NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

REBUILDING THE FOURTEENTH AMENDMENT: THE PROSPECTS AND THE PITFALLS

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> [W]e must always bear in mind that we are dealing with a brand new field of law both as to substantive law and procedural law…. While evaluating the recent decisions we must constantly look to the future.
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> --Thurgood Marshall, 1951[1]

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[1] Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education through Resort to the Courts* (1952), reprinted in Mark V. Tushnet, ed.,

INTRODUCTION

It has now been more than twenty years since the libertarian community began a concerted effort to rescue the Fourteenth Amendment from the misinterpretations foisted upon it over the course of the previous century. One might quibble over when that effort began,[2] but it was certainly underway by 2000, when Institute for Justice litigators prevailed in *Craigmiles v. Giles*,[3] and for the first time since the New Deal a federal court ruled that a state occupational licensing law was irrational and, therefore, unconstitutional under the Fourteenth Amendment.

Today, almost two decades after *Craigmiles*, there appears to be a slowly increasing willingness in the legal community to recognize again the constitutional status of economic liberty and private property rights—not just in words,[4] but in deeds. It is still too early to offer anything more than tentative optimism.But on the 150th anniversary of that Amendment, there are things to celebrate—as

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Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences 156 (Chicago Review Press 2001).

[2] Perhaps with the founding of the Pacific Legal Foundation in 1973, see Lee Edwards, *Bringing Justice to the People: The Story of the Freedom-Based Public Interest Law Movement* (Heritage Books 2004), or the 1980 publication of Bernard Siegan's *Economic Liberties and the Constitution* (Routledge), or the 1984 conference on "Economic Liberties and the Judiciary." See generally Roger Pilon, *On the Origins of the Modern Libertarian Legal Movement*, 16 Chap. L. Rev. 255, 261–62 (2013).

[3] 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *affd* 312 F.3d 220 (6th Cir. 2002).

[4] Time and again, the courts have acknowledged that there is no principled basis for treating economic liberty and private property as lesser-status rights. See, for example,*Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."); *Lynch v. Household Finance Corp.*, 405 US 538, 552 (1972) ("the dichotomy between personal liberties and property rights is a false one."). But such verbiage has not usually been backed up by serious action.

well as new obstacles to address. It is worthwhile at this point to assess the progress of the last two decades in reviving that Amendment's long-neglected legal protections for economic liberty and property rights, and to consider where the focus of future work should be.

I. ECONOMIC LIBERTY'S STATUS AS A CONSTITUTIONAL RIGHT

A. THE SLOW REALIZATION THAT ECONOMIC LIBERTY MATTERS

There are strong grounds for hope that judges and legal academics are, however grudgingly, coming to recognize the importance of economic liberty. From David E. Bernstein's celebrated reevaluation of *Lochner* [5] to G. Edward White's acknowledgment that the conventional hostility toward that case and its legacy "relies…heavily on pejorative labels and…lightly on a close analysis of the language and reasoning in the cases [involving economic liberty]," there has been a blossoming of scholarship addressing the constitutional status of economic freedom of choice. [6] Law review articles now regularly comment on the importance of legal protections for economic freedom, and *Lochner* itself has regained a remarkable degree of academic respectability.[7] In 2015 the Obama Administration recognized the deleterious consequences of occupational licensing laws and released a report urging state

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[5] David E. Bernstein, *Rehabilitating Lochner* (University of Chicago Press 2011).
[6] G. Edward White, 2 *Law in American History* 398 (Oxford University Press 2016).
[7] See, for example, Richard A. Posner, *A Political Court*, 119 Harv. L. Rev. 31, 53 (2005) (noting *Lochner*'s "perfectly respectable present-day defenders."); Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 Notre Dame L. Rev. 875, 942 (2008) ("Few judges today are advocating a return to the *Lochner* era, but certainly among conservative academic commentators, this is an increasingly prominent and respectable position.").

officials to refrain from imposing such restrictions, in part because of the harms they inflict on racial minorities and the poor.[8] And certainly in the wake of *Kelo v. New London*,[9] there has been widespread recognition that private property rights are critical to protecting people who lack political influence from abuse and exploitation in the form of property seizures.[10] The law is slow, of course. But decisions by state and federal courts in Texas,[11] Wisconsin,[12] Kentucky,[13] California,[14] and elsewhere, demonstrate remarkable progress in normalizing economic liberty.

One realm in which awareness of the importance of economic liberty appears to be growing quickly is in the intersection of economic freedom and free speech.[15] Recent decisions, in fact, have

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[8] *Occupational Licensing: A Framework for Policymakers* (July 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

[9] 545 U.S. 469 (2005).

[10] See, for example, Ilya Somin, *The Grasping Hand: Kelo v. New London and the Limits of Eminent Domain* chapter 5 (University of Chicago Press 2015). Equally welcome is recent scholarship pointing out how zoning laws and other restrictions on property use have tended to have disproportionately negative consequences for the poor and racial minorities. See, for example, Richard Rothstein, *The Color of Law* (Liveright 2017). It is important not to exaggerate the backlash against *Kelo*, however. Although many states responded to the *Kelo* decision by amending their eminent domain statutes or by issuing judicial decisions limiting the power of eminent domain, most such reforms proved essentially toothless. See Timothy and Christina Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* 135-139 (Cato Institute 2d ed. 2016). Even some that were meaningful were later undermined, such as the New Jersey Supreme Court's decision in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 191 N.J. 344 (2007), which was severely weakened in *62-64 Main Street, L.L.C. v. Mayor & Council of City of Hackensack*, 221 N.J. 129 (2015).

[11] *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69, 98 (Tex. 2015) (Willett concurring).

[12] *Porter v. State*, 913 N.W.2d 842 (Wis. 2018).

[13] *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014).

[14] *Merrifield v. Lockyer*, 547 F.3d 978, 982 (9th Cir. 2008).

[15] See text accompanying notes 53-75.

approached this convergence so nearly that it is common for dissenters in these cases to invoke the bogeyman of *Lochner*. For example, in *Sorrell v. IMS Health*,[16] *National Institute of Family and Life Advocates v. Beccera*,[17] and *Janus v. AFSCME*,[18] the dissents felt it necessary to trot out that canard, because the Court was "turning the First Amendment into a sword, and using it against workaday economic and regulatory policy."[19]

What actually happened in these cases, though, was that the Court used the First Amendment as it was intended—to protect individual freedom from government intrusion, even if that freedom is categorized as "economic," and even if the intrusion is labeled "democratic."

A similar intersection of economic liberty and other kinds of rights was involved in *Whole Woman's Health v. Hellerstedt*,[20] which considered a Texas law imposing various requirements on abortion clinics. These requirements were facially neutral health-and-safety standards, but they imposed a substantial burden on abortion clinics.. The restrictions essentially doubled the cost of regulatory compliance.[21] Rather than defer to the state regarding these economic regulations, however, the Court examined them and concluded that they were not imposed in response to genuine concerns about patient safety,[22] but were instead devised in order to

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[16] 564 U.S. 552, 585 (2011) (Breyer dissenting).
[17] 138 S. Ct. 2361, 2381 (2018) (Breyer dissenting).
[18] Id at 2382 (Kagan dissenting).
[19] Id.
[20] 136 S. Ct. 2292 (2016).
[21] Id at 2318.
[22] Id.

"place a substantial obstacle in the path of women seeking an abortion."[23]

My point here is not to address the constitutionality of abortion rights, but to observe that the same Court that ordinarily declines to engage in a realistic means-ends scrutiny of economic regulations showed in *Whole Women's Health* that it can do so and can in the process see that so-called economic regulations can impose significant burdens on other kinds of rights.

Similarly, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project,*[24] the Court observed that building codes that ostensibly protect residents from dangerous or unsanitary conditions can also drive down the availability of housing by increasing the burdens suppliers must bear and that this increases housing costs in ways that disproportionately harm racial minorities.[25]

Still more strikingly, in *North Carolina Board of Dental Examiners v. FTC,*[26] the Court recognized that occupational licensing restrictions can be used by existing firms to exclude economic competition in violation of the principles of economic freedom. In that case, the Court held that state regulators can be liable under antitrust law when they use licensing restrictions to exclude trade without a legitimate public safety justification. The decision itself was of limited effect.[27] But it indicates a growing awareness on the part of the Court that licensing restrictions are often exploited for the benefit

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[23] Id at 2316.
[24] 135 S. Ct. 2507 (2015).
[25] Id at 2523-24.
[26] 135 S. Ct. 1101 (2016).
[27] See Timothy Sandefur, *Freedom of Competition and the Rhetoric of Federalism*, Cato Sup. Ct. Rev. 195 (2014-2015).

of political insiders and that this is a proper subject of judicial discourse.[28]

Indeed, it appears from these cases that all the ingredients now exist for a revival of serious constitutional security for the right of economic freedom of choice, if a court were willing to use them.

That said, significant obstacles remain-particularly the academy's failure or refusal to acknowledge the long and honorable *historical* pedigree of economic liberty as a constitutionally protected right. Despite scholarship that has demonstrated beyond reasonable doubt that economic freedom is one of the rights deeply rooted in this nation's history and tradition and that it was among the primary "libert[ies]" and "privileges or immunities" that the Fourteenth Amendment was written to protect,[29] academia—and the "faint-hearted" bench[30]—are still wedded to the myth that protecting economic freedom harms the poor, or exceeds the proper scope of judicial authority.

Part of this is institutional inertia. Part of it is the fact that, as Michael J. Phillips writes, "embracing economic substantive due process would require that liberals reject some deeply ingrained beliefs and practices"—particularly their cherished "Progressive myths about the old Court."[31] Part is fear and lack of imagination: many genuinely believe that legal protections for economic liberty

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[28] To be fair, Justice Stevens acknowledged this in his dissent in *Hoover v. Ronwin,* 466 U.S. 558, 584 (1984).

[29] See, for example, Siegan, cited in note 2; Timothy Sandefur, *The Right to Earn a Living*, 6 Chapman L. Rev. 207 (2010); David N. Mayer, *Liberty of Contract: Rediscovering a Lost Constitutional Right* (Cato Institute 2011).

[30] See generally Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. Cin. L. Rev. 7 (2006).

[31] Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 Syracuse L. Rev. 917, 968–69 (1999).

will wreak havoc on society and cause poverty, child labor, social uprisings, et cetera.[32] And part of it is rooted in a frankly admitted belief that the Constitution is simply obsolete.[33] But I suspect for the most part it rests on nothing more than a prejudice—an almost Puritanical horror, in fact—of commercial enterprise itself. This prejudice is every bit as powerful and irrational as the hysterical fear of "social equality" was in the days of racial segregation. Keeping in mind that courts are generally the trailing edge, not the leading edge, of social change, we must face the fact that restoring constitutional protection for economic liberty will require overcoming this prejudice.

B. THE PREJUDICE AGAINST ENTERPRISE AND THE "TRADE TRIGGER"

Henry David Thoreau once said that "[t]rade curses everything it handles."[34] It is at least true that under the prevailing post-New Deal jurisprudence, trade diminishes the legal respect accorded to virtually anything.,. This makes no sense; as Jason Brennan and Peter Jaworski have argued, the presence or absence of a commercial transaction does not in any way alter the normative character of behavior: "[T]he market does not transform what were permissible acts into impermissible acts" or vice versa.[35] And as a legal matter, the Constitution makes no explicit distinction between rights based

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[32] See, for example, Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 Chap. L. Rev. 31, 32 (2003)

[33] Louis Michael Seidman, *Ambivalence and Accountability*, 61 S. Cal. L. Rev. 1571, 1581–82 (1988); Louis Michael Seidman, *Let's Give up on the Constitution* (N.Y. Times, Dec 30, 2012), archived at https://perma.cc/P2RY-7R52.

[34] Henry David Thoreau, *Walden* (1854) in Robert F. Sayre, ed., *Thoreau: A Week, Walden, The Maine Woods, Cape Cod* 378 (New York: Library of America 1985).

[35] Jason F. Brennan & Peter Jaworski, *Markets without Limits: Moral Virtues and Commercial Interests* 10 (Routledge 2016).

on the presence of a commercial transaction. Nor is any implicit distinction to that effect tenable in most cases: the right to an attorney, for example, would mean nothing if it did not include the right to pay for the lawyer of one's choice; the right to free speech must include the right to buy, sell, give, or lend a book; the right to travel must include the right to buy a railroad ticket.

Yet courts routinely regard the presence of a commercial exchange as transformative: as a trigger that automatically lowers the constitutional protections accorded to whatever behavior is going on.. Even sexual privacy rights—the most obvious example of *purely* personal rights, the protection of which can *only* be justified by a commitment to personal autonomy—are held to disappear upon contact with economic transactions. Thus in 2007, the Eleventh Circuit Court of Appeals rejected the argument that a state law banning the sale of "sex toys" violated the Constitution's protections for privacy because "*commerce*" is "an inherently public activity."[36] This is manifestly false: commerce is often a wholly private matter, between parties who have both a subjective and an objectively reasonable expectation of privacy that society is prepared to accept—in the doctor's office, for instance, or in a consultation with a lawyer. But the reason for the court's holding is plain: while sexual autonomy is regarded as wholly a matter of personal choice,[37] the presence of an economic transaction is a convenient point at which to *qualitatively* deprive that choice of constitutional security.[38]

Perhaps a less fraught example is home-sharing. Although the right to allow guests to stay in one's home is doubtless within the

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[36] *Williams v. Morgan*, 478 F.3d 1316, 1322 (11th Cir. 2007).
[37] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[38] See also *Erotic Service Provider Legal Education & Research Project v. Gascon*, 880 F.3d 450, 459 (9th Cir. 2018) (right to economic liberty does not encompass prostitution).

realm of constitutionally protected privacy,[39] the moment a guest pays money to stay in a home, many people assume that protection evaporates, or at least is blurred, so that the state may intrude.

The prevailing prejudice against economic exchange is so strong that even rights that under the post-New Deal settlement ought to enjoy the highest degree of protection deteriorate in the presence of trade. Thus, freedom of speech, viewed as among the most cherished of fundamental rights, is relegated to lesser status when it is an advertisement ("commercial speech") or speech by a professional to a client ("professional speech") or if the speech is itself the business in which the person is engaged ("occupational speech"). I call the jurisprudential habit of treating rights differently in the presence of a commercial transaction "the Trade Trigger."

There are exceptions, as with the vindication in *Citizens United* of speech by people who choose to associate in the corporate form[40]—but these are savaged by the dominant voices in the legal community, sometimes with intemperate ferocity,[41] despite the fact that free speech by corporations is absolutely indispensable to the survival of our modern media.

Consider professional speech—a legal doctrine manufactured almost out of whole cloth by lower courts, based on two opinions by individual justices that actually contradict each other. In *Thomas v.*

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[39] See, for example, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). See also Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home-Sharing Regulations Chip Away at the Foundation of an American Dream*, 39 U. Haw. L. Rev. 395, 406–12 (2017).

[40] See, for example, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[41] See, for example, Gene Nichol, *Citizens United and the Roberts Court's War on Democracy*, 27 Ga. St. U. L. Rev. 1007 (2011); Steven L. Winter, *Citizens Disunited*, 27 Ga. St. U. L. Rev. 1133 (2011).

Collins,[42] Justice Jackson, writing only for himself, argued that when a professional is engaged in speech as part of his job, that speech deserves full First Amendment security, and should cast over the rest of the professional's activities a greater degree of legal protection. It was improper, Jackson wrote, for the government to "associat[e] the speaking with some other factor which the state may regulate so as to bring the whole within official control."[43] By contrast, in *Lowe v. SEC*,[44] Justice White argued in his separate opinion that when a professional engages in speech, that speech should be viewed as a type of activity—*not* purely as speech—and therefore that judicial protections should be *reduced*.[45]

On the basis of these two opinions, Courts of Appeal concocted a jurisprudence of "professional speech"—a term neither case used—under which speech by professionals could be more directly controlled by the government than speech by others. Not only was this conclusion unauthorized by the First Amendment—which does not distinguish in any way among types of speech—but it resulted in an incoherent disarray of precedent. Some cases even suggest that speech by professionals enjoys *more* protection than other types of speech.[46] But by and large, the lower courts ruled that states may control what professionals say to their clients because that is not *really* speech, but an economic transaction, subject to regulation. (This was, of course, precisely what Justice Jackson had warned against in *Thomas*.) If the state prohibited a layman from advising a friend to take an aspirin for a headache, that prohibition would be

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[42] 323 U.S. 516 (1945).
[43] Id at 547.
[44] 472 U.S. 181 (1985).
[45] Id at 228–35 (White concurring).
[46] *Stuart v. Camnitz*, 774 F.3d 238, 254 (4th Cir. 2014).

subject to strict scrutiny. But the state may, under some professional speech rulings, dictate wholesale what a trained and experienced physician may say to a patient about his headaches.[47] And the rationale for this difference in treatment is that in the latter case, money changes hands.

This last term, in *National Institute of Family and Life Advocates v. Beccara*,[48] the Court seemed to repudiate the idea of "professional speech," acknowledging that it "has not recognized 'professional speech' as a separate category," and that "[s]peech is not unprotected merely because it is uttered by 'professionals.'"[49] Unfortunately, the opinion left unaltered the rule that "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech."[50] The word "incidentally" seems to stand for a lot in that sentence, and future litigation over the degree to which states may restrict what professionals say will doubtless turn heavily on whether those restrictions are "incidental." Still, the decision signals that the Court is dissatisfied with the extreme lengths to which lower courts have gone in allowing states to restrict speech uttered by professionals by defining that speech as "conduct."

A separate category of economically-oriented speech raises similar concerns. This is the category of "occupational speech," and it encompasses workers whose trade consists entirely of speech.[51]

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[47] See, for example, *Pickup v. Brown*, 728 F3d 1042 (9th Cir. 2013); *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014).

[48] 138 S. Ct. 2361 (2018).

[49] Id at 2371.

[50] Id at 2372.

[51] Professional speech is speech engaged in by a professional in a one-on-one client setting where the professional has a fiduciary responsibility. Traditionally, there were only three professions—the law, the clergy, and medicine—which were marked off by a high degree of internal professional discipline and a legal claim to some type of privilege against testimony. Occupational speech, by contrast, refers to speech

These workers often find their expressive rights barred because they engage in the speech as a business. Two simultaneous cases involving occupational speech by professional tour guides provide the examples.

The Fifth Circuit upheld a licensing law that required government permission to offer a tour of New Orleans: a plain violation of the rule against prior restraints.[52] Without even addressing that objection, the court upheld the law because it "promote[d] a substantial interest that would be achieved less effectively absent the regulation." This is a form of rational basis review masquerading as the heightened scrutiny to which speech is ordinarily entitled.[53] The court purported to be mystified that anyone could find fault with the rule[54] because it "promoted the government['s] interests" in "requiring the licensees to know the city and not be felons or drug addicts."[55] It is impossible to imagine a court treating freedom of speech so cavalierly in any other context. For example, if the tour guides were unpaid volunteers, no rationale so flimsy would ever be held to justify a prohibition on speech.

By contrast, in *Edwards v. District of Columbia* the D.C. Circuit invalidated a Washington, D.C., licensing requirement for tour

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engaged in by persons whose work consists solely of speech, but who are not engaged in a one-on-one client/professional relationship and are not part of an organized or traditional profession.

[52] A prior restraint is any law requiring a person to get government permission before speaking, as opposed to a law that penalizes a person after speaking (such as laws against libel). The tour guide licensing requirement forbade speaking without government permission and was therefore a prior restraint. See Timothy Sandefur, *The Permission Society* 96-98 (Encounter Books 2016).

[53] *Kagan v. City of New Orleans, La.*, 753 F3d 560, 562 (5th Cir. 2014)

[54] Id at 562 ("how is there any claim to be made about speech being offended?").

[55] Id at 562.

guides.[56] It noted the irrationality of a law that would allow, say, a bus driver to carry passengers through the city while playing an audio tape of a tour, but would not allow a live person to say the same words over a bullhorn to passengers on a tram.[57] But the court made no comment on the more obvious inconsistency: that the government would certainly be prohibited from censoring *volunteer* tour guides. If unqualified tour guides are a genuine threat to public safety, it would be irrational for the state to only prohibit unlicensed tour guides *who are paid*, while allowing people to take their out-of-town relatives to the monuments *for free*. The unquestioned assumption in both cases is that the presence of a financial transaction qualitatively transforms a tour from a run-of-the-mill example of free speech into the sort of activity that can be regulated by the state.

The most obvious example of the way that speech loses constitutional protection when it touches money is commercial speech. Although the authors of the First Amendment did not distinguish between commercial and non-commercial speech, the New Deal Court treated commercial speech as not speech *at all*.[58]

Of course, the Court had said the same about motion pictures in 1915, ruling that they enjoyed no First Amendment protection for the same reason: they were "mere" commercial transactions. (After all, money isn't speech.) Not until the 1950s did the Court recognize the fallacy in that thinking, and hold that films are a form of constitutionally protected expression even if people pay to see them.

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[56] 755 F.3d 996 (D.C. Cir. 2014).
[57] Id at 1008.
[58] *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

So, too, the courts were gradually compelled to recognize that commercial speech enjoys at least some constitutional security.[59]

Yet not only has the degree of security accorded commercial speech remained unclear, but even the definition of the term is unclear. In 1976, the Court defined it as speech that "does no more than propose a commercial transaction,"[60] which appears to limit the "commercial speech" category exclusively to advertising. Later the Court said that the category includes only speech that proposes a transaction *with the speaker*.[61] But these limits have often been disregarded, and judges have treated non-advertising speech by businesses as commercial as well.

Most notably, the California Supreme Court in *Nike v. Kasky*[62] defined commercial speech as any speech by a business that is likely to influence a consumer's choices. That, of course, means all speech by all businesses always. In *Kasky*, the speech in question was a report commissioned and distributed by the company in an effort to refute claims that it operated sweat-shops overseas—certainly an ordinary exercise of political or social commentary that should enjoy the full protection of the First Amendment, but which, under current law, does not because the speaker was a business.

The Supreme Court has been making progress in the direction of freedom in recent speech cases, and it is to be hoped that it will apply these new precedents to commercial speech doctrine in the near future. For instance, it has ruled that strict scrutiny applies to speech restrictions that are triggered by the speaker's identity or commercial

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[59] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
[60] Id at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 384 (1973)).
[61] *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984).
[62] 27 Cal.4th 939 (2002).

motive,[63] or that are based on the content of the speech.[64] It has also applied strict scrutiny to laws that impose penalties based on the individual's engaging in an act of speech—so called "speech triggers"[65]— As a doctrinal matter, these principles ought to spell the end of *any* discriminatory treatment of commercial speech—since that category cannot even be defined without considering the content of the message being communicated, or the identity or commercial motive of the speaker.[66] Yet courts continue to differentiate between commercial and non-commercial speech in terms of their constitutional status. And the sole reason for that difference in treatment is the presence of a commercial transaction somewhere in the mix.[67]

Another instance of the Trade Trigger is what courts call "holding out." In *Liberty Coins v. Goodman*,[68] the Sixth Circuit Court

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[63] *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011).
[64] *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).
[65] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010).
[66] Certainly it should spell the end of such discriminatory treatment in states where the state constitution protects speech more broadly than the First Amendment. See generally Jared Blanchard and Adi Dynar, *Heed Reed* (Goldwater Institute, 2016), archived at https://perma.cc/B9BY-GHR2.
[67] It is often claimed that commercial speech must enjoy lesser protection, because otherwise the state would not be free to prohibit false advertising. This is incorrect, however, as the state can prohibit false statements in the absence of commercial motives—fraud is fraud in any case. Jonathan Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence,* Cato Institute Policy Analysis No. 161, Sept. 23, 1991. A more plausible explanation for the difference in treatment is offered by Martin Redish and Howard Wasserman: businesses tend to take an anti-regulatory, more free-market-friendly position on matters of public concern, and restrictions on their expression are therefore likely to censor that side of the debate. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 236 (1998).
[68] 748 F.3d 682 (6th Cir. 2014).

of Appeals upheld a law requiring precious metals dealers to obtain a license before communicating to the public that they were willing to purchase gold. The law did not, however, require a license for *buying* gold—just for saying one wanted to do so. The difference, said the court, was that such communication constitutes "holding oneself out" as a gold-buyer, and that this conduct is what was being regulated. The statute thus "uses 'holding oneself out' to distinguish between those who[m] [the state] wish[es] to regulate and those who should and must remain free from regulation by nature of the infrequency and informality of their precious metals transactions."[69]

This was a speech-trigger: It distinguished between legal conduct and illegal conduct based solely on the presence of a truthful, non-misleading communication. Yet the Sixth Circuit upheld it. Indeed, it found that the presence of speech about a transaction somehow transformed otherwise fully-protected expression into an act that could be regulated, subject only to rational basis review. As a matter of doctrine, this "holding out" distinction cannot be reconciled with the rule against speech-triggers, so long as "holding out" consists solely of speech. To rule otherwise would mean that a practitioner can engage in the *business* of, say, dealing in precious metals, but cannot truthfully *say so*, meaning that the only conduct actually being regulated is the speech, not the business activity. Such a statute reverses the professional speech paradigm by regulating speech *primarily,* and only *incidentally* restricting the activity.

Similarly, the Eighth Circuit in *Young v. Ricketts*,[70] held that a woman who helped homeowners advertise "for sale by owner" property had violated the law because she did not have a real estate

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[69] Id at 692.
[70] 825 F.3d 487 (8th Cir. 2015).

broker's license. It was lawful to advertise for-sale-by-owner property for *no* compensation, and it was in fact *unlawful* for a person who *did* have a broker's license to advertise for-sale-by-owner property *at all*. Nevertheless, the court found that the speech—advertising—was actually "a course of conduct" subject to regulation.[71] That conduct consisted entirely of communicating information. But because it was information about a transaction, that was okay.

Even outside the speech context, the presence of an economic transaction is often used as a trigger, particularly occupational licensing. In many states, activities that are prohibited without a license are nevertheless allowed if the person engaging in it receives no compensation. This alone should fail the rational basis test, since if an activity is dangerous enough to the public health, safety, and welfare that it must be prohibited to anyone who lacks a government license, then it must also be so dangerous that unlicensed persons should be barred from doing it for free.

It is irrational to say, for example, that blow-drying someone's hair may be safely done without a license so long as a person does it for no money, but that blow-drying hair *for money* is so dangerous that it must be banned without government pre-approval.[72]

That irrationality is compounded in cases of barter or informal exchanges. With regard to home-sharing, for instance, while a homeowner has a right to allow guests in her home, local governments are now making it a crime to let a person stay in her home for cash. These laws are premised on the notion that the

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[71] Id at 492 (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)).

[72] Eric Boehm, *Why Does Blow-Drying Hair in Arizona Require 1,000 Hours of Training?* (Reason.com, Dec. 27, 2017), archived at https://perma.cc/4RNU-FZ7B.

presence of a commercial transaction transforms home-sharing into a business use of property.[73]

This is illogical. Sleep-overs are a residential use, and the idea that a homeowner's decision to let someone stay in her home in exchange for doing chores is lawful—indeed, protected by the highest degree of constitutional sanctity—while it is an unlawful commercial activity to do the same thing in exchange for money, simply makes no sense.[74] The Trade Trigger—born out of an ideologically-driven prejudice against commercial exchange—perpetuates these self-contradictory and intrusive restrictions on freedom.

II. SOME PROBLEMS WITH RATIONAL BASIS

A. WHAT VIOLATES IT?

It is commonplace now to recognize that the rational basis test as practiced in today's courts is a travesty. It has been said that a law fails rational basis if it strikes the judges "as wrong with the force of a five-week-old, unrefrigerated dead fish."[75] But judges nonetheless uphold such laws. Justice Thomas wrote in *Lawrence v. Texas*[76] that he viewed the law under review there as "uncommonly silly," but nevertheless thought it survived rational basis.[77] The Ninth Circuit has said that a law will violate the test if it is self-contradictory,

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[73] See, for example, *Reihner v. City of Scranton Zoning Hearing Bd.*, 2017 WL 6061177, at *2–6 (Pa. Commw. Ct., Dec. 8, 2017).

[74] See Christina Sandefur, *Turning Homeowners into Outlaws*, 39 Hawaii L Rev 395, 429 (2017).

[75] *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002), quoting *United States v. Searan*, 259 F.3d 434, 447 (6th Cir. 2001); *United States v. Perry*, 908 F.2d 56, 58 (6th Cir. 1990).

[76] 539 U.S. 558 (2003)

[77] Id at 605 (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965)).

specifically if it restricts something on the grounds that it is a threat to the public, but then allows that very same thing.[78] Yet laws do this frequently—as with licensing requirements that forbid people from performing some task for money, but allow them to do the same activity for free, or laws that provide clear restrictions on an activity but then allow executive officials unlimited discretion to grant exemptions to that ban.[79]

Moreover, "a bare desire to harm a politically unpopular group" violates the Equal Protection Clause.[80] The Court has not explained why, but presumably the answer is that the Constitution forbids government from differentiating between people except on account of some principled justification that consists with the government's obligation to legislate in the *public* interest. Yet that is precisely the principle that anti-competitive licensing laws and other restrictions on economic freedom violate.

The anti-animus rule is certainly correct; the Constitution does indeed forbid what Professor Sunstein has called "naked preferences"[81]—the use of political power merely to gain what one group wants, regardless of benefit to the general public. Lenient as rational basis review may be, it nevertheless requires that the government must act in a *lawful* manner, that is, in a rational manner that is aimed at serving some public interest. If the government cannot deprive a person of even a trivial liberty unless it is conceivable that doing so serves the public good, then certainly it should not be able to block so crucial a freedom as the right to make

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[78] *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).
[79] See, for example, *Lindquist v. City of Pasadena*, 669 F.3d 225 (5th Cir. 2012).
[80] *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).
[81] Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum L Rev 1689 (1984).

one's own economic choices for reasons that do not even arguably advance such an interest.[82]

The most interesting fault line in the legal battle over economic liberty—the one that reaches deepest—is the now decade-long circuit split over whether economic protectionism is a legitimate interest for purposes of Fourteenth Amendment rational basis review. In *Powers v. Harris*,[83] the Tenth Circuit squarely held that it is,[84] as has the Second Circuit, albeit in dicta.[85] But in *Craigmiles v. Giles*[86], the Sixth Circuit said that it is not.[87] The Ninth Circuit in *Merrifield v. Lockyer*[88] also held that it is not, but that there may be cases where protectionism serves some other government interest sufficient to justify it.[89] And the Fifth Circuit has held that it is not, but that a protectionist act may nonetheless be rescued from constitutional invalidity by some *post hoc* public benefit that arises from the statute.[90] This question is plainly critical to the future of economic liberty under the Constitution.

The anti-protectionism rule embraced in cases like *Craigmiles* fits snugly into the anti-animus principle. If the rule against animus bars the government from imposing burdens on disfavored groups out of a "bare...desire to harm" them,[91] it is no great leap to conclude that economic restrictions (or confiscations of property) that lack a

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[82] See generally Timothy Sandefur, *Right to Earn A Living*, 6 Chapman L Rev 207 (2003).
[83] 379 F.3d 1208 (10th Cir. 2004).
[84] Id at 1221.
[85] *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015)., *cert. denied* 136 S.Ct. 1160 (2016).
[86] 312 F.3d 220 (6th Cir. 2002).
[87] Id.
[88] 547 F.3d 978 (9th Cir. 2008).
[89] Id.
[90] *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).
[91] *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

reasonable connection to consumer welfare or to public benefits, but exist solely to exclude the losers and benefit winners in the political contest, should also fail rational basis review. That was what the *Merrifield* court said when it concluded that the licensing restriction at issue had been designed solely to benefit politically well-situated insiders and to exclude outsiders.[92]

The question of what constitutes a legitimate government interest is obviously one fraught with philosophical ramifications because it asks whether government is constitutionally required to exercise its authority in the service of *some* conception of the public good—and then, what that good might be—or whether the state truly is a winner-take-all scramble for the use of government power in whatever way will benefit those who wield it. The Supreme Court has struggled, at least for the past several decades, to avoid deciding such questions. For all its sophisticated legal analysis, it still "[has] not elaborated on the standards for determining what constitutes a 'legitimate state interest.'" [93] That, of course, renders the entire question of constitutional analysis arbitrary to some degree, since it

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[92] *Merrifield*, 547 F.3d at 991. It might be objected that such economic barriers are not designed to penalize outsiders, but only to reward insiders, but the Court has already squarely rejected this sophistical effort at manufacturing a distinction. In *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), it found that an Alabama law that imposed a tax on out-of-state insurance companies violated the Equal Protection Clause of the Fourteenth Amendment. (Congress had waived its Commerce Clause exclusivity, so that was not a factor in the decision. Id at 880.) Finding that this difference in treatment was "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent," the Court expressly rejected the effort to distinguish between helping insiders and harming outsiders, which it called "a distinction without a difference." If that theory were endorsed, the Court noted, it would enable any form of discrimination to evade constitutional limits because it "would stand or fall depending primarily on how a State framed its purpose—as benefiting one group or as harming another." Id.

[93] *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987).

is logically impossible to determine whether something is "rationally related to" a legitimate interest without knowing what legitimate interests are. Determining what interests are and are not legitimate would certainly require a serious consideration of political philosophy—specifically, the political philosophy articulated in the Declaration of Independence and the Constitution.[94]

The correct answer, and the one the Court will be forced to face someday, is that economic liberty and private property are fundamental human rights, and that the taking of wealth or economic opportunities from some groups and giving them to others as a mere exercise of political will is illegitimate. *Powers* must be recognized for what it is: among the most nihilistic pronouncements of any American court. It goes beyond the (false) notion that the Constitution is made for people of fundamentally differing views,[95] and asserts that the Constitution is also made to enable the legislative majority to impose its will without any requirement that its legislation serve some conception of the public good. Yet the very purpose of a written constitution is to ensure that there are limits to the political process, to prevent that process from degenerating into a mere combat of wills whereby economic opportunities, resources, and other goods are redistributed according to raw political power. The Constitution of Oklahoma (situs of the *Powers* case) declares that "government is instituted for [the people's] protection, security, and benefit, and to promote their general welfare," and that "[a]ll persons have the inherent right to life, liberty, the pursuit of happiness, and

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[94] See generally Timothy Sandefur, *The Conscience of the Constitution* (Cato Institute 2014); Richard A. Epstein, *The Classical Liberal Constitution* (Harvard 2014)
[95] *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

the enjoyment of the gains of their own industry."[96] The *Powers* decision rejects these principles wholesale.

These principles are no less a part of the Fourteenth Amendment. They are embedded in the Due Process of Law Clause, which forbids the government from exercising its powers in an arbitrary or causeless fashion, and requires the government to abide instead by a rule of *law*—which is to say, by such substantive values as regularity, publicness, comprehensibility, *etc.*, which together distinguish lawful rule from arbitrary rule.[97] From the days of Aristotle[98] to Thomas Aquinas[99] to John Locke[100] to James Madison[101] to Lon Fuller[102] to the present, constitutional thinkers have agreed on at least this: that legitimate government rule seeks to promote the public good, and not merely to benefit those who exercise government power. And since the founding of the country, that has been understood as a basic principle of Due Process of Law. Obviously the ticklish question is: *what counts as the "public" good?* But the *Powers* Court did not seek any answer. Rather, it rejected the very

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[96] Okla Const Art II §§ 1, 2.

[97] See generally Timothy Sandefur, *In Defense of Substantive Due Process, or The Promise of Lawful Rule*, 35 Harv J L & Pub Pol 283 (2012).

[98] Aristotle, *Politics* § 1279a-b at 77-78 (Hackett 1998) (C.D.C. Reeve, trans).

[99] Thomas Aquinas, *Summa Theologiae* § IIaIIae at 995 (Christian Classics 1981) (Fathers of the English Dominican Province, trans) (Law is "an ordinance of reason for the common good, made by him who has care of the community, and promulgated").

[100] John Locke, *Essays on the Law of Nature* at 189 (Oxford University Press, 1988) ("we should not obey a king just out of fear, because, being more powerful, he can constrain (this in fact would be to establish firmly the authority of tyrants, robbers, and pirates)…").

[101] Federalist 51 (Madison), in *The Federalist* 347, 352 (Wesleyan 1961) (Jacob E. Cooke, ed) ("Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.").

[102] See, for example, Lon Fuller, *The Morality of Law*, 46-49 (Yale 1964) (generality is a requirement for a purported law to be an actual law).

possibility of answers; it spurned the proposition that government actions, to be legitimate, must aim at *any* kind of public good, and ruled instead that *whatever* economic restrictions the government sees fit to impose—even if they are *concededly not* for the public benefit, but are adopted solely for the self-interest of a politically influential faction—satisfy the legitimate government interest prong of the rational basis test *ipso facto*. And the reason? Because to "apply[]" a contrary rule "in a principled manner would have wide-ranging consequences."[103] How disgraceful: to refuse to issue a legally correct ruling on the grounds that it might prove hard to enforce.

B. FIXING RATIONAL BASIS

1. No More Subdivisions

The anti-animus theory has sometimes been characterized as a separate category within rational basis, called "rational basis with bite."[104] But advocates of liberty should refuse to accept the proposition that there are two different kinds of rational basis test. There is no doctrinal justification for such a distinction, and it is exceedingly unlikely that entrepreneurs or property owners would profit from it being created. To fashion a less-protective standard of scrutiny—one even less protective than rational basis, if such a thing can be imagined[105]—would almost surely result in even more

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[103] *Powers*, 379 at 1222 (10th Cir. 2004).

[104] See, for example, Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 NYU L REV 2070, 2093–95 (2015).

[105] In fact, there is already such a standard at work in some cases. Under California law, for example, a resolution by a local government authorizing condemnation for redevelopment "gives rise to a conclusive presumption that the taking is justified." *Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121, 1128 (1985).

oppressive and unjust laws getting a free pass. More likely, it would further encourage judges to apply their subjective desires in the guise of an "interest-balancing inquiry" guided by pragmatic instead of constitutional considerations.[106]

The rational basis test says simply that everything the government does must, at a minimum, be connected to an effort to advance some legitimate public end. To say that something even less rational than a bare desire to harm another is tolerable, so long as the victims are property owners or entrepreneurs, would be devastating to these minorities—and that would be the certain outcome of subdividing the rational basis test.

In an unusually interesting recent article, Professor Katie Eyer argues that the notion of "rational basis with bite" would in practice operate as a roadblock to emerging groups of civil rights litigants, because it would force them to satisfy "gatekeeping criteria that many emerging social movements are unlikely to meet."[107] In other words, the effort to subdivide rational basis would "further[] its own ultra-deferential account and undermine[] the diversity of ways that social movements have actually used rational basis review to disrupt the constitutional status quo."[108] In Eyer's perhaps overly optimistic account, rational basis review has in the past "provided the initial openings for social movements to generate constitutional transformation during the modern era,"[109] and the creation of a lower-tier rational basis test would prevent these emerging social movements from obtaining the constitutional respect they seek.

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[106] Contrast *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (rejecting a similar proposal by Justice Breyer).
[107] Katie R. Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L Rev 1317, 1364 (2018).
[108] Id.
[109] Id at 1365.

However that may be, it is at least true that emerging movements in the legal world are better off being able to rely on precedents set by previously successful rational basis litigants than they would be if a new, lower tier of scrutiny were established. The Supreme Court has already refused to subdivide the rational basis test, even when Justice Thurgood Marshall recommended that course in *City of Cleburne v. Cleburne Living Center*,[110] and those seeking to rebuild the Fourteenth Amendment should do likewise.[111] There is, and should be, only one rational basis test.

2. No More Made-Up Stuff

The most important step toward rebuilding the Fourteenth Amendment must be to reject the idea that the rational basis test empowers courts to manufacture justifications for statutes, even in the absence of evidence—or that the test calls for a court to imagine a hypothetical world in which the challenged statute might have been thought to be justified. Not only was this approach to rational basis an interpolation of the 1950s[112]—directly contrary to what the Court said when it first announced the test[113]—but as a logical matter it transforms that test into an impervious shield against legal attack.

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[110] 473 U.S. 432 (1985).

[111] Id at 458 (Marshall, J., dissenting) ("[T]he Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called 'second order' rational-basis review rather than 'heightened scrutiny.'").

[112] The history of the "conceivable" version of rational basis is complicated. See Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 Iowa L Rev 941, 982–95 (1999); John O. McGinnis, *The Duty of Clarity*, 84 Geo Wash L Rev 843, 885–908 (2016). Even today, the question has not been fully resolved. Roughly speaking, the "conceivability" version of rational basis can be said to have prevailed only in the 1950s with cases such as *Berman v. Parker*, 348 U.S. 26 (1954), or *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

[113] *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934).

If a court should uphold a statute whenever it is possible to conceive a basis for supporting it, and if "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [law] actually motivated the legislature,"[114] then the rational basis test is, indeed, nothing more than a rubber-stamp, because it is *always* possible to imagine *some* basis for a statute.[115] Some courts have even dismissed rational basis challenges prior to discovery, merely because the government defendant "articulates" a rationalization for the statute in a motion to dismiss—regardless of whether that rationalization has any basis in fact.[116] That simply cannot be the law.

This question came to the fore in the Fifth Circuit's 2013 decision in *St. Joseph Abbey v. Castille*,[117] an economic liberty case challenging the constitutionality of a licensing requirement for the sale of coffins.[118] The court was forced to reconcile precedents that hold that mere economic protectionism is not a legitimate government interest with the exceptional degree of deference owed the government under today's rational basis test. To what degree should a court be "willing[] to accept post hoc hypotheses for economic regulation"?[119] The court's answer was that legislative "favoritism" which might otherwise offend the Constitution will not prove fatal if the statute in question "[can] be supported by a post hoc perceived rationale" (so long as that rationale is not "fantasy").[120]

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[114] *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).
[115] Id at 323 n 3 (Stevens, J., concurring) ("Judicial review under the 'conceivable set of facts' test is tantamount to no review at all").
[116] See generally Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"*, 25 Geo. Mason CR L J 43 (2014).
[117] 712 F.3d 215 (5th Cir. 2013).
[118] Id.
[119] Id at 221.
[120] Id at 222–23.

Gratifying as it is that courts recognize the problem with licensing laws being used for protectionist purposes, this decision leaves open the unwelcome possibility that a court might review a challenge to anti-competitive, private-interest legislation, and perceive some abstract benefit to the public which only arises *after* the challenged statute's enactment, or as a consequence of it, which is then held to retrospectively justify its initial violation of constitutional rights. One can hardly imagine this sort of backwards rationalization being applied in any other realm; it is as if the courts were to uphold the constitutionality of censorship on the grounds that it inspired the beautiful prose of John Milton's anti-censorship *Areopagitica,* or to affirm the legality of an illegal tax on the grounds that it ended up providing employment for accountants.[121] And, again, if courts must uphold a statute on the basis of any *conceivable* set of facts, then even the most obvious abuse of government power will be seen in retrospect to have had *some* public benefit and therefore to satisfy the rational basis test.

There is plenty of precedent already on the books to warrant backing away from the notion that judges may manufacture purely fanciful rationalizations for challenged laws in rational basis cases. The Court has already said that rational basis requires a challenged statute to have a "footing in the realities of the subject,"[122] and the anti-animus principle itself requires judges to determine "the relation between the classification adopted and the object to be attained."[123] That cannot be done if judges must manufacture admittedly fictitious

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[121] But see *Armour v. City of Indianapolis*, 566 U.S. 673, 682-83 (2012) (cost of refunding wrongly-collected taxes was itself a rational basis that justified refusing to refund the money). See also Richard A. Epstein, *Intellectual Laziness on the Supreme Court* (Defining Ideas, June 11, 2012), archived at https://perma.cc/9ED2-JDEM

[122] *Heller v. Doe*, 509 U.S. 312, 321 (1993).

[123] *Romer v. Evans*, 517 U.S. 620, 632 (1996).

justifications for a statute and then uphold the real statute based on that fiction.[124] The Supreme Court said in 1934—the same year it created the rational basis test[125]—that the test was only a rebuttable factual presumption, and that courts must not transform it into "a rule of law which makes legislative action invulnerable to constitutional assault" by "treating any fanciful conjecture as enough to repel attack."[126] It should reiterate that point and make clear that while the test is lenient, it is still confined to the actual facts of reality.

3. No More Dismissals of Well-Pleaded Rational-Basis Complaints

Still more pernicious is the willingness of courts to employ the rational basis test, not at the *merits* stage of litigation, but at the *motion to dismiss* stage. A plaintiff with a well-pleaded complaint is entitled to have all the factual allegations in that complaint assumed as true and every reasonable inference drawn in her favor—yet the rational basis test cuts in the opposite direction: it requires a court to presume in favor of the government defendant. Worse, if the rule entitles courts to invent their own rationalizations to uphold a law, even in the absence of evidence supporting those rationalizations, then the result is a conflict between the pro-plaintiff 12(b)(6) rule and the pro-defendant rational basis test—a conflict that courts have often called

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[124] See further Clark M. Neily III, *Terms of Engagement*, 137-147 (Encounter 2013) (detailing how the "conceivable set of facts" approach to rational basis is logically incoherent).

[125] Although a nascent rational basis theory can be found in cases predating 1934, it was in *Nebbia v. New York*, 291 U.S. 502 (1934) that the Court officially embraced it and discarded the earlier "affected with a public interest" test that it had adopted in *Munn v. Illinois,* 94 U.S. 113 (1876).

[126] *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934).

"perplexing."[127] Unfortunately, district courts seem increasingly willing to dismiss rational basis cases without allowing plaintiffs to prove their allegations, simply because the government "articulates" a possible rationalization for the challenged law.[128]

Thus, for example, in *Jones v. Temmer*,[129] the district court dismissed a constitutional challenge to a law limiting the number of taxicabs that could operate in Denver[130]. The plaintiffs alleged that the law's connection to public health and safety was a pretext, and that in fact the law blocked them from practicing their trade without a rational basis. There is nothing inherently implausible about such an argument—indeed, plaintiffs have prevailed in similar cases.[131] But the District Court *dismissed* the case prior to discovery, based solely on the government's conclusory assertion that the law served public interests.[132] Such an approach to rational basis really does transform it into "a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault."[133] And it *must* be wrong—because plaintiffs do sometimes win rational basis cases. As a matter of logic, therefore, the rational basis test *must* either be a rebuttable presumption of fact—in which case a plaintiff with a well-pleaded complaint should survive a motion to dismiss—or it must be a logically impervious barrier to any and all constitutional attack, in which case the legal profession should be

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[127] See, for example, *Wroblewski v. City of Washburn*, 965 F.2d 452, 459–60 (7th Cir. 1992); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995).
[128] See, for example, *Hettinga v. United States*, 770 F. Supp. 2d 51, 59–60 (DDC 2011), affd, 677 F.3d 471 (D.C. Cir. 2012).
[129] 829 F. Supp. 1226 (D. Colo. 1993), vacated as moot, 57 F.3d 921 (10th Cir. 1995).
[130] Id.
[131] See, for example, *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 700–01 (E.D. Ky. 2014).
[132] *Temmer*, 829 F. Supp. at 1235.
[133] *Borden's Farm Products*, 293 U.S. at 209.

honest enough to admit that all rational basis plaintiffs are barred from court *per se*. A focus of future reform must be to clarify that rational basis plaintiffs are at least entitled to a day in court.

III. REBUILDING DUE PROCESS AND PRIVILEGES OR IMMUNITIES

A. JUDICIAL ENGAGEMENT

One positive trend in recent years is the increasing recognition that the modern theory of "judicial restraint" lacks a legitimate historical foundation or intellectual justification, and, taken to its logical extreme, transforms individual rights into mere privileges that can be revoked by the government at will.[134] That is not what the Constitution contemplates and it is not consistent with its language. On the contrary, the notion of judicial restraint is a relative newcomer, which originated in the Progressive era with thinkers who sought ways to diminish constitutional restrictions on government authority. It was then adopted by conservatives in reaction against the Warren Court era; for decades, these conservatives disregarded warnings that the doctrine of "judicial restraint" is incompatible with the natural rights tradition that many conservatives claimed to embrace.[135] It should have come as little surprise, then, that in the past 20 years, a "restrained" judiciary

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[134] See, for example, Clark M. Neily III, *Terms of Engagement*, (Encounter 2013); Clint Bolick, *David's Hammer: The Case for an Activist Judiciary* (Cato Institute 2007); Timothy Sandefur, *The Conscience of the Constitution*, Chapter 5 (Cato Institute 2014). Perhaps the most revealing moment in this progress so far was the debate at the 2013 Federalist Society convention between Judge J. Harvie Wilkinson and Professor Randy Barnett on the question of whether courts are too deferential. That debate is online at https://www.youtube.com/watch?v=evp84_XcSwY, with a screenshot of the video archived at https://perma.cc/GML7-P2CT.

[135] These warnings can be found, for instance, in the writings of Harry V. Jaffa.

upheld arbitrary restrictions on economic liberty[136] and property rights,[137] and blessed Congressional overreach in the form of the Affordable Care Act[138] and the Controlled Substances Act.[139]

Fortunately, that view is at long last being reconsidered within the libertarian/conservative legal community. There are two reasons for this overdue and welcome development. The first is no doubt the Supreme Court's decisions in such prominent cases as *Kelo v. New London* [140] and *NFIB v. Sebelius*, [141] in which a purportedly conservative Court allowed blatant violations of the Constitution to go forward, in the name of restraint and deference.

The second reason for this reconsideration is the scholarship of Randy Barnett, Roger Pilon, John O. McGinnis, and others who have demonstrated that the theory of restraint really has no legitimate constitutional pedigree. Nowhere is this more evident than in discussions about the Privileges or Immunities Clause of the Fourteenth Amendment and the continuing legitimacy of the *Slaughter-House Cases*.[142] Scholars have convincingly shown that the Clause "does not mean what the Court said it meant in 1873."[143] And it does appear to be the consensus view in the academy that that Clause was meant to be the primary source of legal protections for individual rights against state interference.

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[136] The courts that have ruled against economic liberty in the cases discussed in this article have virtually always recited the judicial restraint shibboleths in doing so. See, for example, *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287 (2d Cir. 2015); *Powers v. Harris* , 379 F.3d 1208, 1217 (10th Cir. 2004).
[137] See, for example, *Kelo v. City of New London*, 545 U.S. 469 (2005).
[138] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).
[139] *Gonzales v. Raich*, 545 U.S. 1 (2005).
[140] 545 U.S. 469 (2005).
[141] 567 U.S. 519 (2012).
[142] 83 U.S. (16 Wall.) 36 (1873).
[143] Saenz v. Roe, 526 U.S. 489, 523 (1999) (Thomas, J., dissenting).

The Court's refusal to address the subject at all in *McDonald v. Chicago* is regrettable, but it is notable that the Court made no serious effort to vindicate the *Slaughter-House* decision—because it could not. Instead, after reviewing the legal history, the Court simply moved on, finding "no need to reconsider" the question, because an alternate route existed. The *McDonald* Court's failure to make any serious effort to defend the *Slaughter-House* precedent speaks volumes.

The Court did, however, note its concern that those seeking to revive the Privileges or Immunities Clause had failed to "identify the Clause's full scope."[144] This criticism, anchored in an illegitimate theory of judicial restraint, reflects a misguided conception of the Clause, which, like the Ninth Amendment, was written specifically to be open-ended. "[T]he ordinary rights of citizenship no law has ever attempted to define exactly," said Senator John Sherman when explaining the Clause in 1872. Privileges and immunities refers to rights such as "are recognized by the common law, such as are ingrafted [*sic*] in the great charters of England, some of them ingrafted [*sic*] in the Constitution of the United States, some of them in the constitutions of the different states, and some of them in the Declaration of Independence. The Constitution's authors "did not attempt to enumerate" these rights because "they [are] innumerable, depending upon the laws and the courts from time to time administered."[145] The Privileges or Immunities Clause protects unnamed rights because rights cannot all be named. The Constitution enumerates the *powers of government*. Not only does it

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[144] *McDonald v City of Chicago, Ill.*, 561 U.S. 742, 758 (2010).

[145] *Cong. Globe* 42d Cong. 2d Sess. 844 (1872). Lest I be misunderstood: I am not citing Sherman's beliefs as defining the meaning of the Clause, but merely quoting the words of someone whose analysis was correct.

make no attempt to enumerate all individual rights, but it *expressly* refuses to do so,[146] because that is impossible.[147] The *McDonald* Court's concern about the Clause's "full scope" thus reflects a categorical misunderstanding of what the Amendment means.

Yet that concern echoes a continuing debate in Fourteenth Amendment scholarship, one which liberty-oriented legal scholars must attend to. Kurt Lash and others have recently mustered an impressive mass of research to argue for a "more constrained" view of the Privileges or Immunities Clause,[148] that seeks to address conservative worries about so-called activist judges "enforc[ing] their preferred ideas of government power and individual freedom."[149] According to Lash, the Clause was designed not to protect "unenumerated rights,"[150] but only "the express enumerated rights of the Constitution."[151]

Yet even if one assumes all the conclusions Lash draws from the speeches and writings surrounding the Clause's adoption, the *enumerated* rights in the first ten amendments include unenumerated rights, *by definition*. The Fifth Amendment, for example, provides that no person shall be "deprived of…liberty" without due process of law. But *liberty* consists of an infinitely long list of "unenumerated" rights. It includes, for example, the right to run barefoot through sprinklers on a hot summer day, the right to think about a peppermint candy, the right to take a photograph of a rainbow (and to sell it), the right to take such a photo on a Tuesday

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[146] U.S. Const. Amend IX.
[147] See generally *Sandefur, Conscience* (cited in note 95).
[148] Kurt Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* 287 (Cambridge 2014).
[149] Id at 286.
[150] Id at 287.
[151] Id at 251.

and also on a Wednesday, the "right to wear [one's] hat if [one] please[s]," or to "get up when [one] please[s], and go to bed when [one] [thinks] proper"[152]—and so on indefinitely. The Ninth Amendment, too—which Lash himself contends *can* be incorporated through the Privileges or Immunities Clause[153]—references "other rights" and leaves them *unenumerated*. Thus, even under Lash's argument, the "liberty" and "other rights" guarantees of the Bill of Rights, and possibly other similarly open-ended guarantees, must be included among the privileges and immunities of federal citizenship that Section One of the Fourteenth Amendment protects. And that means that even on Lash's own reading, the Clause plainly *does* incorporate at least *some* "unenumerated" rights—including the indefinitely large set of rights subsumed under the word "liberty"—against state interference. It also means that at least some of those unenumerated rights are *individual* rights, rather than, or in addition to, the "collective right[s]"[154] that Lash thinks the Ninth Amendment refers to.[155]

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[152] 1 *Annals of Cong*. 759-60 (Rep. Sedgwick, Aug. 15, 1789).

[153] Lash at 298 (cited in note 148).

[154] Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Tex. L. Rev. 331, 347 (2004).

[155] If for no other reason than because the state constitutions that Lash looks to as the source of those "other rights" that he believes the Ninth Amendment refers to *also* refer to unenumerated rights. For example, the Massachusetts Constitution of 1780 states that "[a]ll men…have certain natural…rights, *among which may be reckoned* the right of enjoying…their…*liberties*." Mass. Const. Pt. I art. I (1780) (emphasis added). Therefore, even if the "other rights" referenced in the Ninth Amendment are only those found in state constitutions, the Massachusetts Constitution itself refers to still other "other rights," via its use of the phrase "among which" and the word "liberties," both of which necessarily imply (an indefinitely long list of) unenumerated individual rights. By the transitory principle, therefore, the Ninth Amendment (and the Privileges or Immunities Clause of the Fourteenth Amendment) must include at least some unenumerated individual rights. For other helpful critiques of Lash, *see*

This is not, of course, the place to address all of Lash's claims regarding the Clause; it is merely to say that the *McDonald* Court's concern about "the Clause's full scope" reflects a desire to determine precisely what kinds of rights the Clause protects—a desire that cannot be appeased because the Clause is by its own nature open-ended and illimitable. Thus the Clause requires the kind of judicial engagement the Court fears.

B. THE PROBLEM OF VAGUE LAW

As to due process of law, however, there are other matters regarding economic freedom, narrower but no less important, that should be the focus for future litigation. One relates to the procedural protections that ought to apply in all situations in which the government requires a person to obtain a license or a permit. In a series of cases beginning in the 1950s, the Supreme Court made clear that whenever the government requires a person to obtain a permit before exercising any of the "freedoms which the Constitution guarantees," [156] that permit requirement must provide certain procedural safeguards: (1) the criteria for obtaining the permit must be clearly stated, (2) the applicant must be given a specific deadline within which she will receive an answer, and (3) the applicant must have an opportunity for judicial review in the event that she is wrongfully denied the permit.[157] Although the subject is typically discussed in the context of First Amendment rights, it is plain that

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Christopher R. Green, *Incorporation, Total Incorporation, and Nothing but Incorporation?*, 24 Wm. & Mary Bill Rts. J. 93 (2015); Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to A Textual-Historical Theory of the Ninth Amendment,* 60 Stan. L. Rev. 937 (2008).

[156] *Staub v. City of Baxley*, 355 U.S. 313 (1958).

[157] *Freedman v. State of Md.*, 380 U.S. 51, 58-59 (1965). See also *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 227–28 (1990).

these basic "procedural safeguards"[158] must apply to any type of licensing or permit requirement.

Yet these safeguards are regularly ignored outside the First Amendment context, and particularly in situations involving economic freedom and private property rights. Zoning laws, occupational licensing requirements, and similar restrictions are often phrased in vague terms so that applicants cannot know whether or not they will obtain licenses. For example, certificate-of-need laws which bar a person from operating a business unless he first proves to the government that there is a "public need" for such a business, generally do not define "public need"—a term that is simply unintelligible otherwise.[159] Applicants are sometimes given no specific deadline within which the licensing authority will render a decision. This puts applicants in legal limbo, where they can neither engage in the activity, nor sue to challenge the prohibition, because their cases are not yet "ripe."[160] And applicants are often forced to appeal wrongful denials not to a court but to an administrative agency, where the rules of evidence and procedure do not apply.[161] If the applicant loses that case, and appeals to a judicial court, often the applicant is forbidden from introducing new evidence to challenge the administrative determination. Further, the law often mandates that the judge rely solely on the evidence in the administrative record, even though it may contain hearsay or other material that would violate the rules of evidence.

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[158] *Freedman* at 58.

[159] See Sandefur, *Permission Society* (cited in note 52) at ch. 5.

[160] See, for example, Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 22 (1992) ("Delay has become a well-honed, tactical weapon of the government; more destructive, in many ways, than substantive takings doctrine.").

[161] See generally Philip Hamburger, *Is Administrative Law Unlawful?* ch. 13 (Univ. Chicago Press 2014).

Prominent academics and judges have expressed growing concern about what Chief Justice Roberts has called the "'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." But even those who are sanguine about such things should agree that the three "procedural safeguards"—clear, unambiguous criteria for obtaining a permit; a specified deadline on which the applicant knows she will get an answer; judicial review that is genuinely independent—ought to apply whenever the government requires a person to obtain a permit before exercising a constitutional right.

A related point: as Justice Neil Gorsuch recently observed, the void for vagueness doctrine is an essential component of due process of law,[162] yet it is regularly disregarded outside the criminal context. There is no good reason why the legislature is required to speak in terms that "the person of ordinary intelligence"[163] can understand when it enacts a criminal statute, but not when it enacts a law that might "strip [the citizen] of a business license essential to his family's living, or confiscate his home."[164] Occupational licensing restrictions, zoning regulations, and other limits on economic freedom or private property rights are routinely phrased in incomprehensible verbiage designed to be as broad as possible in order to maximize "flexibility" (a euphemism for unguided discretion) on the part of government officials, many of whom are not answerable to the voters and against whom the citizen has little realistic recourse.

For example, the California Redevelopment Law empowers cities to deem neighborhoods "blighted" (and hence subject to

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[162] *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223-33 (2018) (Gorsuch, J., concurring).
[163] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).
[164] *Dimaya*, 138 S.Ct. at 1231 (Gorsuch, J., concurring).

condemnation under eminent domain) if those neighborhoods have "[c]onditions that prevent or substantially hinder the viable use or capacity of buildings or lots," or "[a] serious lack of necessary commercial facilities."[165] What do these terms mean? They mean what city officials say they mean—and if challenged in court, judges defer to these officials by using the "substantial evidence" test—a test which dictates that a reviewing court must affirm that decision if there is any evidence to support it, "even if there is also substantial evidence to support a contrary conclusion."[166]

In Nevada, it is unlawful to operate a moving company without first proving to a government agency that "[t]he market…will support the proposed operation," that the new company "will not unreasonably and adversely affect [competing] carriers," and other factors.[167] How does one prove such things? Impossible to say. Yet courts have proven resistant to addressing the vagueness of such rules.

In a Kentucky case involving a statute that forbade moving companies from operating unless they first proved that they would serve the "future convenience" of the public, the agency admitted that there were "no independent standard[s] or document[s] or list of factors or statistics" for deciding such matters.[168] Yet the court refused to find the statute vague.[169]

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[165] Cal. Health & Safety Code § 33031.
[166] *People v. Riley*, 240 Cal. App. 4th 1152, 1165–66 (2015).
[167] Nev. Rev. Stat. § 706.391.
[168] See Sandefur, *Permission Society* (cited in note 57) at 106.
[169] *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 701–02 (E.D. Ky. 2014). The district court claimed that the Kentucky state courts had defined the statute's terms, and cited *Eck Miller Transfer Co. v. Armes*, 269 S.W.2d 287, 289 (Ky.1954), and *Germann Bros. Motor Trans., Inc. v. Flora*, 323 S.W.2d 570, 571 (Ky.1959). In fact, neither case defined the statutory terms. See Timothy Sandefur, *State "Competitor's Veto" Laws and the Right to*

This reluctance on the part of courts to acknowledge the utter incomprehensibility of many licensing and permitting requirements seems to arise from the presumption that businesses are more sophisticated or can obtain legal assistance, and therefore can better understand vaguely worded business regulations.[170] This resembles the "resilience" argument for allowing government greater power to restrict commercial speech.[171] Both arguments fail, and for the same reasons: entrepreneurs and small businesses often cannot easily obtain legal representation, and while they may have an economic incentive to seek to clarify the meaning of vague terms, the politically-privileged incumbent firms have a stronger incentive to keep those terms vague so as to maximize their monopoly power. Moreover, no amount of legal assistance can help to clear up what is meant by such irreducibly vague terms as "future public convenience" or "substantially hinder the viable use of buildings." As to the alleged resilience of economically-motivated conduct or speech, business activity is often the opposite of resilient: timid investors or managers are unlikely to be seen as challenging the powers that be, particularly given that they know they will need another permit from the same agency at a later date. Fear of retaliation or discrimination by a regulatory agency tends to deter businesses from challenging vaguely worded licensing statutes. And the fact that a business is likely to be forced to exhaust its administrative remedies first—generally an expensive, time-

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Earn a Living: Some Paths to Federal Reform, 38 Harv. J.L. & Pub. Pol'y 1009, 1032–34 (2015).

[170] See, for example, *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

[171] See, for example, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 n.6 (1980).

consuming, and futile exercise—probably deters small business owners even further.

Differentiating between criminal and civil law on the subject of vagueness makes even less sense when one considers that the difference between those two is not so clear-cut. As Justice Gorsuch observed, laws that are purportedly "civil" often include severe penalties, including monetary fines, confiscation of assets, and even confinement. "Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies."[172] The Due Process of Law Clause does not distinguish between criminal and civil, and some law that is considered "civil" today would have been considered criminal at the time of the founding: "public nuisance," for example.[173] Statutes that exploit this grey area—such as the "honest services fraud" statute[174] or the prohibition on false statements on an immigration document[175]—make this distinction even harder to maintain. Vgue law is an invitation to abuse and petty (or major) tyranny.[176] In the coming years, one major focus for

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[172] *Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J., concurring). See also Barton L. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and A Modest Proposal: A Reply to O'Reilly*, 86 J. Crim. L. & Criminology 559, 574–75 (1996) ("Which is more severe, a fine, probation, short-term incarceration or a civil damage award, the amount of which may be sufficiently high to destroy a business or strip one of one's earnings and savings, not only in the present but in the future as well? It is no longer clear.").

[173] W. Page Keeton, ed., *Prosser and Keeton on Torts* 617 (West Group 5th ed. 1984). "Public nuisance" is an obvious example of a legal concept so vague as to be unconstitutional, though courts refuse to acknowledge it. See Sandefur, *Right to Earn A Living* 240-45 (cited in note 29).

[174] 18 U.S.C. §§ 371, 1343, 1346.

[175] 18 U.S.C. 1546(a).

[176] See Christopher Hitchens, *Hitch-22: A Memoir* 51 (Twelve 2010) ("The true essence of a dictatorship is in fact not regularity but its unpredictability and *caprice*; those who live under it must never be able to relax, must never be quite sure if they have followed the rules correctly or not.... Thus, the ruled can always be found to be in the wrong.").

libertarian litigation should be against the vague, incomprehensible regulations that violate the rights of entrepreneurs and property owners.

C. NORMATIVE JUDGMENTS AND FALSE OBJECTIVITY

I hope I have made clear a few of the legal matters that remain to be resolved before the libertarian side of the civil rights spectrum will be fully vindicated. But I want to return to an earlier point and emphasize that no such resolution is possible as long as the legal community persists in its refusal to respect the underlying *normative* principles of the Constitution. The single greatest obstacle within the legal community to vindicating the Fourteenth Amendment is *relativism*: the pseudosophisticated notion that the Constitution is fundamentally a democratic document that sets the rules of the game but which takes no overall position on the substantive outcomes of the democratic process.

Relativism is a fairly new idea in the law—it's what Progressives wrongly thought science was like, and what they sought to emulate[177]—and under its influence, lawyers are today taught to regard with indifference the outcome of the legislative process so long as the procedures are adequately honored. It is the source of such clichés as that the Fourteenth Amendment does not enact Herbert Spencer[178] (or Robert Nozick[179]), or that judges are just

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[177] As Grant Gilmore and G. Edward White have noted, the Progressive-era legal intellectuals sought to remove moral considerations, which they viewed as subjective, unscientific impulses, from the substance of law. They largely succeeded in contract law, but not in torts. See, for example, G. Edward White, *Tort Law in America: An Intellectual History* (Oxford Univ. Press 2003); Grant Gilmore, *The Death of Contract* (Ohio State Univ. Press 1974).

[178] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[179] *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 27 Cal. 4th 643, 677 (2002).

umpires calling balls and strikes,[180] or that "[i]t is not [courts'] job to protect the people from the consequences of their political choices."[181] It is also the basis of the popular misconception that government can decide whether to "create a market economy"[182] or the opposite, and that the legal profession should regard that choice as beyond their ken. The fact of the matter is that a free economy is not the sort of thing that can be *created*, and that the law cannot possibly regard the alternatives of freedom or unfreedom as equally legitimate or equally *lawful* outcomes.

This relativism is literal nonsense, because it inherently presumes that individual rights are of the same order as material resources that the state can distribute or withhold as it chooses, and that the legal profession's sole responsibility is to ensure that the debate over that distribution complies with formal procedures. This notion was exploited to masterful comic effect in Mark Twain's short story "Cannibalism in the Cars," in which an acquaintance relates an incident in which the passengers in a stranded train—who happened to be members of Congress—politely debated whom they should eat. When the man finishes his tale, Twain tells us, "I never felt so stunned, so distressed, so bewildered in my life. But in my soul I was

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[180] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee) ("Judges are like umpires. Umpires don't make the rules, they apply them…. [I]t's [the judge's] job to call balls and strikes, and not to pitch or bat."). It is of course true that judges are umpires. But that job is not possible if an umpire refuses to understand the overall role of the rules in baseball or (to stretch the metaphor a bit) refuses to acknowledge what the point of baseball is. Judges—and umpires, to some extent—necessarily do and must "make" rules. At a minimum, judges make rules of procedure and decide motions *in limine* that are making rules.

[181] *Sebelius*, 567 U.S. at 538.

[182] Cass R. Sunstein, *Free Markets and Social Justice* 219 (Oxford Univ. Press 1997).

glad he was gone. With all his gentleness of manner and his soft voice, I shuddered whenever he turned his hungry eye upon me."[183] And this nonsense was exposed effectively by John Locke in his *First Treatise,* when he asked whether, if kings can decide whether or not to give their subjects freedom, they "might [they] eat their subjects too"?[184] Lawyers ought to have the same reaction toward those who suggest either that the government "creates" freedom,[185] or that its choices of whether to "give" people freedom or to deprive them of it can be regarded as equally legitimate.

The fallacy [186] here lies in disregarding the fundamental asymmetry between freedom and its opposite—an asymmetry that originates in the fundamental difference between the experiences of (a) my being imprisoned and (b) my being blocked from imprisoning another. I am harmed in the first instance; I am annoyed, perhaps, but not harmed, in the latter. It is by disregarding this basic distinction that opponents of freedom (Hobbes, for example) are able to maintain that all laws constrain freedom because they, for instance, deprive me of the freedom to murder someone else. The same fallacy occurs when contemporary intellectuals, elevate democracy over liberty as a fundamental constitutional value.

Yet in today's legal community, to argue that our Constitution has a normative direction, that that direction is pro-freedom, and that our constitutional commitment to individual freedom must take the

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[183] Mark Twain, *Cannibalism in the Cars* (1868), reprinted in Lawrence I. Berkove, ed., *The Best Short Stories of Mark Twain* 21 (Random House 2004).
[184] John Locke, *First Treatise of Civil Government* §27 (1689), reprinted in Peter Laslett, ed., *John Locke: Two Treatises of Civil Government* 31 (Cambridge Univ. Press rev. ed. 1963).
[185] Timothy Sandefur, *Does the State Create the Market – and Should It Pursue Efficiency?*, 33 Harv. J.L. & Pub. Pol'y 779, 779–98 (2010)
[186] I address this matter more fully in *The Permission Society* (cited in note 52) at 6-12.

form of the "presumption of liberty," [187] is regarded as the fundamental sin: it is to "*Lochner*ize."[188] That explains the *Powers* court's self-congratulatory refusal to "creat[e]" a "libertarian paradise" by requiring the legislature to legislate for the public good, instead of the private good. [189] And it explains the California Supreme Court's refusal in another case to "impos[e]" a "personal theory of political economy on the people of a democratic state" by forbidding local governments from charging property owners extortionate fees for permission to use their own property.[190]

"Libertarian views," however, are by definition not forced on anyone. People are born naturally free. It is government *restriction*, and property *expropriation*, and regulation, confinement, and censorship, that are forced upon people. Freedom is not forced on people—it is already theirs. This is a fundamental fact of reality—although if the legal positivist needs some authority for it, it is also to be found in the organic laws of the United States.[191] It is essential that this basic idea and its corollaries—that all people are born with a fundamental right to themselves; that they are presumptively free, and that restrictions on their liberty must be justified; that the Constitution was written to preserve liberty, not to facilitate collective decision-making without regard to its direction; that the law is not morally neutral—become a central part of our legal

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[187] Id.

[188] Robert Bork, *The Tempting of America* 44 (The Free Press 2d ed. 1990).

[189] *Powers,* 379 F.3d at 1222.

[190] *San Remo Hotel L.P.*, 27 Cal. 4th at 677.

[191] See, for example, *Declaration of Independence*, 1 Stat. 1 (1776) ("All men are created equal…[with] certain inalienable rights…[including] liberty"). See also *Virginia Declaration of Rights* ¶ 1 (1776) ("all men are by nature equally free and independent and have certain inherent rights, of which…they cannot, by any compact, deprive or divest their posterity…[including] liberty."); *Mass. Const.* Pt. 1 art I ("All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying…their…liberties.").

discourse if the Fourteenth Amendment's promise is to be fully realized.

The relativism I've complained of is not confined to those who oppose the efforts to restore economic liberty and property rights to their rightful constitutional place. It is also found within the libertarian/conservative legal community. For example, I suspect that nascent relativism is one reason for the popularity of "Originalism." Not that Originalists are relativists—some are; some aren't—but Originalism offers a mirage of objectivity that enables its advocates to distance themselves from contested normative judgments, and thereby appear detached and objective.

Originalism was fashioned in an effort to find an interpretive theory that would not turn on the personal political opinions of judges, but which would also not embrace freewheeling living constitutionalism. Admirable aims, no doubt, but as Professor Tara Smith has argued, Originalism fails to attain them.[192] It seeks not to determine what the words of a legal text *mean*, but what some privileged individual or group *believed* them to mean at some privileged time.[193] Thus Originalism—of both the "original intent" and "original meaning" varieties—seeks the subjective understanding of a text's meaning in the mind of some authoritative figure, a sovereign whose understanding is taken to be the definitive quality of law—typically the author, or, nowadays, a hypothetical reasonable member of the general public at the time of authorship. This is not objectivity, however—it's saying that the beliefs of a

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[192] See, for example, Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective*, 26 Const. Comment. 1 (2009).

[193] Typically, the time of enactment, which in the Constitution's case means the time of ratification. Why not the time of writing, or of promulgation? The Originalist answer to this question depends *not* on Originalist criteria but on other (normative) arguments, which are then really doing all the work in the theory.

privileged class (or, what is the same thing, the objective fact of what was subjectively believed by them about what a text meant) are *definitive* as to its content.[194] That is what Smith calls "'he said, she said' law."[195] It is not only subjective, but, ironically, it is contrary to the intent of the framers, who believed, in the words of Alexander Hamilton, that "the sacred rights of mankind are not to be rummaged for among old parchments or musty records," but "are written as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power."[196] Hamilton—incidentally, one of the earliest proponents of the theory of Substantive Due Process in American history[197]—certainly did not contemplate the sort of picayune, record-searching archaeology that today's Originalists engage in. For one thing, if there is to be a privileged class of meaning-definers, whose subjective beliefs are the content of the law, should it not be *today's* Americans—who, after all, are required to live under this law?[198] The earth does belong to the living.[199]

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[194] Smith, *Originalism's Misplaced Fidelity*, (cited in note 193) at 38.

[195] Tara Smith, *Originalism, Vintage or Nouveau: "He Said, She Said" Law*, 82 Fordham L. Rev. 619, 635 (2013).

[196] Alexander Hamilton, *The Farmer Refuted* (1775), reprinted in 2 *The Works of Alexander Hamilton* 80 (1850).

[197] See Sandefur, *Conscience* (cited in note 94) at 107-08.

[198] See, for example, Tom W. Bell, *The Constitution as if Consent Mattered*, 16 Chap. L. Rev. 269 (2013).

[199] See Thomas Jefferson, *Letter to James Madison* (Sept. 6, 1789), in M. Peterson ed., *Thomas Jefferson: Writings* 959 (Library of America 1984). Two possible responses to this point come to mind: first, Originalists do not deny that a normative justification of Originalism is valid or necessary (*i.e.,* that Originalism is to be preferred because it yields better substantive outcomes)—and second, that Originalism is not the end-all, be-all of the law, but instead that law must include other considerations in addition to the meaning of written terms; Originalism seeks only to resolve this last question. These are valid points, and ones I have argued myself. See Timothy Sandefur, *Hercules*

Originalism has much to recommend it.[200] But a proper jurisprudence looks to the thoughts of a thinker like Hamilton to guide interpretation not because Hamilton thought them, but because the thoughts are themselves worthy of consideration on their own merits—which means that a proper interpretation is guided not by the identity of the interpreter, but by the quality of the interpretation. And that means that it is not qualitatively "Originalist," because the "origin" is not an operative component of the argument.[201] Rather, what does the work in that version of "Originalism" are plain, old fashioned common-law rules of interpretation, rules that were developed, not in an effort to ascertain an author's intentions, but to aim the law toward normative goals validated by other means.[202] The fact that the normative direction of our legal system happens to generally align with classical liberal

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and Narragansett Among the Originalists, 39 Reason Papers 8, 16-24 (2018). It seems to me that the problem with these contentions is that invoking them results in a theory in which the *origin* of the language doing none of the interesting work—so that the theory then ceases to be distinctively "Originalist." In my view, for instance, Laurence Solum's "Construction Zone"—see Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. Rev. 551, 569 (2010)—is just where the theory shades out of Originalism and into objectivity. (Which is a good thing!)

[200] For a superb effort at resolving the concerns I've raised here regarding Originalism, *see* Gary Lawson, *Reflections of an Empirical Reader (or: Could Fleming Be Right This Time?),* 96 B.U. L. Rev. 1457 (2016).

[201] For more on these matters, see my exchange with Smith in *Symposium: Tara Smith's Judicial Review in an Objective Judicial System,* 39 Reason Papers 8-36 (2017).

[202] The contract rule of *contra proferentum,* for example, has no basis in considerations of Originalism *per se*. Rather, it was devised to serve normative concerns in contract law. For exactly the same reason, the rule of leniency in criminal law was devised. But to use such considerations to interpret the Constitution—for example, to adopt interpretations that avoid concerns raised by Anti-Federalists during the ratification debates, as Justice Thomas suggests in *Missouri v. Jenkins*, 515 U.S. 70, 126 (1995) (Thomas, J., concurring)—means applying a rule of construction whose validity is supported by normative considerations that lie outside the reach of Originalism *per se*.

principles may account for the appeal of Originalism, but Originalism—faithfulness to the fact that the founders thought something—should not be taken as a substitute for appreciating those normative commitments on their own terms.[203]

This raises another, closely related concern: the question of Substantive Due Process. This concern is critical because the libertarian/conservative legal community has formed a consensus on the revival of the Privileges or Immunities Clause that risks accepting a dangerous compromise. In seeking to revive that Clause, some defenders of individual liberty have appeared willing to

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[203] These commitments are not "subjective," but they are normative. It is a persistent and crippling myth in our jurisprudential theory that normative and subjective are synonyms. And it is the pervasiveness of this myth, I suspect, that accounts for a large part of the appeal of Originalism in today's world—because, as suggested above, people who either adopt this misconception or who wish to avoid the topic, see Originalism's promise of objectivity as a route around that often heated debate.

An interesting subject for further reflection would be the question of whether law's origin plays a role in its bindingness on us. Hannah Arendt, commenting on "the strange fact that constitution-worship in America has survived more than a hundred years of minute scrutiny and violent critical debunking," suggested that "the remembrance of the event itself...has continued to shroud the actual outcome of this act...in an atmosphere of reverent awe," and that "the authority of the republic will be safe and intact as long as the act itself, the beginning as such, is remembered whenever constitutional questions in the narrower sense of the word come into play." Hannah Arendt, *On Revolution* 196 (New York: Penguin 2006) (1963)). If by "reverent awe," she was referring to the "civic religion" that James Madison and other founders saw as essential to the sustainability of the Constitution—see generally Gary Rosen, *American Compact: James Madison and the Problem of Founding* (Lawrence: University Press of Kansas 1999)—then there may indeed be some truth to this. It may seem like mythology to speak of law being rooted in reverent awe—but what else is constitutional law itself but a myth of reverent awe? "Mankind is an inventive species," wrote David Hume, when discussing justice, "and where an invention is obvious and absolutely necessary, it may as properly be said to be natural as any thing that proceeds immediately from original principles without the intervention of thought or reflection." 2 David Hume, *A Treatise of Human Nature* 278 (New York: Longmans, Green & Co., 1909) (1740).

sacrifice Substantive Due Process, in a sort of trade. Justice Thomas seems foremost among these: while he acknowledges that the Privileges or Immunities Clause protects so-called unenumerated rights, including natural rights,[204] he emphatically rejects the idea that the Due Process of Law Clause contains any substantive component. In *Sessions v. Dimaya*, for example, he reiterated his position that the Court should not "actively interpret[] the Due Process Clause to strike down democratically enacted laws," and singled out "liberty of contract"—written in scare-quotes—as the sort of thing the Court should not be protecting.[205]

He has explained this apparent inconsistency by arguing that a judicial inquiry into what does and does not constitute due process of law is too "tenuous" and "flexib[le]," whereas an inquiry into what are and are not among the "privileges or immunities" of citizens of the United States is objective, and can be resolved by consulting ancient legal sources.[206] This is an unpersuasive argument, in part because a court determining the substantive content of the Due Process of Law Clause examines the same sorts of materials in the same way, and in part because if Justice Thomas concedes that the Fourteenth Amendment guarantees natural rights *at all*, then he must also acknowledge that a court applying those guarantees must engage in a value-laden philosophical inquiry, over and apart from mere historical shovel-work. And if that's true, then there is no reason not to do so as part of the Due Process of Law inquiry—which,

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[204] See, for example, Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y 63 (1989).
[205] *Dimaya,* 138 S. Ct. at 1244 (Thomas, J., dissenting).
[206] *McDonald v. Chicago*, 561 U.S. 742, 811-17 (2010) (Thomas, J., concurring in result).

after all, has had a substantive component to it for so long that the memory of man runneth not to the contrary.[207]

More pragmatically, the desire among some conservatives to jettison Substantive Due Process while reviving Privileges or Immunities appears to be rooted in a desire to eradicate constitutional protection for certain disfavored rights such as abortion.[208] If *Roe v. Wade*[209] was an "activist" Substantive Due Process decision, then a future court could reject that theory without simultaneously abandoning all natural rights, if it substituted Privileges or Immunities instead. This is a dubious theory, and one that threatens, notwithstanding protestations to the contrary, to transform the Privileges or Immunities Clause into nothing more than an itemized list of specific rights that the justices believe are sufficiently grounded in historical documents—which is to say, precisely the sort of positivism that is contrary to the natural rights component of our constitutional law.[210]

Substantive Due Process, rightly understood, is a guarantee against arbitrary or rationally indefensible applications of government power. It is the oldest and most basic of all

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[207] See generally Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law* (March 26, 2018), available at SSRN: https://ssrn.com/abstract=3149590; Sandefur, *In Defense of Substantive Due Process, supra* note 97; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585 (2009); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941.

[208] See, for example, Douglas W. Kmiec, *Natural Law Originalism for the Twenty-First Century - A Principle of Judicial Restraint, Not Invention*, 40 Suffolk U. L. Rev. 383, 390 (2007); John C. Eastman, *Re-Evaluating the Privileges or Immunities Clause*, 6 Chap. L. Rev. 123, 134–36 (2003).

[209] 410 U.S. 113 (1973).

[210] Tara Smith, *Judicial Review in an Objective Legal System* 168-75 (Cambridge Univ. Press 2015).

constitutional guarantees, originating in the Magna Carta at the dawn of our constitutional tradition. And because it bars arbitrary and indefensible government actions, it necessarily takes sides as to what does and does not qualify as arbitrary and what can and cannot be defended. It is a one-way arrow, normatively speaking. It differentiates law—which contains all necessary normative ingredients—from that which falls short of law: the arbitrary act of government power. And that necessarily subtends a moral arc[211] in the Constitution.

Fears about "living constitutionalism" are well taken when they target a court's willingness to indulge government intrusion on liberty—but not necessarily when they target protections of individual freedom. We rightly reject the notion that the Second Amendment only protects muskets, because those were the only firearms in existence at the time, or that the Fourth Amendment does not apply to infrared cameras because they were not invented yet. We reject those arguments because the expansion of the Constitution's *principles* to unforeseen cases is just part of what law means—and would mean, even if nobody involved in writing those amendments thought so. In the same way, the Constitution's explicit guarantee of "liberty"—as open-ended a term as our language contains—is far broader than any itemized list of historically-approved rights. To replace the principled inquiry that is part of Due Process analysis with a sort of rote-memorization list of itemized "privileges or immunities" threatens to undo a critical aspect of our freedom. It would be, as the Supreme Court warned in *Hurtado v. California*, "incongruous" to "measure and restrict" our rights by relying only on "the ancient customary English law," when the

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[211] Or, if you prefer, it creates a penumbra, formed by an emanation.

Constitution actually protects "not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."[212] Such an approach would "deny or disparage" our rights in a way Constitution's framers rejected.

True, there is much to complain of in existing Substantive Due Process jurisprudence. But the effort to replace it *in toto* with a revived Privileges or Immunities Clause will have one of two consequences: either it will make no difference at all, because it the latter will include the same natural-law inquiry that the former has always called for, or it will utterly transform our constitutional law by replacing the Fourteenth Amendment's broad guarantees of liberty with a delimited set of specified rights. This would be "dangerous" because it would "afford a colourable pretext" to the government "to claim more [powers] than were granted."[213] One need not believe that *Slaughter-House* was rightly decided, or that it should remain on the books, to be wary of any bargain whereby the critical and ancient protections of Due Process of Law are surrendered in exchange for an itemized list of privileges or immunities. The bottom line is this: the attack on Substantive Due Process is fundamentally an argument for judicial deference—which is to say, for judicial abdication—even if it accompanies a willingness to revive the Privileges or Immunities Clause. Advocates of liberty should refuse to participate in that.

Why is this so important? Consider that in the light of history, our law with regard to privacy is in a bewildering and perhaps untenable state. No society before ours has ever regarded religious beliefs and sexual matters as being purely private affairs into which the government may not intrude. The reason is that every society

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[212] 110 U.S. 516, 532 (1884).

[213] Federalist 84 (Hamilton), in *The Federalist* 575, 579 (Wesleyan 1961) (Jacob E. Cooke, ed)

before ours believed that there are consequences to society from a citizen's private religious or sexual relations—something it is impossible to deny. The difference—and sole defensible basis for the difference—is that no society prior to ours had a conception of the natural rights of the individual. That revolutionary idea lies at the heart of our Constitution. All alternatives to it, no matter how sophisticated they may appear, are variations on the same ancient theme which the Constitution's authors rejected: namely, the notion that individuals have only such freedom as those in power choose to give them. That idea lay at the heart of what I have called "permission societies," and unless abandoned, that idea will inevitably lead to our nation abandoning its commitments even to those aspects of freedom we might blithely assume to be safe and sound today, including religious and sexual privacy. It certainly can happen here. It has happened virtually everywhere else.

CONCLUSION

This essay has been an effort to assess the progress made in the past 20 years by those who seek to revive and expand the guarantees of the Fourteenth Amendment. The progress has been remarkable, and there is much reason to celebrate. But we face greater challenges—challenges that will likely grow rather than diminish in the coming years. Foremost among these is relativism, hostility to the idea of natural rights, and the "Trade Trigger"—the lingering prejudice against economic exchange that leads our courts to strip activity and even speech of its constitutional protections whenever it intersects with trade. In the meantime, there are many complicated and important questions left to resolve in litigating for economic liberty and property rights—particularly in bringing rationality to the rational basis test and enforcing the constitutional rules against vagueness and arbitrary permitting laws. These challenges will be significant, but we have this consolation with us, that that which is hard won is highly prized.