has protected corporate advocacy in political campaigns. The Court has been particularly active in using First Amendment values to protect advertising by professionals such as lawyers and pharmacists, thus reducing the anticompetitive effect of state control over the licensed professions.

The rights of association and nonassociation are also extensions of First Amendment interests. The right of association started simply as a restriction on the state's ability to impede the gathering together of persons to promote mutual political interests. The right has expanded, however, to include gatherings for purely social purposes, although the Court has held that this branch must yield to competing state goals such as equality. Meanwhile, a right of nonassociation has been urged unsuccessfully in cases in which a property owner claimed protection from state demands of access to the property for speech interests and workers claimed protection from state-enforced labor union dues. The

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243 Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 20-21 (1986) (holding unconstitutional a state utility commission order requiring a private utility company to provide space in its billing envelopes four times a year to a private interest group critical of the utility).


247 NAACP v. Alabama, 357 U.S. 449, 466 (1958) (holding that the state of Alabama could not compel the NAACP to disclose its membership lists).


250 Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-37 (1977) (holding unconstitutional compulsory service fees charged under a closed shop agreement that were used for
latter holding is highly questionable today, as the cases on compulsory bar membership demonstrate.

The lawyer's First Amendment claim to refuse participation in a mandatory bar association shows the difference between First Amendment and substantive due process claims. Under the First Amendment, the analysis focuses on verbal expression of political positions by the bar, and the remedy is mere refund of that portion of the lawyer's bar dues reflecting political activity by the bar association. Under substantive due process, however, the challenge would go to the very existence of membership as a licensing requirement. In Keller v. State Bar of California, the Supreme Court unanimously accepted a First Amendment challenge to the spending of bar dues while assuming the validity of compulsory membership. The case raises at least as many questions as it answers, not the least of which is why the plaintiffs failed to attack the mandatory membership rule itself.

Keller was preceded by Lathrop v. Donohue, in which a plurality of the Court rejected a First Amendment challenge to mandatory bar membership, while leaving open the claim that dues could not be exacted for political advocacy. There being no majority opinion for the Court, the votes were roughly divided as follows. Three Justices, represented by Brennan, held that the State could require membership for the purpose of "elevating the educational and ethical standards" of lawyers generally. This group left open the question of whether a lawyer could

the ideological or political objectives of the Union); Machinists v. Street, 367 U.S. 740, 769-71 (1961) (holding that unions may not support against the protests of union members political candidates or doctrines with union dues).

U.S. CONST. amend. I (Congress shall make no law ... abridging ... the right of the people peaceably to assemble, ...).

Keller v. State Bar of Cal., 496 U.S. 1, 14-16 (1990) (holding that the California State Bar's use of compulsory dues to finance political and ideological activities with which members disagree violates those members' First Amendment rights).


Id. at 4.

367 U.S. 820, 847-48 (1961) (holding that rules requiring lawyers practicing in the state of Wisconsin to become members of the integrated State Bar of Wisconsin and to pay reasonable annual dues were constitutional).

Brennan's opinion stated:

Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State's
"constitutionally be compelled to contribute his financial support to political activities which he opposes."

Three other Justices would have cleared the mandatory membership requirement on both associational and free speech grounds. Justice Douglas would have found a violation of the right of association (or nonassociation), and Justice Black would have found a violation of his absolute version of free speech. Thus, six Justices found a sufficient justification for requiring membership, but five were at least willing to consider the argument that dues could not be exacted for political purposes.

One case that challenged both premises of Lathrop, Levine v. Supreme Court of Wisconsin, died on its way to the Supreme Court. The district court in Levine held that compulsory bar membership is a violation of the right of nonassociation. The two key elements for the district court's consideration were that the Supreme Court apparently had altered its views since Lathrop and that the Wisconsin disciplinary system had changed. The change in law to which the district court referred was the increasing significance attached to associational and nonassociational interests. Even more important, however, were the changes in Wisconsin's practice that had created separate agencies for continuing legal education and for lawyer disciplinary process. Without serving these functions, the Wisconsin bar lacked any justification for the compulsory membership that had existed at the time of Lathrop.

legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.

Id. at 843.

257 Id. at 848.

258 Id. (Harlan, J.; Frankfurter, J., concurring); id. at 865 (Whittaker, J., concurring).

259 Id. at 881 (Douglas, J., dissenting).

260 Id. at 873 (Black, J., dissenting).

261 679 F. Supp. 1478, 1502 (W.D. Wis. 1988) (holding that the requirement that attorneys belong to the State Bar of Wisconsin as a condition of practicing law in Wisconsin abridges the attorney's rights of free speech and free association under the First Amendment).

262 Id.

263 Id.


265 Levine was reversed in Levine v. Hefferman, 864 F.2d 457 (7th Cir. 1989), in which the Seventh Circuit stated that "the district court overemphasized the importance of the bar's role in the areas of continuing legal education and attorney discipline to the Lathrop Court. This overemphasis in turn, led the district Court to erroneously conclude
Meanwhile, during the same period, a number of other courts had dealt with challenges to integrated bars. Two trends seemed to be emerging. First, retention by the state bar of the disciplinary authority was a key factor in whether membership could be required. Second, exemption from a portion of the dues representing political activity could be ordered as part of the free speech claim.

It is a mystery why retention of the disciplinary authority is a factor in favor of mandatory membership. If an otherwise "private" entity takes on the function of licensing and license revocation on behalf of the state, then it is unquestionably a state entity. Nothing would be terribly offensive about the state telling practitioners of a certain trade that they must pay an annual fee for the costs of maintaining the disciplinary system for that trade. It is offensive, however, to tell those practitioners that the agency will use their fees for "educational" and other policy-making functions that are not controlled by the state when the price of nonpayment is the loss of one's license. Moreover, the bar association is surely setting the standards of conduct in the course of disciplinary proceedings, even if the basic "law" of ethical practice is handed down by some other entity (the court or legislature). Delegating the setting of professional conduct standards to an unregulated political structure is the essence of the unregulated monopoly that British law had declared to be offensive to basic liberty.

The Keller plaintiffs had the opportunity to break new ground by testing the Wisconsin District Court's assertion that the Supreme Court had altered that Lathrop was not a controlling precedent in this case." Id. at 462.

266 Gibson v. Florida Bar, 798 F.2d 1564, 1569-70 (11th Cir. 1986) (holding that certain positions taken by the State Bar of Florida were not sufficiently germane to its administration-of-justice function to justify the expenditure of compulsory dues); Keller v. State Bar Ass'n, 181 Cal. App. 3d 471, 226 Cal. Rptr. 448, 452 (1986) (holding that members of the State Bar may not constitutionally be compelled to support political and ideological positions with which they disagree); Falk v. State Bar of Mich., 305 N.W.2d 201, 246-47 (Mich. 1981), subsequent opinion, 342 N.W.2d 504, 511-14 (Mich. 1983) (holding that the State Bar of Michigan may constitutionally use mandatory dues of members for lobbying and other activities of the State Bar); In re R.I. Bar Ass'n, 374 A.2d 802, 804 (R.I. 1977) (upholding a motion by the Rhode Island Bar Association suspending an attorney for not paying his dues).

267 In re R.I. Bar Ass'n, 374 A.2d at 803.

268 See In re R.I. Bar Ass'n, 374 A.2d at 804.

its position since *Lathrop*. Instead, the plaintiffs chose to attack only those portions of the bar expenditures that were not "germane" to the purposes of the association.\(^{271}\) The Court accepted this attack, thereby creating the question of to what the test of germanity refers.\(^{272}\) Can the bar require dues to be paid only for the purposes of "regulating the legal profession and improving the quality of legal services,"\(^{273}\) as the Court implies at one point in its opinion?\(^{274}\) If so, there will be never-ending disputes over whether a particular staff member’s time is spent on "improving the quality of legal services."\(^{275}\)

Even with the opt-out for politically offensive activities, mandatory bar membership restricts the lawyer’s right of livelihood without providing a concomitant public benefit. One asserted public benefit is the setting of ethical standards by knowledgeable practitioners.\(^{276}\) Even without questioning whether the setting of ethical standards by those involved in a type of practice that may be completely different than the type of practice in which other lawyers are engaged is proper, it is highly suspect to allow a self-governing institution to police its own ethical standards. A less restrictive alternative would be for the state to police the ethical behavior of its lawyers directly rather than using the self-serving, anticompetitive mechanism of other lawyers.

A second asserted public benefit of mandatory bar membership is the education of lawyers.\(^{277}\) Again, a requirement of continuing legal

\(^{272}\) Id. at 13-14.
\(^{273}\) Id. at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)).
\(^{274}\) The Court at least made it clear that the Bar’s asserted test of "improvement of the administration of justice" was too broad. Id. at 15.
\(^{275}\) Id. Allowing a rebate of the portion of the fee going to non-germane political activities is not particularly helpful. In the first place, calculation of that amount is fraught with uncertainty. The entire staff of the bar association exists for political purposes to one extent or another. Every phone call, every media interview, every committee meeting has some role in developing the political positions of the bar or selling a certain image to the public. In the second place, rebating a portion of the fee does not alleviate the part of the objection that goes to the setting of licensing standards by a self-interested portion of the profession itself. That part of the double bind cannot be eliminated without taking away the disciplinary function. If that function were eliminated, then mandatory membership would not be nearly so offensive.
\(^{276}\) Id. at 13 ("The State Bar of California was created ... to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession.").
\(^{277}\) "Precisely where the line falls between ... activities in which ... the Bar [is] acting essentially ... and those activities having political ideological [implications] ... not reasonably related to the advancement of [essential activities] ... will not always be
education, even if it has a sufficient benefit to warrant its imposition, can be supplied by a number of providers without a requirement of membership in a trade association. In the face of these questionable public benefits is the infringement on the lawyer's right of livelihood by being required to support a self-serving organization with which he disagrees.

The justification for allowing a compulsory fee to support bar-related political activities is a rule of necessity: removal of the compulsory fee would be akin to creating free riders by allowing some people to benefit from the bar's activities without paying for them. Based on this rationale, one federal court upheld the federal government's imposition of a mandatory fee on beef producers, the proceeds of which were to be used for promoting the beef industry. This rationale supports at most only the imposition of fees for activities that benefit each member of the bar, and the disciplinary function is probably the only function that can meet this test. Even then, the establishment-like aspect of being required to support an entity against your wishes is highly questionable.

Including the right to practice a profession is not a great extension within the definition of expression. The right to be a river pilot free of nepotism or a lawyer with off-beat values could easily be a part of one's ability to express oneself in the modern world. If so, then the First Amendment could become part of the emanations creating protection for some aspects of the right of professional livelihood. But the First Amendment by itself does not carry the explicit history of protection against unregulated monopolies that is contained within due process, and First Amendment analysis does not extend to the requirement of compulsory membership.

6. Antitrust

Federal antitrust laws prohibit monopolization and agreements in restraint of trade, such as agreements to set prices. When a state legislature or agency grants a monopoly or sets prices, the arrangement
could have been challenged as a violation of federal law had the Supreme Court not created an implied exception for state action in *Parker v. Brown*. The issue in *Brown* was the California Agricultural Prorated Advisory Commission's authorization of farm cooperatives to establish pricing policies for various crops grown exclusively within the state and consumed almost entirely outside California. When competing producers challenged the scheme, the Court responded that the antitrust laws are directed against "individual and not state action."

*Goldfarb v. Virginia State Bar* was a challenge to state bar association enforcement of a minimum fee schedule for certain kinds of services. The Supreme Court found that the fee schedule had neither been adopted nor required by the state licensing authority, which was the state supreme court. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign [to fall within the State action exception to the Sherman Act]." *Bates v. State Bar of Arizona* was a similar challenge to state bar rules against lawyer advertising that began with a state disciplinary proceeding and eventually ended in the United States Supreme Court. The Supreme Court held that Arizona's rules "reflect[ed] a clear articulation of the State's policy . . . [and were] subject to pointed reexamination by the policy-maker—the Arizona Supreme Court—in enforcement proceedings." Therefore, the rules were exempt from operation of the federal antitrust laws. The Court went on, however, to hold that a blanket prohibition on all lawyer advertising would violate the First Amendment guarantees of free speech and press and that the rules in question were unconstitutional.

In a series of cases typified by *Southern Motor Carriers Rate Conference v. United States*, the Court held that the state need not compel the anticompetitive conduct but that mere authorization and

282 *Id.*
283 *Id.* at 352.
285 *Id.*
286 *Id.* at 790.
287 *Id.* at 791.
289 *Id.* at 362.
290 *Id.* at 363.
291 *Id.* at 384.
"active supervision" are enough to invoke the state-action exception.293 Thus, the Court is forcing professions that want anticompetitive regulations to have those regulations explicitly authorized or supervised by state agencies. When this happens, however, the practice then becomes state action subject to constitutional challenge under the First Amendment, the Equal Protection Clause,294 the Contract Clause,295 the Privileges and Immunities Clause,296 or the Commerce Clause,297 not to mention the Due Process Clause.298

7. Summary and Evaluation of Other Doctrines

In the absence of substantive due process, the Court has built an impressive array of weapons for dealing with anticompetitive and protectionist behavior by a state government at the behest of special interest groups within the state. Two of these doctrines, derived from the Commerce Clause and the Article IV Privileges and Immunities Clause, deal explicitly with trans-state problems, and, thus far, the Equal Protection Clause has been used in the economic field only against nonresident discrimination. The Court, however, has noted the great societal importance attached to interstate commerce and has drawn a distinction between regulations that touch on a person's livelihood as opposed to those that affect only recreational opportunities. The result is the recognition of a protected right of profession or livelihood, at least in areas that affect interstate business.

Is the ability to pursue a trade or profession deserving of protection without regard to the interstate impact, that is, a protectable right of livelihood within the state itself? The rhetoric of the Fourteenth Amendment Privileges and Immunities Clause certainly lends itself to this modern equivalence,299 particularly when bolstered by some of the older rhetoric of the Contract Clause. If we add the protections now being granted under the First Amendment and procedural due process, we have

294 U.S. Const. amend. XIV, § 1.
295 U.S. Const. amend. XIV, § 1.
296 U.S. Const. art. IV, § 2, cl. 1.
297 U.S. Const. art. I, § 8, cl. 3.
298 U.S. Const. amend. XIV, § 1.
299 The right so recognized would then be described as one of the "fundamental rights which belong to the citizens of all free governments." Daniel A. Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331, 1352 (1988) (quoting Poe v. Ullman, 367 U.S. 497, 541 (1961)).
a panoply of claims that are not unlike the protections whose interstices gave rise to the right of privacy in *Griswold*.\(^3\) From the implications of all of these clauses, we could find that there is a core right, much like the right of privacy, that all of these peripheral clauses are designed to enclose. That right would be the fundamental right of pursuing a trade or occupation.

Is it necessary to recognize a fundamental right to pursue a trade or profession in light of all the protections that are now evolving? The principal advantage would be that the single core right would pull together the divergent themes from the panoply that has been brought into existence. It would serve as a unifying theme among, for example, the First Amendment and privileges and immunities cases. In this portion of their operation, the various provisions would then have a common set of goals and analytic tools.

There is another approach that could reach a similar end. If Congress enacted a provision repealing the state-action exception to the federal antitrust laws, then the courts would have a statutory tool with which to deal with anticompetitive behavior by the states. A new exception, however, would be needed for those regulations reasonably designed to protect public health and safety. As the law now stands, an industry can obtain an exemption from federal antitrust requirements by having an anticompetitive policy adopted by a state legislature or board. If the legislature or board found a public need for the regulation and that finding was supported by sufficient evidence, then the impact on the right to work could be justified. Under this formulation, the antitrust laws would function much as they do now, except for the layer of judicial review at the stage of determining whether public justification for the restriction existed. This formulation would also function very much like substantive due process analysis. It might be preferable for the resurrection of substantive due process to come from Congress since Congress could change either its own or the Court's mind if things get out of hand. Nonetheless, if Congress fails to act, the Supreme Court has already put into place all the elements of a judicial reincarnation of the doctrine. All that remains is for the Court to utter the words and make clear the operation of the doctrine.

The interplay of the antitrust laws with the new substantive due process will work something like the following. If there is state action in the rigorous sense of the antitrust laws, then substantive due process supplies the constraints because there is an antitrust exemption. The

courts will ask the same questions of the state as it would have asked of an unregulated scheme. The answers, however, may be very different because the state is entitled to make a judgment, clothed with some degree of deference, regarding the public benefits to be derived from the anticompetitive scheme. This type of analysis works in the area of exclusion from market entry, which is most commonly approached in the name of the right of livelihood. Whether it has application in a more general right of competition remains to be seen.

III. THE AREAS OF PROTECTED INTEREST AND JUDICIAL REVIEW

At this point, we switch from what the Court has done to what it might do in the future. If economic rights, such as a right of livelihood, were recognized as elements of substantive due process, what would be the scope of the rights and what would be the standards for judicial review over claimed violations of the rights?

A. Scope of the Rights—Protected Areas of Economic Life

First, we need to identify some elements of economic interests that are deserving of substantive protection in today's world. The intent here is not to construct rigid categories that some later generation will feel compelled to dismantle or "deconstruct." The intent, instead, is simply to identify elements that, at this stage in our history, will trigger special solicitude under the Due Process Clause. Future problems will need future solutions that may be different.

Property constructs serve several important social functions, identified well by Professor Cohen's categories—economic productivity, occupation, labor and personality. The same functions can be said to lie behind more generalized protection for economic interests, but the rigor of protection is not set simply by identifying the

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302 The economic function seeks to promote maximum productivity. *Id.* at 19.
303 The occupation function refers to the law's role in protecting peaceful enjoyment of an occupant's rights on the land. *Id.* at 15.
304 The labor function refers to the protection of the fruits of one's labors. *Id.* at 16.
305 Property rights encourage the development of personality traits, or what Madison and Field called a person's faculties. *Id.* at 18.
306 This approach has been advocated by such diverse scholars as Epstein and Sunstein. Richard A. Epstein, *The Classical Legal Tradition*, 73 Cornell L. Rev. 292, 297-99 (1988); Sunstein, supra note 2, at 884-86.
functions to be performed. For example, criticisms of licensing and regulatory processes on the ground that they impede economic interests may fall short because the activities being regulated intersect more than one person’s protectable interests. The activity, such as practicing law, does not merely serve the economic interests of the practitioner; it also affects the personal development, productivity, and perhaps the labor of the recipient of the activity. The practice of law also affects third parties who are not parties to the transaction at all, and thus would have no ability to protect their own interests. Government regulates these activities precisely because they do affect persons other than the regulated.307

Licensing and regulation, however, restrict activities that perform many of the social functions formerly served by property. In the post-industrial state, economic productivity, labor, and personality functions merge in many aspects of our business lives. For example, restrictions on market entry and participation cut across these three functions of the property model.308 When a particular regulation cannot be said to serve the third-party recipient, then there may well be a substantive due process objection, and we will need to see how the objection might be framed in the marginal case.

1. The Right of Livelihood

Given the modern importance of work and the corollaries between one’s choice of livelihood and historic protections against unregulated monopolies, it is appropriate to recognize a substantive “right of livelihood.” The label “right of livelihood” is chosen instead of “right of occupation” in order to avoid confusion with the occupation function of property.309 The “right to work” is also rejected in order to avoid confusion with the anti-union movement and section fourteen of the Taft-Hartley Act.310 The “right of profession” might be preferable were it not for the implication of identity with a narrow category of self-proclaimed “learned” professions, and “vocation” seems too narrowly confined to

307 See Cohen, supra note 301, at 26 (noting the positive duties that property owners owe to third parties).

308 Business regulations outside the land-use field rarely implicate the occupation function of property interests; nobody is likely to be seriously confused about who is entitled to occupy an economic field that physically could accommodate an infinite number of competitors. The natural monopoly will be regulated precisely because of the exclusive occupancy.

309 Cf. Womell, supra note 8, at 92 (discussing the term “occupation”).

certain types of jobs. A better label should be available but has not yet suggested itself to this author.

In a sympathetic but critical treatment of the *Lochner* holdings, written while that case still held sway, Professor Hamilton traced rights of property from Locke's defense, premised in large part on the need to protect the fruits of a person's labor, through the period of abolitionist rhetoric, to the industrialists. The latter pictured labor as a highly individualized component of one's property, thus fostering the divide-and-conquer strategy that prevented the growth of labor unions and social legislation. Marxist doctrine was only one of the responses to the alienation of the person from the fruits of his labor. Another response was the effort to create equality of bargaining position so that laborers could exact a fair return for their labor. The individualistic approach to property interests and liberty of contract during the heyday of the *Lochner* era, though it sounds almost sadistic to the modern ear, rang true to many people at the time.

When the Great Depression showed that individualizing or dividing-and-conquering actually resulted in a loss of productivity, the social functions of labor became clear. If a worker does not receive a fair return on his or her labor, the workplace is likely to deny to the worker the ability to be economically productive. One result of this denial is a denigration of the individual’s personality because of the very insistence on “exalting” each individual as an isolated economic entity. A

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313 For a brief introduction to Marxist doctrine, see generally Gerd Hardack et al., *A Short History of Socialist Economic Thought* (James Wickham trans., 1978).


315 According to Lochner, “[u]nder such circumstances [lack of a health rationale], the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the federal Constitution.” *Lochner v. New York*, 198 U.S. 45, 64 (1905).

316 *Id.* at 53 (discussing the right of contract as part of the liberties provided by the Fourteenth Amendment).

317 Hamilton, *supra* note 312, at 878-80 & n.45.

318 Hamilton says that [a]gainst an unplanned and undirected industrialism, and its imminent hazards to life, liberty, and property, we have no constitutional rights. But thanks to John Locke—or to the thinkers, statesmen, warriors, business men, and jurists who put the punch in his words—we have adequate safeguards against the resort
further consequence is a loss of total productivity, resulting in a loss of profits to the entrepreneur.

Collectivization was necessary under these circumstances both to prevent ruin of the individual and to maintain acceptable levels of productivity. But collectivization for economic power can have a negative influence on the worker’s initiative, and regulation in the public interest can impede creativity and foreclose opportunities. If collectivization and status stifle challenges to the existing order, then the public interest itself can suffer. The interest in pursuing a lawful trade or occupation has been extolled by any number of writers, both on the Supreme Court and elsewhere. In the post-industrial state, this interest takes on even more significance. The high-tech world emphasizes mental labor. Success in the modern economic world, whether viewed individually or collectively, requires development of personality traits because skills will be the most marketable commodities we will have.

Denying entry to a trade or profession is a direct deterrent to both personal and economic potential. In addition, regulations that restrict entry into the profession may disserve the public interest by raising prices and protecting the inept. Thus, the recognition of a right of livelihood is warranted as much by the public interest and social objectives of an economic (property) system as by individual concerns. Balanced against these concerns is the need for protection of the public interest through prevention of inept practice of a profession that is so complicated that the marketplace cannot be expected to exert any sensible control on competence. The consumer has no means to judge the ability or diligence of a practitioner who may be seen only once in a lifetime, and demands for heightened regulation or self-regulation of the professions increase directly with the complexity of the profession.

by any state to the kind of stuff the Stuart kings used to pull. Hamilton, supra note 312, at 880.


320 The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. . . . To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man. Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

321 McCloskey, supra note 2, at 56-58.

322 See Gellhorn, supra note 60, at 25. Actually, state codes reveal regulation of every
The right of livelihood is not threatened by distributive schemes such as taxation and wealth redistribution, the existence of which is implicit in the social compact.\textsuperscript{323} The right would only rarely be implicated by land-use regulations,\textsuperscript{324} which most often will be analyzed under the Takings Clause.\textsuperscript{325} Furthermore, most routine business regulatory systems affecting banking, securities markets, or public utilities would not seriously threaten the right of livelihood. The ordinary business regulatory system may implicate the right of livelihood, but the public justifications would be easy to demonstrate and justify.

2. A General Right of Competition

We could extrapolate from the right of livelihood to a right of competition that would deal with many of the incidents of anticompetitive state behavior described above since many of the same considerations are involved. There could be unreasonable impositions on the ability to pursue a trade when the state grants a monopoly to a public utility, such as a cable television company, or allows an industry board to exclude certain products from the market. Exclusion of competition also works to business from hair cutting through doctoring and lawyering. Nonetheless, the degree of anxiety that the public feels about its inability to evaluate professional services certainly increases as the text indicates.

\textsuperscript{323} Epstein's statements in his TAKINGS book go too far in this regard. He seems to have backed off and recognized that the mutual reciprocity of benefit implicit in taxation and redistributive schemes is enough justification to avoid the effect of the Takings Clause. Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985); Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain, 41 U. Miami L. Rev. 1, 11 (1986).

\textsuperscript{324} But see Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (holding that South Carolina's coastal regulation, which deprived a landowner of all economic benefit of his property, constituted a taking within the meaning of the Fifth Amendment).

\textsuperscript{325} This conclusion is more important than it might first appear. One of the reasons for undertaking this Article was my initial belief that a workable version of substantive due process might avoid some of the confusion that has arisen in the takings field. But if substantive due process is limited to regulations that restrict the right of livelihood, either by eliminating a trade or creating an unregulated monopoly, then the doctrine will not have widespread utility with regard to land-use regulations. That leaves us free to approach issues under the compensation clause with less concern for whether the question of public benefits ought to be addressed first under the Due Process Clause. In a takings challenge, the public benefits of a regulation can be weighed directly against the effect on core elements of the substantive, federal definition of property. The result is compensation rather than invalidation, so the court is not skating on such thin ice in making this direct comparison of benefits and costs.
the detriment of the public when it stifles innovation and raises prices.\textsuperscript{326} These practices can thus implicate economic productivity as well as labor and personality functions. From the perspective of political process theory, it is even possible to construct a constitutional argument that judicial protection against anticompetitive seizure of legislative processes is necessary to protect democratic institutions.\textsuperscript{327}

Indeed, the common law abhorrence of monopolies and the British protection against unregulated monopolies was not only protection for the aspiring competitor, but also protection for the public against the social disutility and political subversion of the unregulated monopoly.\textsuperscript{328} This belief was so strong in pre-American law that it is quite possible to track protection against unregulated monopolies into the liberties guarded by the Due Process Clause.\textsuperscript{329} In this context, the safeguards imposed on the exercise of the patent and copyright powers of Congress are a corollary of the rules against unregulated monopolies.\textsuperscript{330}

On the other hand, in an increasingly complicated technological environment, very few of us can judge the safety or value of a product or service. Some industries demand the presence of only one supplier with heavy regulation and cross-market subsidization that require continuous agency oversight rather than judicial intervention.\textsuperscript{331}

Recognizing a general right of competition would be a major step. Arguably, though, it is not desirable in light of the protection already afforded by other provisions of the Constitution. One could argue that entry restrictions are being addressed in a reasonably satisfactory manner by the current application of antitrust laws combined with the Privileges and Immunities Clause, the Commerce Clause and the First Amendment. Arguments in favor of recognizing the right of competition include the point that the panoply of constitutional doctrines being developed obscures the focus that a single doctrine under due process might achieve. In addition, federal antitrust law would need to be modified in order to eliminate the state action exception before we could conclude that the

\textsuperscript{326} Wonnell, \textit{supra} note 8, at 97.
\textsuperscript{327} \textit{Id.} at 108-11.
\textsuperscript{328} \textit{Id.} at 103-11.
\textsuperscript{329} \textit{Id.} at 111-29.
\textsuperscript{331} The breakup of AT&T's monopoly on long-distance services has been of questionable benefit to consumers. For example, local telephone service rates have risen because of the elimination of the subsidy from long-distance service. \textit{See generally} Louis Schwartz \textit{et al., Government Regulation} 874, 881 (6th ed. 1985).
The panoply of protections would be sufficient for the time being.\textsuperscript{332} The economic productivity functions of property-liberty as well as some elements of the personality and labor functions demand that we take the presence of a general right of competition seriously.

For reasons of judicial process,\textsuperscript{333} the general right of competition would be difficult to apply. Application of the right would throw the courts into the business of directly addressing either the good faith or the wisdom of the legislature in the absence of the clarity of individual interests afforded in the right of livelihood. For now, it should be sufficient to emphasize the right of livelihood and leave it to future advocacy to disclose whether other categories of rights may be implied from the functional justifications for property recognition.\textsuperscript{334}

3. Freedom from Regulation

There has floated in some circles the notion that government can do only what private citizens could do prior to government.\textsuperscript{335} Sometimes this argument is phrased in "political science" terms as stemming from the assumption that participants in the social compact can grant no more authority to government than they held themselves.\textsuperscript{336} The argument may also take the form of insisting that regulation subverts the limits on government that were a precondition to the social compact in order to prevent domination by interest groups.\textsuperscript{337} A logical outcome of the

\textsuperscript{332} See supra note 280 and accompanying text for more information concerning federal antitrust law. For a discussion of the state action exception, see supra notes 281-90 and accompanying text.

\textsuperscript{333} See infra notes 337-41 and accompanying text.

\textsuperscript{334} A very different set of interests are disclosed in state regulatory schemes designed to benefit local residents as opposed to out-of-state people. Such schemes implicate federalism concerns but only occasionally intersect with any of the rationales for recognition of property interests. The right of livelihood was involved in a number of privileges and immunities cases, including the shrimp and elk cases. See Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 388 (1978) (holding that a state may charge a nonresident more than a resident for an identical elk hunting license because elk hunting was deemed recreation as opposed to a means of livelihood); Toomer v. Witsell, 334 U.S. 385 (1948) (ruling that a large disparity between license fees charged resident and nonresident commercial shrimp fishermen was a violation of the Privileges and Immunities Clause).

\textsuperscript{335} Epstein, supra note 306, at 12-13 (citing John Locke, Of Civil Government at ¶ 135 (1690)).

\textsuperscript{336} See id. at 12 (stating that "[n]o one can convey what he does not own").

argument is that regulation for any purpose other than self-protection is invalid; government would not be able to regulate for the purpose of increasing productivity or general social welfare.

This position is patently ridiculous. Government exists precisely for the purpose of accomplishing collective goals. Those goals may well include the functions of increasing productivity as well as protecting the fruits of labor and personality. But if government seems to intrude upon those functions for one group, it may well be enhancing those same functions for another group. It is precisely this collective choice that has given rise to the creation of government and the vesting of the police power, which must be adequate for all purposes except invasions of protected interests. To create a general right to be free of regulation would not define a protected interest but would instead deny the very existence of the governmental power itself.

The activities that might be protected by a general freedom from regulation could implicate many economic and safety analyses that are even less within the competence of judges to understand than are those implicated by the right of livelihood. Requiring judges to understand these issues sufficiently to exercise judicial review is not the same as requiring judges to "substitute their judgment" for that of the legislature. As explained below, judicial review does not involve making the political decisions; it is a checking function designed to insure that the political decisions are made on the right premises. Unless the claim of a regulatee can be framed in terms of the right of livelihood, thus invoking both the labor and personality functions, the lack of institutional competence in the courts should probably suffice to produce dismissal of the claim.

Judge Posner describes the "libertarian argument" as an argument that government is prevented by the nature of the social compact from involving itself in redistribution of goods and services.\textsuperscript{338} He rejects the argument for three reasons: (1) it confuses the notion of limited government with democratic government; (2) it leads to a government obligation to provide services within the compact; and (3) courts are incompetent to assess the competing economic considerations of policy.\textsuperscript{339} I disagree with the third reason, am dubious of the second, but basically agree with the first. The following simple example will suffice to make the point.

At its extreme, the argument for a general freedom from regulation asserts that "government programs uniformly do more harm than good."\textsuperscript{340} The argument contends that the \textit{Lochner} Court was correct

\textsuperscript{338} Posner, \textit{supra} note 41, at 21.

\textsuperscript{339} \textit{Id}. at 21-24.

\textsuperscript{340} Note, \textit{supra} note 3, at 1372 (citing Ronald Coase, \textit{Economists and Public Policy},
because the "baker's union and the large institutional bakeries simply pushed through a law that would benefit them at the expense of politically unorganized consumers and small bakeries." Although this assertion, if true, would have many of the same overtones of political corruption that militate in favor of a general right of competition, the argument ignores the externalities of the transaction between employer and employee. Wage and hour laws are not enacted to benefit the worker who has the job so much as to benefit the unemployed worker who would get a job if the current workers' hours were reduced. Therefore, if the consumer pays more for the same product, the higher price should be offset by the greater circulation of money in the economy, which allows the consumer to charge more for his or her services in the workplace. The interlocking nature of all of these relationships supposedly justifies the regulation and demonstrates the inability of a court to deal with all aspects of the transaction. Only the legislature can adopt the plethora of controls that are needed to ensure that each apparent harm is compensated by another, perhaps indirect, benefit. The legislature's adoption of a regulation that benefits one group without a corresponding public benefit creates a problem, but the constitutional protection is to be found in a guaranteed right, not a general freedom from regulation.

In summary, with regard to the issue of whether to recognize economic rights under the Due Process Clause, the Court has already created a right of livelihood and should recognize its substantive due process dimensions. Furthermore, even though a general freedom from regulation is not warranted, recognizing some due process limitations as antecedents to the takings question might ease the analysis in the takings area. Some general right of competition is lurking in the wings, but it is not yet ready for recognition.

B. Techniques of Judicial Review

*Slaughterhouse* was never officially overruled during the *Lochner* era. Similarly, *Lochner* has never been overruled in the post-New Deal era. What the Court has said of *Lochner* is that the test for substantive due process is merely the "rational basis" test, in which the

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* in LARGE CORPORATIONS IN A CHANGING SOCIETY 169, 183-84 (J. Weston ed., 1975)).

341 Id. at 1373.


Court will accept or even construct any possible theory on which the legislature could have found that the regulation in question would serve the public interest. The effect, as stated in the Court's own opinions, is no longer to ask the question. In addition to the strong social and historical factors causing the Court to abandon its questioning of legislative judgments, the rational basis test itself is an impediment. It takes an exceptionally courageous judge to declare that an entire legislative majority has reached an "irrational" conclusion. The very words themselves constitute a hindrance to the exercise of the judicial review function. On the other hand, the "compelling state interest" test would move us too far back in the Lochner direction. Modern tools of economic analysis should save the Court from Lochner difficulties no matter what phrasing is chosen for the new substantive due process test.

The Court could employ a straightforward statement that it will strike down legislation that is not reasonable in its production of positive social benefits. The focus on social benefits will inevitably draw the Court into assessing the wisdom of regulation versus competition in a given market. This is unfortunate from a political standpoint because it returns the Court to the posture of second-guessing the legislature and substituting the Court's own judgment concerning the wisdom or desirability of regulatory schemes. There is no escape from this posture, however, except by abandoning the field as the Court has done for the last several decades.

346 See supra notes 182-95 and accompanying text.
347 See supra notes 182-95 and accompanying text.

Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."


348 The Court has expressed concern that in American society, some things are simply best left up to the legislative branch, which is meant to be the people's branch, which is meant to be the people's representative. Ferguson, 372 U.S. at 729-30.

349 One of the key historical factors was the attempt by President Roosevelt to alter the structure of the federal court system in the wake of the courts' active role in striking several New Deal programs for being unconstitutional. Although President Roosevelt's attempt to pack the Court with justices more favorable to his programs failed, this attempt has significantly influenced the judiciary. For a discussion of this factor, see Peter Graham Fish, The Politics of Federal Judicial Administration 112-30 (1973).
The first step may be to require the legislature to state the objectives and reasons for its rule, just as with an administrative agency. Indeed, the California state courts have come very close to this approach in a series of cases dealing principally with zoning variances and water rights. If the legislative objective is stated by the legislature itself, then a means-end test can be applied. The result, rather than being the compelling interest test, would be rational basis in a procedural posture that ties reasons to results. If the legislation does serve stated legislative goals, the next step would be to determine whether it invades a protected interest, such as the right of livelihood. If so, then familiar techniques of judicial review require the Court to balance the stated public objectives with the purposes behind the defined right.

In the means-end portion of the exercise, the Court will need to address itself to the factual issue of whether there is a public benefit flowing from the regulation. In a rare instance, the benefit rationale will be as transparently empty as in the river pilots' case. Of course, in these cases, concluding that a public benefit is lacking is the same as holding that there is no rational connection between the objective and the means and, thus, no rational basis for the regulation. The difference between rational basis and a straightforward benefits test is merely the phrasing. In most cases, however, the regulation would arguably promote some public benefit while imposing onerous burdens on some individuals. The public benefits test would have to work in something like the following fashion.

Imagine a city ordinance that requires $100,000 in operating capital before one can obtain a license to operate a ski repair business. The basis is the same as for many similar regulations, that the operating capital assures the stability of the business and provides a fund for satisfaction of judgments against the business. The result, however, is to force out of business all but the largest company in town, including some small entrepreneurs who might actually be better ski mechanics or offer something the public wants in the way of personalized service. One approach would be to make the validity of the ordinance turn on the anticompetitive monopolization effect in the local market, reducing the Due Process Clause to a reiteration of federal antitrust laws. Sound

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34 Nat'l Audubon Society v. Superior Ct. of Alpine Cty., 658 P.2d 709 (Cal. 1983) (allocation of water from Mono Lake); Topanga Ass'n for a Scenic Community v. County of Los Angeles, 522 P.2d 12 (Cal. 1974); Strumsky v. San Diego Cty. Employers Ass'n, 520 P.2d 29 (Cal. 1974) (if a "fundamental vested right" is involved, the court must exercise independent review of the evidentiary record).

35 See supra notes 62-71.
judicial administration of constitutional principles argues against ad hoc rules and decision making that emphasize local conditions. Even worse would be a focus on the motives of the city council, which could be inferred from facts such as the ownership of the surviving business by a councilman's brother-in-law, because motive is logically irrelevant to either impact on other entrepreneurs or public benefits.

Preventing perversion of the political process certainly is a value that underlies economic substantive due process, but it is not a value that translates readily into standards for judicial review. Almost all of the evidence relevant to the issue would be off the public record, including discussions (if they took place at all) behind closed doors. The judicial inquiry would include a great deal of speculation about whether a legislator could vote against the wishes of a particular constituency, how well organized competing constituencies are, and how many legislators are subject to varying kinds of interest-group pressures.

Both because the motives of the legislators are irrelevant to the impacts of their acts and the evidence would be unusually "soft," the political perversion issue should not be the focus of judicial review. Thus, we are left with the essential question of whether the anticompetitive effects outweigh the safety benefits. The appropriate focus is on the public risks and benefits, an inquiry in which the "natural rights" of the individual have virtually no role other than to define the problem. The same analysis can be applied to limiting the dispensing of eyeglasses to licensed optometrists, requiring apprenticeships for television repair persons, limiting the practice of law to graduates of ABA law schools, or a host of other market entry restriction devices.

Now we must again face the process-oriented reasons why the courts have abandoned a judicial review role in this field. The questions to be asked require a relative weighing of public risks and benefits, an exercise that is both familiar yet troubling from the arena of the "personal" liberties. The courts' constitutional mandate arises when the Due Process Clause is triggered by a regulation that touches on the personality, labor,

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350 One problem with the trucking and other Dormant Commerce Clause cases is the tendency to make the outcome depend on local facts more than on nationally applicable principles.

351 Professor Wonnell urges a focus on pressure group politics. See Wonnell, supra note 8, at 108-11. Professor Phillips concludes that such a focus is impossible. I would agree with Professor Phillips, but add that the inquiry is also somewhat beside the point. See Phillips, supra note 2, at 301-13. While insulation from pressure group politics may be one of the values that underlies the right of livelihood, it is not the focus of the right. As Judge Posner urges, our job is interpretation, rather than perfection of the economic and political system. See Posner, supra note 41, at 31-38.
or welfare functions of an economic-property system. The test employed is whether the regulation lacks sufficient social safety or health justification, a question that should have been answered by the political process were it functioning well. Under the Holmes approach, the recourse of the public that is being disserved by a "dumb" regulation is to the legislative process.

Although we can defer to the legislature on the economic productivity issue, sending the dissatisfied competitor to the legislative process is too glib an answer. The individuals whose oxen are being gored usually lack any political clout (otherwise they would not be in this fix), most trades and businesses are too complex to be easily understood by the average voter, and the public generally is uninformed about which regulations are good and which are bad.

The Supreme Court's stated reason, following Holmes' admonition, for deferring to the legislative judgment was the belief that courts had no special role or expertise in the arena of social and economic policy. This reason, however, is not a good explanation for the abdication of the last half century. Courts certainly have as much wisdom and insight as the legislative bodies in assessing whether public benefits outweigh costs of a particular measure. The better explanation for the abdication is that the courts are not able to take on the full range of a given social or economic agenda at their own behest. A court that strikes one regulation stands in great danger of detrimentally affecting a number of other regulations. Because regulations in the economic arena interlock just as economic life interlocks, courts must be particularly cautious about exercising constitutional review authority in the economic sphere.

What we are describing are various points on the spectrum of human conduct that run from the most isolated to the most interconnected. The interconnected end of the spectrum implicates governmental regulations that affect economic life, an area in which courts must be acutely conscious that their actions may well have unknown effects on parties not before the court. At the isolated or autonomy end of the spectrum are those aspects of human behavior most susceptible to the notion of privacy, such as possession of printed material in one's own home. The latter behavior affects virtually no one, and the courts have little difficulty weighing public benefits and costs.

352 Lochner v. New York, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting) ("I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.").

353 See New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) ("[T]he judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that ... [do not] affect fundamental rights. ... ").
We will never know whether Justice Black in *Ferguson*\(^{354}\) or Richard Epstein\(^{355}\) has the better of the original understanding of the Due Process Clause; the truth of the matter is that the world has become so complex since the New Deal that the political process rationale simply no longer fits the circumstances. So what do we do? Do we leave it alone until there is a constitutional amendment? Do we adopt the Epstein approach, which places a heavy burden of proof on the legislature to show public benefit and requires compensation unless there is an offsetting mutuality of benefit?

The best approach would be one that strikes a middle ground between inaction and the Epstein approach. Under this proposed approach, the challenger would have the burden of proof. If the challenger can persuade the court that the regulatory method is unrelated to the putative benefits, then the regulation should be stricken. The effect on public regulatory processes will actually be quite mild. The litigation required to produce such a result would be very expensive and time-consuming, and the likelihood of a favorable holding would be minuscule. The number of plaintiffs taking such cases to trial would be very few, and the number of regulations stricken even fewer. Nevertheless, the process and theories should be available. Otherwise, we have allowed the state extreme latitude to dispel individual initiative and creativity to the detriment of us all.

What we are left with is the conclusion that "rational basis" is just an unfortunate choice of words for the proper test. A "rational basis with teeth" test could cure some of the worst of the anticompetitive measures embodied in regulatory laws while not recreating the *Lochner* problems. Some gain could be expected from amalgamating several doctrinal developments into a single heading of substantive due process. But the doctrine could hardly become what it was in the early part of this century, or what some of its more strident proponents might envision, because the Court now has available tools of analysis and information that were not previously available. The essence of the right of livelihood and the possible right of competition that are advocated here flows directly from the English rules on unregulated monopolies that were contained in the Due Process Clause. Although translating the antimonopoly principle into modern commercial contexts is not easy, there is a clean historical line back to that principle. There is also sufficient post-


1937 demonstration of abuse to warrant recapitulation of the rights that were abandoned in the 1937 revolution.

CONCLUSION

The abandonment of substantive due process sometime after 1937 did not result in just deferral to the economic policies of legislative bodies. Instead, the Court essentially has held that the Constitution does not enact lasting limits on the legislature’s ability to regulate our “economic” lives. But that holding is far too broad to survive comfortably in the modern world, and the Court has gone about creating limits on legislative authority through a variety of other rubrics. The time has come for a straightforward recognition of the utility of the substantive due process concept. The post-1937 tools of economic analysis that the Court is likely to use mean that the revived doctrine would not have the harsh bite of the *Lochner* era. There is, however, much to be said for limiting the harshness of the legislative results that have been made possible in the wake of the Court’s capitulation.

The scope of the revived doctrine will almost certainly be limited to protection of the right of livelihood. Although there may also be room for a broader right of competition, there does not seem to be any reason to recognize a generalized freedom from regulation. In this posture, substantive due process does not threaten any of the institutional values that were threatened by the more sweeping version of the *Lochner* era.