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## Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause

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## WILL, JUDGMENT, AND ECONOMIC LIBERTY: MR. JUSTICE SOUTER AND THE MISTRANSLATION OF THE DUE PROCESS CLAUSE

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Among other things, the Fourteenth Amendment forbids the deprivation of "liberty" without "due process of law."<sup>1</sup> To many, the Due Process Clause means what it says, that is, it merely requires states to follow certain procedures before depriving someone of liberty.<sup>2</sup> Others, however, maintain that the clause

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<sup>1</sup> U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

<sup>2</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31-32 (1990); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 24-25 (1997); Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 90-91 (1982); Learned Hand, *Due Process of Law and the Eight Hour Day*, 21 HARV. L. REV. 495, 495-96 (1908). See generally John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 501 (1997) ("[T]here is a time-honored objection to the very idea of substantive due process. The objection is that the 'process' referred to in the Clause is procedure.").

has a "substantive" component that limits the authority of the state over certain rights, even if fair procedures have been employed to abridge them.<sup>3</sup>

Of course, a conclusion that the Due Process Clause provides substantive protection for certain liberties begs two important questions: which liberties, and how much protection? The logical place to begin, it might seem, would be with the meaning attached to the Due Process Clause when the Fourteenth Amendment was written and ratified. An investigation of that meaning, many have argued, would reveal that the Framers and Ratifiers believed that the phrase "liberty" referred to the right to contract and the right to pursue an occupation—rights that were subject to abridgement only in certain narrow circumstances.<sup>4</sup> Still, for decades, the Supreme Court has refused to offer even the slightest protection for liberty of contract and liberty of occupation under the aegis of the Due Process Clause.<sup>5</sup> Similarly, many influential scholars embrace the distinction drawn by modern constitutional doctrine between economic liberties and so-called personal rights.<sup>6</sup> Predictably, this bifurcation between economic and other rights has led to the charge that the Su-

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3. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 536-45 (1961) (Harlan, J., dissenting) (discussing the right to privacy); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302-12 (1988) (same).

4. See, e.g., BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293, 296 (1985); see also *infra* notes 76-90 (discussing various primary sources).

5. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 732-33 (1963) (sustaining a Kansas statute that barred non-lawyers from debt adjusting); *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (upholding an Oklahoma statute that prohibited opticians from fitting or duplicating lenses without a prescription); *Olsen v. Nebraska*, 313 U.S. 236 (1941) (sustaining a Nebraska statute fixing private employment agency fees); see also Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 *SUP. CT. REV.* 34, 43-45 (describing the "dual standard" applied to economic and personal rights).

6. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 153-59 (1991); LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF* 24-90 (1996) (endorsing enterprise of substantive due process and rejecting protection for economic liberties); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 40-67 (1993); TRIBE, *supra* note 3, at 564-86. Of course, there are exceptions, that is, scholars who would employ substantive due process in furtherance of economic liberties. See, e.g., SIEGAN, *supra* note 4, at 318-26.

preme Court and the scholars who endorse this bifurcation have invoked substantive due process selectively, in furtherance of value choices not discernible from the Constitution.<sup>7</sup>

For those few scholars who subscribe to the theory of "constitutional moments," this charge is easy to rebut. As they see things, the Due Process Clause was effectively amended in 1937.<sup>8</sup> This amendment did not take the form required by Article V. Instead, "The People," after significant mobilization and political deliberation, rejected the protection accorded economic liberties in substantive due process decisions such as *Adkins v. Children's Hospital*<sup>9</sup> and *Lochner v. New York*.<sup>10</sup> The Supreme

7. See *Griswold v. Connecticut*, 381 U.S. 479, 514-15 (1965) (Black, J., dissenting) (rejecting the majority's finding of a guarantee to the right of marital privacy in the penumbra of the Bill of Rights); BORK, *supra* note 2, at 223-25 (agreeing with Professor Siegan that "economic liberties are no different, from a judicial point of view, from other freedoms not mentioned in the Constitution that the modern Court does not see fit to protect"); LEARNED HAND, *THE SPIRIT OF LIBERTY* 206 (1960) (questioning distinction between personal rights and property rights); SIEGAN, *supra* note 4, at 248-64, 318-31; Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 828-29 (1986) (arguing that consistent application of the rationale of privacy decisions would also require protection for economic liberties); McCloskey, *supra* note 5, at 45-54 ("[W]e are left with a judicial policy which rejects supervision over economic matters and asserts supervision over 'personal rights'; and with a rationale, so far as the written opinions go, that might support withdrawal from both fields but does not adequately justify the discrimination between them."); Bernard H. Siegan, *Separation of Powers & Economic Liberties*, 70 NOTRE DAME L. REV. 415, 473 (1995) ("Establishing the priority of liberties is a political judgment involving the distribution of benefits on a subjective basis. This is a matter of political policy and not judicial administration.").

8. The chief proponent of this view, of course, is Professor Ackerman. See 1 ACKERMAN, *supra* note 6, at 47-57. Others have jumped on the bandwagon. See, e.g., James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 304-05 (1990) (broadening Professor Ackerman's approach to investigate the role of direct popular power generally). Moreover, long before Professor Ackerman announced his theory, others had concluded that, regardless of the original meaning of the Constitution, the New Deal Court could not resist indefinitely the sustained Popular opposition to its decisions. See, e.g., OWEN J. ROBERTS, *THE COURT AND THE CONSTITUTION* 61 (1969) ("Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country. . . ."); McCloskey, *supra* note 5, at 53 ("No doubt the Court was presumptuous to imagine, before 1937, that it could hold back such waves as the wage-control movement or the demand for social security.").

9. 261 U.S. 525 (1923) (voiding minimum wage law as inconsistent with liberty of contract).

10. 198 U.S. 45 (1905) (voiding maximum hour law as inconsistent with liberty

Court confirmed this amendment, it is said, in *West Coast Hotel Co. v. Parrish*<sup>11</sup> and *United States v. Carolene Products Co.*,<sup>12</sup> in which the Court abandoned aggressive protection for liberty of contract and liberty of occupation respectively.<sup>13</sup> Thus, even if decisions such as *Lochner* and *Adkins* were faithful renderings of the Fourteenth Amendment's original meaning, these scholars say, the events of 1937 superseded that meaning.<sup>14</sup> Because this purported "amendment" did not repudiate substantive due process as such, nothing about it was inconsistent with recognition of non-economic liberties,<sup>15</sup> such as the so-called right of privacy announced in *Griswold v. Connecticut*<sup>16</sup> and applied in subsequent decisions, such as *Roe v. Wade*.<sup>17</sup>

Many scholars have rejected the theory of constitutional moments.<sup>18</sup> Moreover, while scholars can speak of constitutional moments, judges cannot. Whatever their true interpretive theories, our legal culture ensures that judges at least purport to explain their decisions as faithful interpretations of our written Constitution, a document that does not always include the "amendments" produced by constitutional moments.<sup>19</sup> In so do-

of contract).

11. 300 U.S. 379 (1937).

12. 304 U.S. 144 (1938).

13. See 1 ACKERMAN, *supra* note 6, at 119-30; see also *Carolene Prods.*, 304 U.S. at 154; *West Coast Hotel*, 300 U.S. at 391 (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)).

14. See 1 ACKERMAN, *supra* note 6, at 66 ("*Lochner* might have been constitutionally plausible in 1905 . . .").

15. See *id.* at 150-58.

16. 381 U.S. 479 (1965).

17. 410 U.S. 113 (1973).

18. See, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Professor Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992) (book review) (rejecting Ackerman's view); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992) (book review) (criticizing Ackerman's approach); see also BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 9-138 (1998) (arguing that the Court's abandonment of protection for economic liberties was the result of the natural doctrinal evolution driven by changed economic circumstances); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN L. REV. 395, 448-51, 453-61 (1995) (questioning the theory of constitutional moments and providing an alternate account of the New Deal).

19.

Supreme Court Justices and other federal judges always try to justi-

ing, they must rely upon the traditional sources of meaning: text, structure, and history.<sup>20</sup> They must appear to exercise judgment, rather than will, implementing decisions not their own.<sup>21</sup> Because the purported Constitutional Moment of 1937 did not produce any changes in constitutional text, we would not expect judges to explain the repudiation of *Lochner* and *Adkins* by invoking the "amendment" of 1937. Moreover, scholars wishing to influence judicial doctrine must provide an account of 1937 that is consistent with common conceptions about the judicial role.

Still, without relying upon any theory of constitutional moments, the Supreme Court has invoked substantive due process to protect certain personal rights, while at the same time abjuring any protection for economic liberties.<sup>22</sup> Similarly, many schol-

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fy their decisions by writing opinions that appeal to the constitutional text, to history, and to prior caselaw. Such appeals are what the Justices' employers—the American people—expect from their Court. They think this is the proper way in which judges should go about interpreting and understanding the Constitution.

Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 *FORDHAM L. REV.* 1435, 1455 (1997).

Of course, in some instances, the Constitution *does* at least appear to include textual results of constitutional moments, results that were not adopted pursuant to the procedures outlined in Article V. See 1 ACKERMAN, *supra* note 6, at 81 (asserting that the Fourteenth Amendment was adopted in a manner inconsistent with the procedures mandated by Article V). The purported Moment of 1937, however, produced no such text.

20. This is not to say it is physically impossible. During the nineteenth century, a southern gentleman could refuse a challenge to a duel. He would not do so, however. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. CHI. L. REV.* 943, 969-70 (1995).

21. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-79 (1803); *THE FEDERALIST* NO. 78, at 437 (Alexander Hamilton) (Issac Krammick ed., 1987) (arguing that, in conducting judicial review, judges must exercise "judgment," not "will").

22. See *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (holding that liberty of occupation is not a "fundamental right" for purposes of equal protection review); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (same); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (same). Compare *Washington v. Glucksberg*, 521 U.S. 702, 752-65 (1997) (Souter, J., concurring) (recounting roots of substantive due process), and *Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833, 861-62 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (justifying the Court's choice to abandon the protection of liberty of contract), and *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 278-79 (1990) (announcing right to refuse medical treatment), and *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (protecting grandmother's right to live with her grandchildren), and *Roe v. Wade*, 410 U.S. 113,

ars endorse the judicial bifurcation between economic and other liberties without embracing the theory of constitutional moments.<sup>23</sup> Without the figleaf of a constitutional moment, scholars and jurists who support the current dichotomy between economic and other rights must offer some other explanation for their selective invocation of substantive due process. They must explain why some forms of liberty, such as privacy, find shelter in the Constitution, while other forms, such as the right to pursue an occupation, may be trammelled by the legislature at will. The absence of such an explanation, or, what may be worse, the provision of an explanation that will not withstand scrutiny, suggests that the distinction between personal rights and economic rights, and, with it, the legitimacy of the enterprise of substantive due process, is an illusion.

Some scholars and jurists have risen to this challenge, attempting to justify the bifurcation between economic and other liberties without relying upon the purported occurrence of a constitutional moment. What has emerged is a dominant account of, and justification for, the bifurcation between economic and other liberties. This account does not question the Framers'

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117 (1973) (citing with approval the dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), while at the same time announcing a right to abortion), and *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (announcing the so-called "right of privacy"), with *Ferguson v. Skrupa*, 372 U.S. 726, 732-33 (1963) (upholding state statute restricting the practice of debt adjusting solely to lawyers), and *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (upholding state statute prohibiting opticians from making lenses without a prescription), and *Olsen v. Nebraska*, 313 U.S. 236, 240 (1941) (upholding statute restricting the maximum compensation that an employment agency may collect from an applicant). Indeed, some Justices have gone so far as to reject economic liberties explicitly protected by the Constitution's text, while at the same time embracing expansive protection for personal liberties under the aegis of substantive due process. Justice Brennan, for instance, would have given states carte blanche to demand real property as a condition of receiving government benefits, such as a zoning permit. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 843-45 (1987) (Brennan, J., dissenting) (concluding that such conditions should be judged under a rational basis test). In contrast, however, he argued that the Court should apply strict scrutiny when reviewing statutes conditioning receipt of medicaid funds on the recipient's agreement not to use such funds to purchase an abortion. See *Maher v. Roe*, 432 U.S. 464, 482-90 (1977) (Brennan, J., dissenting).

23. See, e.g., *SEIDMAN & TUSHNET*, *supra* note 6, at 45-48; *SUNSTEIN*, *supra* note 6, at 40-67; *TRIBE*, *supra* note 3, at 581-86.

commitment to economic liberty, including liberty of contract and liberty of occupation. Instead, it asserts that the repudiation of *Lochner* in particular and economic liberty in general can be described as a faithful application or "translation" of the Fourteenth Amendment's original principles in light of changed conditions that characterize the modern economy.<sup>24</sup> Thus, even if *Lochner* and its progeny were correct when decided, it is argued, the Court properly jettisoned these decisions in 1937, when changes in economic conditions called into question the factual premises on which the protection of economic liberty had rested.<sup>25</sup>

Perhaps the most complete judicial justification of the bifurcation between economic and other rights can be found in two relatively recent opinions authored by Justice Souter: *Planned Parenthood v. Casey*,<sup>26</sup> and *Washington v. Glucksberg*.<sup>27</sup> Taken together, these opinions mount a comprehensive defense of the enterprise of substantive due process, while at the same time insisting that economic liberties should receive no protection under the Due Process Clause.<sup>28</sup> In mounting this defense, Justice Souter did not question the commitment of the Framers to economic liberty. Nor did he claim that 1937 had produced a de facto amendment of the Due Process Clause. Instead, he argued that changed economic circumstances had justified—indeed, *required*—the Court to abandon liberty of contract and liberty of occupation in 1937. Thus, he concluded, the distinction between

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24. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993); TRIBE, *supra* note 3, at 578-79; Lessig, *supra* note 18, at 454-61 (arguing that rejection of liberty of contract by the New Deal Court can be explained as a "translation" of the Fourteenth Amendment's original principles in light of changed economic facts); see also CUSHMAN, *supra* note 18, at 9-138 (characterizing the Court's repudiation of economic liberty as natural doctrinal evolution driven by changed economic circumstances); *infra* notes 113, 127-34 and accompanying text (describing similar views held by other academics). See generally Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (sketching theory of interpretive translation). This translation-based justification, it should be noted, is not of modern origin, but has roots that predate 1937 itself. See, e.g., Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

25. See, e.g., TRIBE, *supra* note 3, at 573-75.

26. 505 U.S. 833, 861-62 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

27. 521 U.S. 702, 752-65 (1997) (Souter, J., concurring).

28. See *infra* notes 64-65 and accompanying text.

economic and other liberties that characterizes the modern incarnation of "substantive due process" is the product of a "reasoned judgment," faithful to the principles that originally animated the Due Process Clause.<sup>29</sup>

This Article offers a critique of the dominant account of the judicial bifurcation between economic and other liberties. In so doing, this Article focuses on Justice Souter's opinions in *Glucksberg* and *Casey*, opinions that provide a convenient vehicle for understanding and examining the dominant account. These opinions suggest or adumbrate several bases for "translating" the Due Process Clause in a manner that explains and justifies the Supreme Court's refusal to protect economic liberty. This Article examines these translations, each of which has been articulated and refined by various scholars, and finds them insufficient to justify the repudiation of liberty of contract. Some of these translations depend upon false assertions about the economic consequences of industrialization.<sup>30</sup> Others depend upon a threshold misunderstanding of the principles that necessarily inform any constitutional protection for liberty of contract.<sup>31</sup> Far from applying the principle behind liberty of contract in light of new circumstances, the various translations examined here repudiate that principle altogether.

Moreover, even when taken on their own terms, none of the translations suggested by Justice Souter and others justifies the modern bifurcation between economic and other liberties. More precisely, even if one or more of these translations provides a persuasive justification for abandoning liberty of *contract*, none of them even purports to justify the wholesale abdication of the Court's obligation to protect other economic liberties, in particular, liberty of *occupation*. Instead, at the most, each translation supports only the abandonment of those decisions voiding regulation of wages and, perhaps, other incidents of the employment relationship. While Justice Souter and others who subscribe to the dominant account are to be commended for attempting to justify the refusal to protect economic liberties, these attempts

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29. See *Washington v. Glucksberg*, 521 U.S. 702, 755-73 (Souter, J., concurring).

30. See *infra* notes 150-70.

31. See *infra* notes 171-91.

ultimately fall short. If the Due Process Clause contains a substantive component, the dominant account does not provide a valid explanation for the differential treatment of economic rights and so-called personal rights, such as the right of privacy. Absent some new explanation for the refusal of courts to protect "liberty" consistently, scholars and others will be forced to conclude that judges are not capable of implementing substantive due process in a principled fashion or, in the alternative, that 1937 produced a constitutional amendment after all.

### I. CASEY AND GLUCKSBERG AS EXAMPLES OF THE MODERN POSITION

As suggested above, the dominant account of the modern bifurcation between economic and other liberties rests upon several assumptions. First, it rejects the assertion that "process means process"—that is, the Due Process Clause contains no substantive component.<sup>32</sup> Second, it assumes, for the sake of argument, that the ratifiers of the Fourteenth Amendment understood the "liberty" encompassed by the Due Process Clause to include liberty of contract and liberty of occupation.<sup>33</sup> Finally, it rejects the assertion, made most notably by Professor Ackerman, that the events of 1937 worked an amendment to the Constitution. Despite these various constraints, the scholars and jurists who adhere to the dominant account maintain that the Due Process Clause affords no protection to economic liberties such as liberty of contract and liberty of occupation.

As noted above, Justice Souter, an unabashed supporter of substantive due process, has offered the most sustained judicial defense to date of the distinction between economic and personal liberties, a defense consistent with that offered by several scholars. This defense has appeared in *Glucksberg*<sup>34</sup> and *Casey*.<sup>35</sup> A

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32. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995).

33. See GILLMAN, *supra* note 24, at 1-60; SUNSTEIN, *supra* note 6, at 48; see also *infra* notes 93-100 and accompanying text (highlighting Justice Souter's and Justice Bradley's recognition of the Framers' expansive definition of liberty).

34. See *Glucksberg*, 521 U.S. at 759-64.

35. See *Planned Parenthood v. Casey*, 505 U.S. 833, 861-62 (1992) (joint opinion

consideration of these opinions, it will be seen, provides an excellent vehicle for illuminating the current bifurcation between economic and other liberties as well as the challenge that this bifurcation poses to those who defend it. Moreover, an examination of these opinions reveals one possible answer to this challenge: the repudiation of economic liberty can be justified as a translation of original values in light of new circumstances.

### A. *Planned Parenthood v. Casey*

In *Casey*, the Supreme Court reaffirmed the central holding of *Roe v. Wade*,<sup>36</sup> that women retain a substantial liberty interest in choosing whether to carry a fetus to term.<sup>37</sup> While two justices would have reaffirmed *Roe* outright, three others—Justices O'Connor, Kennedy, and Souter—issued the controlling opinion, an opinion rejecting *Roe*'s controversial trimester framework.<sup>38</sup> This "joint opinion" was a quintessential exemplar of the current approach to substantive due process, including the bifurcation between economic and other rights. At the outset, the opinion expressly rejected the claim that the Due Process Clause contains no substantive component.<sup>39</sup> Moreover, the opinion abjured a constrained view of the "liberty" that should receive substantive protection, in favor of a more open-ended approach to defining that term.<sup>40</sup> Finally, the opinion insisted that such an approach to the Due Process Clause was consistent with the judicial role.<sup>41</sup> Judges, the opinion said, could and should exercise "reasoned judgment" in defining the outer contours of liberty when conducting substantive due process review, and could do so without relying upon their own personal beliefs.<sup>42</sup>

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of O'Connor, Kennedy, and Souter, JJ.)

36. 410 U.S. 113 (1973).

37. See *id.* at 154.

38. See *Casey*, 505 U.S. at 869-87 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

39. See *id.* at 848-49.

40. See *id.* at 847-50. Justice Souter offered a similar analysis in *Glucksberg*. See *Glucksberg*, 521 U.S. at 765-73 (Souter, J., concurring). For an alternate approach, see *Glucksberg*, 521 U.S. at 721-23; *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.) (arguing that the Due Process Clause only protects liberty historically recognized by society).

41. See *Casey*, 505 U.S. at 849-52.

42. See *id.* at 849.

The opinion did not, however, assert that *Roe* had properly applied the doctrine of substantive due process. Instead, in a section apparently authored by Justice Souter, the joint opinion held that, regardless of whether *Roe* had been correct as an initial matter, the doctrine of stare decisis required the reaffirmation of the decision's "central holding" absent some "special reason" for abandoning it.<sup>43</sup> Mere disagreement with *Roe*'s reading of the Due Process Clause, these Justices said, could not constitute such a "special reason" and thus did not justify repudiation of it.<sup>44</sup>

There was, of course, a rather obvious question posed by the joint opinion's reliance on stare decisis to justify adherence to *Roe*. After all, the Court had previously overruled other landmark decisions that had stood longer and been reaffirmed more often than *Roe*.<sup>45</sup> Perhaps most notably, in 1937, the Court overruled *Adkins v. Children's Hospital*, and by implication *Lochner*, in *West Coast Hotel Co. v. Parrish*.<sup>46</sup> *Adkins* had voided a minimum wage law on the ground that it unduly infringed upon the "liberty of contract" protected by *Lochner*.<sup>47</sup> Thus, the *West Coast Hotel* Court abandoned a principle—liberty of contract—that had stood for over thirty years and been reaffirmed dozens of times.<sup>48</sup>

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43. See *id.* at 864; see also *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (arguing that the Court should adhere to precedent absent some "special justification" for abandoning it).

44. See *Casey*, 505 U.S. at 864.

45. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-78 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

46. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)); see also *Casey*, 505 U.S. at 957-62 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that the joint opinion's stare decisis analysis was inconsistent with that employed in *West Coast Hotel*).

47. See *Adkins*, 261 U.S. at 545-50 (relying upon *Lochner* several times for the proposition that the Court's protection of liberty of contract was well-established and settled).

48. See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 603 (1936) (relying upon *Adkins* to void minimum wage law); *Adair v. United States*, 208 U.S. 161, 173-74 (1908) (relying upon *Lochner* to find "yellow dog" contracts sheltered by liberty of contract). *Lochner*, of course, had been applied countless times by the Court. See TRIBE, *supra* note 3, at 567 n.2 (noting that between 1899 and 1937 the Court voided nearly 200 statutes on economic due process grounds).

Nevertheless, the joint opinion in *Casey* endorsed *West Coast Hotel* as a proper explication of the Due Process Clause.<sup>49</sup> Moreover, the joint opinion asserted that its own approach to stare decisis was entirely consistent with *West Coast Hotel*'s repudiation of *Adkins* and the *Lochner* line of decisions.<sup>50</sup> This assertion, of course, required a description of *West Coast Hotel* that involved something other than a mere disagreement with *Lochner*'s account of the original meaning of the Due Process Clause. Thus, despite its endorsement of the modern bifurcation between economic and other liberties, the *Casey* joint opinion did not—and could not—assert that *Lochner* or *Adkins* improperly read economic liberty into the Due Process Clause. Such an account of these decisions would have exposed the Justices to the charge that they were invoking stare decisis selectively, in furtherance of their own predilections.<sup>51</sup> Instead, the decision's endorsement of *West Coast Hotel*'s repudiation of economic liberty had to rest on some other basis.

### B. *Washington v. Glucksberg*

More recently, in *Washington v. Glucksberg*,<sup>52</sup> the Court sustained a Washington statute forbidding physicians to assist in suicide.<sup>53</sup> In a concurring opinion, Justice Souter gave the fullest account of any sitting Justice of the source and limits of substantive due process.<sup>54</sup> Unlike the joint opinion in *Casey*, which simply relied upon precedent for the existence of this authority, Justice Souter's concurrence in *Glucksberg* argued that, as a matter of original meaning, the Clause's prohibition of deprivations of liberty "without due process of law" not only guaranteed

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49. See *Casey*, 505 U.S. at 861-62 (joint opinion of O'Connor, Kennedy, Souter, JJ.).

50. See *id.* at 864.

51. It should be noted that this charge was made in any event. See *id.* at 961-62 (joint opinion of Rehnquist, C.J., White, Scalia, and Thomas, JJ.) (asserting that *West Coast Hotel* rested upon disagreement with *Lochner*'s elevation of liberty of contract to privileged constitutional status); cf. *West Coast Hotel*, 300 U.S. at 391 ("The Constitution does not speak of freedom of contract.").

52. 521 U.S. 702 (1997).

53. See *id.* at 735.

54. See *id.* at 759-73 (Souter, J., concurring).

a certain level of procedural protection, but also prevented any deprivation that was "arbitrary" in a substantive sense.<sup>55</sup> Thus, he concluded, the text of the Fourteenth Amendment imposed upon the Court "an obligation to give substantive content to the words 'liberty' and 'due process of law.'"<sup>56</sup> Failure to discharge that duty, he said, was inconsistent with the doctrine of judicial review outlined in *Marbury v. Madison*.<sup>57</sup>

Substantive due process, the Justice admitted, had produced *Dred Scott v. Sandford*<sup>58</sup> as well as what he called the "deviant economic due process cases"<sup>59</sup> exemplified by *Lochner*<sup>60</sup> and *Adkins*.<sup>61</sup> Appropriate respect for history, combined with judicial restraint, he said, could avoid these mistakes.<sup>62</sup> Decisions such as *West Coast Hotel*,<sup>63</sup> in which the Court sustained a minimum wage law,<sup>64</sup> and *United States v. Carolene Products Co.*,<sup>65</sup> in which it sustained a prohibition on the sale of filled milk,<sup>66</sup> the Justice argued, evinced the proper level of protection for economic liberties.<sup>67</sup>

Like his reliance on stare decisis in *Casey*, Justice Souter's invocation of *Marbury* raises an important question. According to *Marbury*, courts are obliged to enforce the Constitution because it is the work of "The People" after significant deliberation.<sup>68</sup> That work, John Marshall said, placed limits on the au-

55. See *id.* at 759-60.

56. *Id.* at 764.

57. See *id.* at 763-64 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

58. 60 U.S. (19 How.) 393 (1857) (holding that a former slave lacked standing to sue).

59. *Glucksberg*, 521 U.S. at 761 (Souter, J., concurring).

60. 198 U.S. 45 (1905) (voiding maximum hour law as violative of liberty to contract).

61. 261 U.S. 525 (1923) (holding that statute requiring employers to pay a minimum wage violated liberty of contract).

62. See *Glucksberg*, 521 U.S. at 756 (Souter, J., concurring) ("[T]he acknowledged failures of some of these cases point with caution to the difficulty raised by the present claim.").

63. 300 U.S. 379 (1937).

64. See *id.* at 395.

65. 304 U.S. 144 (1938).

66. See *id.* at 154.

67. See *Glucksberg*, 521 U.S. at 761, 766 (Souter, J., concurring).

68. See *Marbury*, 5 U.S. (1 Cranch) at 176; Frank H. Easterbrook, *The Influence of Judicial Review on Constitutional Theory*, in *A WORKABLE GOVERNMENT?* 170, 170-

thority of government—limits the People meant for judges to enforce.<sup>69</sup> Those limits, in turn, are ascertained by discerning the original meaning of the relevant constitutional text.<sup>70</sup> After all, the question in *Marbury* was not simply whether judges have the power of judicial review; it was also, more mundanely and precisely, whether section 13 of the Judiciary Act was inconsistent with the meaning the Framers gave to Article III.<sup>71</sup> Marshall answered this more discrete question by investigating the original meaning of Article III.<sup>72</sup> This investigation was an exercise of judgment, not will.<sup>73</sup>

Justice Souter did not contest *Marbury*'s vision of the rationale and limits of judicial review. To the contrary, he stated that, in conducting substantive due process review, courts could and should exercise "reasoned judgement," instead of creating and imposing their own notions of liberty and the justifications for abridging it.<sup>74</sup> This embrace of *Marbury*'s methodology would seem to have important implications not only for the meaning of "liberty," but also for the scope of state's authority to infringe it. If courts derive their authority and obligation to undertake substantive due process review from the original meaning of the

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71 (Burke Marshall ed., 1987) [hereinafter Easterbrook, *Constitutional Theory*]; see also Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 374-76 (1992) [hereinafter Easterbrook, *Abstraction*].

69. See *Marbury*, 5 U.S. (1 Cranch) at 177-79; THE FEDERALIST NO. 78, at 438-39 (Alexander Hamilton) (Issac Kramnick ed., 1987); see also *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398-99 (1798) (Iredell, J., concurring) (arguing that the existence of a written constitution implies limits on legislative and judicial authority).

70. See *Marbury*, 5 U.S. (1 Cranch) at 177-80.

71. See generally Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 453-98 (1989) (illustrating the implications of *Marbury* on Congress's power to strip the federal judiciary of jurisdiction).

72. See *Marbury*, 5 U.S. (1 Cranch) at 174 (inquiring whether "it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body").

73. See THE FEDERALIST NO. 78, at 438-39 (Alexander Hamilton) (Issac Kramnick ed., 1987); DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 69-70* (1985) (arguing that Chief Justice Marshall lifted the rationale for judicial review articulated in *Marbury* from the Federalist Number 78, without attribution).

74. See *Washington v. Glucksberg*, 521 U.S. 702, 738 (1997) (Souter, J., concurring).

Constitution, logic would seem to demand that judges must derive the definition of "liberty" and "due process of law" from the same source and in the same manner, that is, by ascertaining what meaning the Framers gave to those terms.<sup>75</sup> If courts must define "liberty" capaciously because the Framers themselves did so, should courts not also be bound by, or at least begin with, the meaning the Framers gave to that phrase? Similarly, if courts are bound by the Framers' belief that an "arbitrary" or "undue" interference with liberty denies the deprived party of "due process of law," should courts not feel bound by the Framers' definition of "arbitrary"?

How, then, would those who wrote and ratified the Fourteenth Amendment have defined "liberty"? Perhaps they would have included the right to be free from unreasonable searches and seizures, the right to keep and bear arms, and the right to be free from cruel and unusual punishments. Perhaps not. One thing, however, seems certain, particularly after consulting the sources on which Justice Souter relied for his conclusion that the Due Process Clause contains a substantive component: the Framers included within their understanding of "liberty" the right to pursue one's occupation and to acquire and dispose of property and labor.<sup>76</sup> These Framers, after all, had recently fought a Civil War to protect and expand a regime of "free labor," that is, the right of an individual to own and dispose of his own labor and entrepreneurial energy.<sup>77</sup> Indeed, the Fourteenth Amendment

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75. It is conceivable, of course, that the Framers intended to delegate to the courts the authority to define "liberty" and "due process of law," with the result that the meaning given those phrases by the Framers is beside the point. Justice Souter, however, did not suggest that courts are the recipient of such a delegation. Moreover, it would seem that such a delegation would be inconsistent with the theory of *Marbury*. See Easterbrook, *Abstraction*, *supra* note 68, at 373, 376-80. Further, none of the scholars who have suggested that the repudiation of economic liberty can be explained as a "translation" of original principles has repudiated *Marbury* or suggested that the Due Process Clause was meant as a delegation of the authority to derive the meaning of "liberty" or "due process of law" independent from the original meaning of those phrases. See generally Lessig, *supra* note 24, *passim* (arguing that interpretive translation is a method of assuring fidelity to the original meaning of constitutional provisions).

76. See *supra* note 33 and accompanying text.

77. See William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 774-79.

was a reaction to the so-called Black Codes, which denied opportunities to southern blacks, including the ability to own and dispose of property, and to make and enforce contracts.<sup>78</sup>

Moreover, as Justice Souter noted, next to *Dred Scott*, the most important substantive due process decision issued before the Civil War was "the famous *Wynehamer* case."<sup>79</sup> In *Wynehamer*, the New York Court of Appeals held that a statute outlawing a previously legitimate business deprived the business owner in question of his property without due process of law.<sup>80</sup> Similarly, Thomas Cooley, whom Justice Souter cited as authority for the existence of substantive due process, had this to say in 1868 about the meaning of liberty:

[I]f the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of *liberty* in particulars of primary importance to his or their "pursuit of happiness."<sup>81</sup>

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78. More precisely, the Fourteenth Amendment apparently was designed to provide a constitutional basis for the Civil Rights Act of 1866, which "provided that blacks were to enjoy the same rights as whites with regard to property ownership, contract, court access, and protection of the law." Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 937-38 (1998); see EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 38, 79-81 (1990); Alexander M. Bickel, *The Original Understanding of the Segregation Decision* 69 HARV. L. REV. 1, 12-13, 16-17, 46-47, 56-58 (1955); see also Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865-1910*, 70 CHI.-KENT L. REV. 439, 445-47, 453-55 (1994) (describing judicial decisions and Black Code provisions which denied southern blacks protection of occupational liberty and the right to contract).

79. *Glucksberg*, 521 U.S. at 757 (Souter, J., concurring).

80. See *Wynehamer v. People*, 13 N.Y. 378, 420 (1856) ("[A] law which should make it a crime for men either to live in, or rent, or sell their houses, would fall within the same prohibition of legislative authority."); see also SIEGAN, *supra* note 4, at 45 (calling *Wynehamer* "the leading pre-Civil War decision on due process at the state level").

81. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 393

Finally, Justice Bradley's dissent in the *Slaughter-House Cases*, from which Justice Souter took the requirement that legislation interfering with liberty be non-arbitrary, argued that the liberty protected by the Due Process Clause included the right to pursue one's chosen calling.<sup>82</sup> Thus, while the joint opinion in *Casey* suggested *West Coast Hotel* should have accepted the principle of economic liberty simply for reasons of stare decisis, Justice Souter's *Glucksberg* concurrence embraced authorities suggesting the principle was correct as an original matter.<sup>83</sup>

Of course, the mere fact that "liberty" encompasses the right to pursue a calling or the right to contract does not necessarily mean that *Lochner* or similar cases were decided correctly. One still needs a theory for determining whether a deprivation of that liberty comports with due process of law. According to Justice Souter, any deprivation of liberty or property deemed "arbitrary" could not be due process of law.<sup>84</sup>

How, though, is a court to determine whether a deprivation is "arbitrary"? Here again, the sources on which Justice Souter relied for the proposition that the Due Process Clause contains a substantive component suggest a provocative answer. According to Justice Bradley's dissent in the *Slaughter-House Cases*, for instance, the state can deprive a citizen of the right to pursue a calling only if that deprivation constitutes a valid exercise of the police power.<sup>85</sup> Thomas Cooley reached the same conclusion, adding that any abridgement of liberty designed simply to further the interest of one group at the expense of another would

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(Da Capo Press 1972) (1868). According to Professor Corwin, this work was "the most influential treatise ever published on American constitutional law." EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, AND DECLINE OF A FAMOUS JURIDICAL CONCEPT* 116 (1978); see also CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS* (1954).

82. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 119-20 (1873) (Bradley, J., dissenting); see also *Glucksberg*, 521 U.S. at 755-73 (Souter, J., concurring) (arguing that the Due Process Clause forbids "arbitrary" deprivations of liberty).

83. No proponent of the dominant account has argued that the meaning of liberty did not include liberty of occupation and liberty of contract.

84. See *Glucksberg*, 521 U.S. at 758-59 (Souter, J., concurring).

85. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 119-20 (Bradley, J., dissenting).

not be in furtherance of a public purpose and thus would be void.<sup>86</sup> Finally, several decisions cited by the Justice as evidence of the widespread acceptance of substantive due process during the nineteenth century reached the same conclusion.<sup>87</sup>

As explained in one of those decisions, the police power was defined and limited by the ancient maxim—*sic utere tuo alienum non laedas*—one should not use property in a manner that harms another.<sup>88</sup> To a modern economist, then, this power consisted of the ability to counteract “externalities.”<sup>89</sup> In a passage often quoted in early substantive due process cases, Chancellor Kent wrote:

The government may, by general regulations, interdict such uses of property as would create nuisances and become dangerous to the lives, or health, or comfort of the citizens. Unwholesome trades, slaughterhouses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.<sup>90</sup>

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86. See COOLEY, *supra* note 81, at 437.

87. See *Mugler v. Kansas*, 123 U.S. 623 (1887); *Munn v. Illinois*, 94 U.S. 113 (1877); *Bartemeyer v. Iowa*, 85 U.S. 129 (1874). Justice Souter cited each of these decisions as evidence that substantive due process was widely accepted in the late nineteenth century. See *Glucksberg*, 521 U.S. at 759-60 (Souter, J., concurring); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (relying upon *Mugler* for the proposition that “for at least 105 years . . . the Clause has been understood to contain a substantive component”).

88. See *Munn*, 94 U.S. at 124-25:

[The] social compact . . . does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers.

(emphasis added); see also GILLMAN, *supra* note 24, at 46-60 (describing development of police power limitations in antebellum jurisprudence).

89. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 107-22 (1985); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 200-04 (1991).

90. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 276 (1827); see also Com-

Thus, it would seem, any abridgement of the right to pursue a calling or to make a contract that does not fall within the police power so defined is arbitrary and inconsistent with the meaning attributed to the Due Process Clause by those authorities on which Justice Souter relied.

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Taken together, the joint opinion in *Casey* and Justice Souter's concurrence in *Glucksberg* amount to a classic restatement of the modern approach to substantive due process. Within this rubric, the Due Process Clause does more than guarantee fair procedures; it also empowers courts to review the substance of legislation. Moreover, the liberty protected by the Due Process Clause includes more than the mere absence of physical restraint; it also includes certain activities deemed "fundamental" and thus deserving of enhanced protection from legislative interference. Further, the importance of economic liberties to the Framers is taken as a given: mere disagreement with *Lochner* does not suffice to overrule it. Still, unlike personal rights such as the right of privacy, economic rights are not deemed fundamental, but instead may be trammelled at will.

Each of the assumptions underlying the modern bifurcation between economic and other liberties is certainly open to question, although it is not my intent to do so here.<sup>91</sup> My critique, instead, is internal to both the notion of substantive due process and the approach to this doctrine exemplified by Justice Souter's opinions in *Casey* and *Glucksberg*.<sup>92</sup> The critique is a narrow

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monwealth v. Tewksbury, 52 Mass. (11 Met.) 55, 59 (1846) (endorsing a similar conception of the police power); COOLEY, *supra* note 81, at 706.

91. For instance, Justice Souter relied upon *Wynehamer v. People*, 13 N.Y. 378 (1856), for the proposition that substantive due process was an accepted doctrine before the Civil War. See *Glucksberg*, 521 U.S. at 757 (Souter, J., concurring). Yet, one of the sources which the Justice cited several times with approval concluded that the reaction of other state courts to *Wynehamer* was largely negative. See CORWIN, *supra* note 81, at 107-15; see also *State v. Paul*, 5 R.I. 185, 197 (R.I. 1858) ("It is obvious that [the argument for substantive due process] confounds the power of the assembly to create and define an offence, with the rights of the accused to trial by jury and due process of law."); Edward S. Corwin, *The Doctrine of Due Process of Law Before The Civil War*, 24 HARV. L. REV. 460, 474-75 (1911) ("[In the 1850s], the *Wynehamer* decision found no place in the constitutional law that was generally recognized throughout the United States.").

92. See *Glucksberg*, 521 U.S. at 761 (Souter, J., concurring) (referring to econom-

one, and begins with the following straightforward question: If, as Justice Souter and others contend, the Due Process Clause prevents the arbitrary destruction of fundamental liberties, why were the economic due process decisions, which protected liberties apparently embraced by the Framers, "deviant" according to Justice Souter? The answer given by Justice Souter is not satisfactory.

## II. EMBRACING A QUESTIONABLE BIFURCATION

Justice Souter was aware of the importance that the Framers of the Fourteenth Amendment placed on economic liberty. Indeed, in *Glucksberg*, Justice Souter relied upon Justice Bradley's dissent in the *Slaughter-House Cases*<sup>93</sup> as evidence of the antiquity of substantive due process. That dissent, Justice Souter noted, argued that "a person's right to choose a calling was an element of liberty (as the calling, once chosen, was an aspect of property)" which could not be "arbitrarily assailed."<sup>94</sup> It was Bradley's opinion, and others like it, upon which courts would come to rely for the protection of liberty of occupation and the derivative liberty of contract.<sup>95</sup> Indeed, in *Allgeyer v. Louisiana*,<sup>96</sup> a unanimous Court relied upon the views of Justice Bradley in holding that the Due Process Clause precluded abridgements of liberty of contract outside the police power.<sup>97</sup> According to Justice Souter, the *Allgeyer* principle was "unobjectionable."<sup>98</sup>

ic due process cases as "deviant").

93. 83 U.S. (16 Wall.) 36 (1873); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (relying upon *Mugler v. Kansas*, 123 U.S. 623 (1887), for the antiquity of substantive due process).

94. *Glucksberg*, 521 U.S. at 759 (Souter, J., concurring) (citing the *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 116 (Bradley, J., dissenting)).

95. See *State v. Goodwill*, 33 W. Va. 179, 181-83 (1889) (relying upon Justice Field's concurrence in *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884)); *In re Jacobs*, 98 N.Y. 98, 107 (1885) (relying upon concurrences of Justices Field and Bradley in *Butchers' Union Co.*). See generally, Pound, *supra* note 24, at 470 n.83 (noting that the Supreme Court of Illinois "has fallen into the settled practice" of treating Justice Bradley's dissenting opinion in the *Slaughter-House Cases* as though it were the majority opinion).

96. 165 U.S. 578 (1897).

97. See *id.* at 589 (relying upon Justice Bradley's concurrence in *Butchers' Union Co.*, 111 U.S. at 762); see also *Butchers' Union Co.*, 111 U.S. at 760-66 (Bradley, J., concurring) (reiterating his dissent in the *Slaughter-House Cases*).

98. *Glucksberg*, 521 U.S. at 760 (Souter, J., concurring).

*Lochner* and its progeny, of course, depended upon this account of the original meaning of the phrase "liberty" and "due process of law."<sup>99</sup> Neither the joint opinion in *Casey* nor Justice Souter's concurrence in *Glucksberg* questioned *Lochner*'s assumption that, as originally understood, the "liberty" encompassed by the Due Process Clause included liberty of occupation and liberty of contract. Indeed, the *Casey* opinion emphasized that the repudiation of liberty of contract in *West Coast Hotel* could not have depended upon any mere disagreement with the *Lochner* Court's reading of the Due Process Clause.<sup>100</sup>

Still, like most other proponents of substantive due process, Justice Souter made it clear that he would reject the aggressive protection for economic liberty once mandated by *Lochner* and its progeny.<sup>101</sup> Although he relied upon history and constitutional text for his assertion that the Due Process Clause has a substantive component, Justice Souter indicated he would ignore these tools when it came to applying the doctrine in practice. Any argument for substantive due process, it seems, must explain how this approach, which begins with the premise of judicial review, is consistent with the underlying rationale for such judicial authority in general, and the doctrine of substantive due process in particular. Absent such an explanation, Justice Souter and others who would employ substantive due process, but refuse to protect economic liberty, can in no way be characterized as exercising "reasoned judgment." Instead, these scholars and jurists endorse an exercise of will, whereby judges employ their authority selectively to further a conception of liberty untethered to the text from which they purport to derive their authority.<sup>102</sup>

In both *Glucksberg* and *Casey*, the Justice seemed acutely aware of this possible criticism. In each opinion, he attempted to

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99. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (relying upon *Allgeyer* for existence of liberty of contract); *supra* note 97 (describing *Allgeyer*'s reliance on Justice Bradley's concurrence in *Butchers' Union Co.*).

100. See *Planned Parenthood v. Casey*, 505 U.S. 833, 861-64 (1992).

101. See, e.g., *supra* notes 6-7, 24 (documenting rejection of economic liberty by scholars supporting substantive due process).

102. See *Casey*, 505 U.S. at 849 (arguing that courts should apply "reasoned judgment" in conducting substantive due process review); THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Issac Kramnick ed., 1987) (asserting that, in exercising judicial review, courts must exercise "judgment" and not "will").

explain his refusal to recognize the sort of economic liberties protected in *Lochner* and its progeny in light of his support for an expansive reading of the Due Process Clause in other contexts.<sup>103</sup> There were a few straightforward ways out of this conundrum. Justice Souter could have joined those Justices who simply believe that judges are not bound by the original meaning of the constitutional text.<sup>104</sup> Or, he could have claimed that, whatever the original meaning of the Fourteenth Amendment, the events of 1937 had effectively amended the Constitution so as to erase the sort of economic liberty apparently held dear by the Framers.<sup>105</sup> Finally, he could have asserted that, as used in the Due Process Clause, liberty did not include liberty of occupation or liberty of contract. Any of these explanations, of course, would have preserved substantive due process, while at the same time justifying the failure of the post-New Deal Court to protect economic liberty.<sup>106</sup>

Justice Souter did not adopt any of these explanations in *Casey* or *Glucksberg*. There was no reference to any "Constitutional Moment," nor any claim that judges possess the power to determine the meaning of liberty unconstrained by historical meaning. Moreover, Justice Souter made no attempt in either opinion to demonstrate that "liberty" as used in the Due Process Clause did not include liberty of occupation or liberty of contract. To the contrary, in *Glucksberg*, he stated that the account of liberty provided in *Allgeyer* was "unobjectionable."<sup>107</sup> Nevertheless, he asserted that the refusal to protect economic liberties was consistent with the *Marbury*-based interpretive methodology that compelled him to employ substantive due process.<sup>108</sup> Despite

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103. See *Casey*, 505 U.S. at 861-62 (joint opinion of O'Connor, Kennedy, and Souter, JJ.); *Glucksberg*, 521 U.S. at 759-64 (Souter, J., concurring).

104. See, e.g., William J. Brennan, Address at the Georgetown University Text and Teaching Symposium (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* (Federalist Soc'y 1986). See generally Easterbrook, *Constitutional Theory*, *supra* note 68, at 175-76 (arguing that most modern approaches to constitutional interpretation, while invoking *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), are inconsistent with *Marbury*'s rationale for judicial review).

105. See *supra* note 8 and accompanying text.

106. See *supra* note 24 and accompanying text.

107. *Glucksberg*, 521 U.S. at 760 (Souter, J., concurring).

108. See *id.* at 757-60. Of course, reliance upon *Marbury* is not necessarily incon-

this assertion, however, he did not offer a comprehensive explanation in either opinion as to why it was appropriate to repudiate what he called the "deviant" economic due process decisions.<sup>109</sup> Still, Justice Souter did suggest several directions that such an explanation might take, directions parallel to those offered by scholars who adhere to the dominant account. Regardless of the specific manner in which the Framers thought the Fourteenth Amendment would be applied, Justice Souter suggested that a translation of the Amendment's principles in light of new circumstances required the conclusion that the protection of economic liberty was no longer appropriate. As shown below, however, none of the "translations" suggested by Justice Souter or scholars sympathetic to this approach survives careful scrutiny.

### III. *GLUCKSBERG* AND THE ECHO OF *DRED SCOTT*

According to Justice Souter, the vice of cases recognizing economic liberty was not their reliance upon substantive due process as such, but instead their method of implementing that doctrine.<sup>110</sup> The economic due process cases were "deviant," he said, because they were "the echo of *Dred Scott*" in the economic realm.<sup>111</sup> Moreover, in their "absolutist" approach, these decisions were "in the spirit of" the decision that had led to the Civil War.<sup>112</sup>

This formed an interesting rhetorical strategy. *Dred Scott*, the Justice had noted earlier in his opinion, had failed the judgment

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sistent with a belief in constitutional moments. Indeed, Professor Ackerman himself embraces *Marbury*. See 1 ACKERMAN, *supra* note 6, at 40-41; Klarman, *supra* note 18, at 761 (noting that much of Ackerman's work is merely "a highfalutin reformulation of views first articulated by Alexander Hamilton in Federalist No. 78 and by Chief Justice John Marshall in *Marbury*"). Reliance on *Marbury*, however, does not *ipso facto* imply a belief that the Constitution can be amended without reliance upon the procedures outlined in Article V. See Easterbrook, *Abstraction*, *supra* note 68, at 368; Klarman, *supra* note 18, at 761-62. Thus, Justice Souter's failure to avert to the notion of constitutional moments should be taken as a rejection of that theory.

109. See *Glucksberg*, 521 U.S. at 761 (Souter, J., concurring).

110. See *id.* at 760 (Souter, J., concurring) (stating that the "principle" announced in *Allgeyer* was "unobjectionable").

111. *Id.* (Souter, J., concurring).

112. *Id.*

of history.<sup>113</sup> His association of the methodology of *Lochner* with the abominable decision that predated the war that had remade the nation seemed to suggest that protection of liberty of contract was in some sense out of place in twentieth-century America. By harboring spirits like those that had animated the *Dred Scott* Court, and mimicking—"echoing"—an approach to liberty that predated that nation's greatest conflagration, the *Lochner* Court attempted to bring the country to a place it already had rejected resoundingly. Justices with an appreciation of history, as well as the proper "spirit," would have been less "absolutist" and avoided this sort of "deviancy."

Others, of course, have associated *Lochner* with *Dred Scott*, albeit usually to treat both as object lessons against the general enterprise of substantive due process.<sup>114</sup> Unfortunately, Justice Souter—who embraced substantive due process—did not explain just why he deemed *Lochner* the "echo" of *Dred Scott*. It is unclear, for instance, why he deemed *Lochner* the "echo" of *Dred Scott* and not of Justice Bradley's dissent in the *Slaughter-House Cases*, or of the decision of the New York Court of Appeals in "the famous *Wynehamer* case."<sup>115</sup> One can only speculate as to what, exactly, Justice Souter had in mind. In light of his concession that the "principle" of contractual liberty articulated in *Allgeyer* was "unobjectionable," what "reasoned judgment" supported the equation of these two decisions? After all, the similarity between *Dred Scott* and *Lochner* is not readily apparent. Indeed, on the surface they are complete opposites. *Dred Scott* held that a black man was not a human being, but was, instead, chattel property, with his labor subject to the control of an "owner."<sup>116</sup> *Lochner*, on the other hand, held that individuals were free to dispose of their own labor in any way that they saw fit,

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113. See *id.* at 758 (Souter, J., concurring).

114. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 998 (1992) (Scalia, J., dissenting); BORK, *supra* note 2, at 83, 116, 131, 193, 209; William H. Rehnquist, *Observation—The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700-04 (1976).

115. See *Glucksberg*, 521 U.S. at 757 (Souter, J., concurring) (relying upon Justice Bradley's *Slaughter-House* dissent and *Wynehamer* as evidence for the antiquity of substantive due process).

116. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 451-52 (1857).

constrained only by the police power.<sup>117</sup> This distinction between owning yourself and owning someone else was fundamental to the American understanding of liberty when the Fourteenth Amendment was ratified.<sup>118</sup> As Abraham Lincoln put it during the Civil War:

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name—liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names—liberty and tyranny.<sup>119</sup>

Those who had sided with Lincoln, of course, won the battles that entitled them to choose which definition of "liberty" the country would embrace, as the Thirteenth, Fourteenth, and Fifteenth Amendments confirm. Presumably any Justice serving on the Supreme Court in the late nineteenth and early twentieth centuries understood this. Indeed, many early proponents of economic substantive due process were committed abolitionists, motivated by the free labor ideology animating the Republican Party at the time.<sup>120</sup> Any "echoes" of *Dred Scott*, it seems, were

117. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."); *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897) ("In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto").

118. See Jonathan A. Glickstein, "Poverty Is Not Slavery": American Abolitionists and the Competitive Labor Market, in *ANTISLAVERY RECONSIDERED* 195 *passim* (Lewis Perry & Michael Fellman eds., 1979).

119. Abraham Lincoln, A Good Definition of the Word Liberty, Address at Baltimore, Maryland (Apr. 18, 1864), in MARIO CUOMO & HAROLD HOLZER, *LINCOLN ON DEMOCRACY* 320-21 (1990).

120. See, e.g., Forbath, *supra* note 77, at 772-79; William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 547-66 (1974). As these scholars explain, Justices

found, not in the majority decisions of the *Lochner* Court but, instead, in Justice Holmes's *Lochner* dissent, which would have brooked all varieties of state control over the disposition of an individual's labor, so long as such control was the outcome of "dominant opinion."<sup>121</sup> Justice Souter's equation of *Lochner* and *Dred Scott*, it seems, falls a bit flat.

But wait. Perhaps the sort of close attention to history urged by Justice Souter might suggest that the distinction between the two cases, glaring as it may appear, is purely a formal one that can be maintained only by "absolutists." After all, a Justice on the *Lochner* Court who *really* knew his history would have recalled not only the choice posited by Lincoln, but also the assertion by southern slaveholders and others that the choice was a false one, that is, that a northern factory worker who nominally "owned" his labor but was subject to "wage slavery" was no better off than a southern slave.<sup>122</sup> Perhaps then, the "liberty" protected in *Lochner* was, as a *substantive* matter, more like the "liberty" protected in *Dred Scott* than the *Lochner* court seemed to assume. Indeed, when *Lochner* was announced, the Socialist Workers Party proclaimed it to be the new *Dred Scott* decision.<sup>123</sup> A Court populated by the proper spirits, then, would

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Field and Bradley, committed abolitionists who opposed *Dred Scott*, drew upon free labor ideology in their dissenting opinions in the *Slaughter-House Cases* and concurrences in *Butchers' Union*. Moreover, Justice Brewer, a stalwart of the *Lochner* Court, was a committed abolitionist. See Nelson, *supra*, at 552. As noted earlier, the *Slaughterhouse* and *Butchers' Union* opinions formed the basis of subsequent protection of liberty of occupation and contract. See *supra* note 95 and accompanying text. Indeed, even Professor Sunstein, a committed opponent of *Lochner*, concedes that, in light of the free labor ideology that infused the Civil War Amendments, "[p]lausibly, minimum wage and maximum-hour legislation thus offended the same principle that doomed slavery." SUNSTEIN, *supra* note 6, at 48.

121. See, e.g., *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting) ("[T]he word 'liberty,' in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion.").

122. Forbath, *supra* note 77, at 806-12; see also Abraham Lincoln, *Fragments of a Speech on Free Labor* [hereinafter Lincoln, *Fragments*], reprinted in CUOMO & HOLZER, *supra* note 119, at 159 ("We know, Southern men declare that their slaves are better off than hired laborers amongst us.").

123. See *The Worker*, May 22, 1905, at 1. Similarly, when the Court struck down a state's minimum wage in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), one member of Congress proclaimed "a new *Dred Scott* decision condemning millions of Americans to economic slavery." 80 CONG. REC. 9040 (1936) (statement of Rep. Fish); see also GILLMAN, *supra* note 24, at 153 ("[T]he so-called freedom of the

have realized that the bakers in *Lochner* were analogous to antebellum slaves and validated the state action taken to assuage their condition. Indeed, several scholars have associated *Dred Scott* and *Lochner* on these grounds.<sup>124</sup> We must assume that Justice Souter had some *reason* for the equation of *Lochner* and *Dred Scott* and the concomitant abandonment of economic liberty. Recognition that wage labor was often quite helpless before capital seems to be the best possible defense of Justice Souter's equation of the two decisions.

As a normative matter this might sound very appealing. Yet, as a method of constitutional interpretation it leaves much to be desired. After all, the opponents of abolition had made their arguments—and they had *lost*. Lincoln championed not only the liberty of a middle class merchant to ply his trade, but also the liberty of a poor farmer to work his land for long hours and little profit.<sup>125</sup> Moreover, none of the sources cited earlier, on which Justice Souter relied for the existence of substantive due process, qualified the right to own and sell one's labor so as to exclude wage laborers from its protection.<sup>126</sup> To reject *Lochner* on

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dependent woman and child to work as long hours and under any conditions, no matter what the danger to health and limb is, in truth, but abject slavery masquerading under that name. Freedom means real liberty to choose." (quoting William F. Willoughby, Address at the American Association for Labor Legislation (1914)); Daniel R. Ernst, *The Yellow Dog Contract and Liberal Reform, 1917-1932*, 30 LAB. HIST. 251, 263-64 (1989) (reporting that opponents of yellow dog contracts analogized such devices to chattel slavery). Other scholars, without mentioning slavery by name, argued that state action was necessary to enhance individual freedom vis-à-vis private power. See, e.g., ALPHEUS T. MASON & WILLIAM M. BEANEY, *THE SUPREME COURT IN A FREE SOCIETY* 249 (1959) (characterizing Chief Justice Hughes's dissent in *Tipaldo* as stating that "the right [of liberty] guaranteed by the Constitution can be infringed by forces other than government, and that government may properly intervene to safeguard the individual against them.").

124. See, e.g., SEIDMAN & TUSHNET, *supra* note 6, at 180; Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper*, 66 GEO. WASH. L. REV. 1269, 1287 n.115 (1998).

125. See Abraham Lincoln, Address Before the Wisconsin State Agricultural Society (Sept. 30, 1859), in CUOMO & HOLZER, *supra* note 119, at 161 ("In these Free States, a large majority are neither *hirers* nor *hired*. Men, with their families—wives, sons and daughters—work for themselves, on their farms, in their houses and in their shops, taking the whole product to themselves, and asking no favors of capital, on the one hand, nor of hirelings or slaves, on the other.").

126. Lincoln, *Fragments*, *supra* note 122, at 159 ("Southern men declare that their slaves are better off than laborers amongst us. How little they *know*.").

the grounds set forth by Justice Souter would be to reject the underlying normative principle embraced by the Framers as reflected in the distinction posited by President Lincoln.

For those who adhere to "translation" as a method of constitutional interpretation, there is more to this "substantive" attack on economic liberty than meets the eye. Perhaps it is true that, in 1868, those who wrote and would ratify the Fourteenth Amendment saw a great distinction between wage labor and slavery. Perhaps it is also true that they would have anticipated the *Lochner*-style protection of liberty of occupation and liberty of contract. By 1905, however, when *Lochner* was decided, the American economy had changed drastically. The proliferation of general incorporation statutes had facilitated the growth of large aggregations of capital.<sup>127</sup> Individuals who once labored for small firms or as independent yeoman farmers, shopkeepers, or merchants, now worked for these huge concerns.<sup>128</sup> Any liberty possessed by the average worker or entrepreneur shortly after the Civil War had been snuffed out by the industrial revolution.<sup>129</sup> Without this protection, workers were left without any real bargaining power vis-à-vis their new masters.<sup>130</sup> In protecting "contractual liberty," the *Lochner* Court assumed a world that was no longer in existence.

Although he did not say so explicitly, Justice Souter, like others who have equated *Lochner* and *Dred Scott*, may have believed that less "absolutist" Justices would have "translated" the values underlying liberty of occupation and contract in light

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127. See HOVENKAMP, *supra* note 89, at 11-64 (tracing the rise of general incorporation statutes).

128. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 29 (1988).

129. See ARTHUR S. MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM 56-57 (1968) ("[T]he rise of the collective power of capital, of business enterprise, [was] all done in the name of an individualism that . . . had vanished.")

130. See *id.* at 57-61; TRIBE, *supra* note 3, at 574 ("[A]s social and economic patterns change or as existing patterns are reassessed, other groups—ultimately, industrial laborers in general—may become unable, or may come to be regarded as unable, to protect their own interests effectively."); Forbath, *supra* note 77, at 795-98; Pound, *supra* note 24, at 454 (criticizing protection for liberty of contract in light of unequal bargaining power produced by modern industrial conditions); Margaret Spahr, *Natural Law, Due Process, and Economic Pressure*, 24 AM. POL. SCI. REV. 332, 343-45 (1930) (same).

of these new circumstances.<sup>131</sup> Such translation would have required deferral to legislative judgments, such as maximum hour laws, minimum wages, and bans on so-called "yellow dog" contracts—regulations that purportedly enhanced the liberty of employees.<sup>132</sup>

As a theoretical proposition, this critique of *Lochner* and its progeny shows some promise. After all, true fidelity to the original meaning of the Constitution does not always require a judge to apply the document so as to produce the results that the Framers would have contemplated at the time of ratification.<sup>133</sup> To the contrary, some of the most dedicated proponents of an original meaning approach to constitutional interpretation argue that judges must, when necessary, "translate" the document's values in light of new circumstances, a process that may result in applications of a constitutional provision different from what the Framers might have anticipated.<sup>134</sup> Indeed, even the "abso-

131. As shown below, Justice Souter explicitly embraced a translation methodology in *Casey*. See *infra* notes 194-99 and accompanying text.

132. See GILLMAN, *supra* note 24, at 152-75 (criticizing *Lochner* and its progeny for refusing to recognize "inequality of bargaining power" between employers and employees brought about by twentieth-century capitalism); ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM* 68-69 (1955); MILLER, *supra* note 129, at 84-86 (arguing that principles animating Due Process Clause favor use of state power to enhance individual liberty against private power); SEIDMAN & TUSHNET, *supra* note 6, at 113-14, 149-50, 180 (equating *Lochner* with *Dred Scott* and arguing that *Lochner* rested upon false assumptions about the freedom of employees); SUNSTEIN, *supra* note 6, at 48-49 ("The same principle that doomed slavery could also call for government assistance against the forms of coercion that drive people to take menial jobs at trivial pay, or that force people to work sixty hours per week if they are to work at all."); Pound, *supra* note 24, at 467-68 ("[The Framers of the Constitution] laid down principles, not rules, and rules can only be illustrations of those principles so long as facts and opinions remain what they were when rules were announced."); John P. Roche, *Entrepreneurial Liberty and the Fourteenth Amendment*, 4 *LAB. HIST.* 3, 11-16 (1963) (arguing that yellow dog contracts were the product of "unequal bargaining power" and thus beyond protection of liberty of contract). See generally Lessig, *supra* note 24 (articulating and defending the theory of interpretive translation). Of course, lawyers are not alone in advancing this type of justification for the increased regulation associated with the welfare state. See SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE* 25 (1966) ("[I]n 1865, though Americans saw a new industrial society emerging, they were without an adequate philosophy of state action to cope with the problems of that society. What was needed was a new philosophy of the state. . . . Industrial America made necessary the evolution of the general-welfare state.").

133. See Lessig, *supra* note 24, *passim*.

134. See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44, 62 n.1 (1991)

lutist" Justices of the *Lochner* Era apparently shared this view. As Justice Sutherland put it in *Adkins*, "the line beyond which the power of interference [with liberty of contract] may not be pressed . . . may be made to move, within limits not well defined, with changing needs and circumstances."<sup>135</sup>

Accepting for the sake of argument the legitimacy of a translation-based approach to constitutional interpretation, there are nevertheless two obstacles to a repudiation of *Lochner* that is premised upon unequal bargaining power. First, any translation based upon the purported presence of unequal bargaining power depends upon a controversial normative account of the scope of the original guarantee. Such a translation assumes that, as understood in 1868, the police power included the authority to redress imbalances in bargaining power and thus concern itself with the purely distributive effects of private transactions. This account of the police power, however, seems inconsistent with the account offered by Thomas Cooley and Justice Bradley, who described a power to combat market failure without regard to distributional consequences.<sup>136</sup> The *Lochner* Court, of course, embraced this vision, a vision that did not include the authority to alter the terms of wage bargains between employers and employees.<sup>137</sup> Indeed, according to the *Lochner* Justices, inequality

(Scalia, J., dissenting); *Ollman v. Evans*, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1490 (1987) (book review).

135. *Adkins v. Children's Hosp.*, 261 U.S. 525, 561 (1923) (emphasis added); see also WILLIAM H. TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 47-48 (1914) (arguing that "changes of social and business conditions" should cause the Supreme Court to "qualify" liberty and property rights when applying the Sherman Act); Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1 *passim* (1999) (arguing that the Supreme Court sustained the Sherman Act and state anti-trust statutes against liberty of contract challenges by translating the Due Process Clause in light of a changed appreciation of the effect of cartel arrangements); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 86-89 (1991) (arguing that *Lochner*-Era Justices believed it appropriate to apply constitutional principles in light of new circumstances).

136. See *supra* notes 85-87 and accompanying text; see also HOVENKAMP, *supra* note 89, at 201 (arguing that Thomas Cooley and the nineteenth-century Court defined the police power as consisting of the power to combat "negative externalities for which the bargaining parties would not account").

137. See *Lochner v. New York*, 198 U.S. 45, 57 (1905) (concluding that a mere "labor law" was not within the police power); HOVENKAMP, *supra* note 89, at 201

in economic position was an incident of the very existence of private property and liberty of contract.<sup>138</sup> Laws that abridged freedom of contract to redress such inequalities struck at the heart of the constitutional guarantee, and could not be justified as exercises of the police power.<sup>139</sup> Thus, even if changed economic circumstances suggest that unequal bargaining power is more widespread than it once was, there is no basis for departing from *Lochner's* application of the Due Process Clause.<sup>140</sup> Consequently, any equation of *Dred Scott* and *Lochner* would seem to involve a repudiation of *Lochner's* principle, and not its application.<sup>141</sup>

Still, the careful reader may not find the above critique of this translation entirely satisfying. After all, Thomas Cooley and the theory of externalities notwithstanding, the Court occasionally sustained regulation that abridged liberty of contract as within

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("[The externality-based vision of the police power] explains why the court generally refused to tolerate inequality of bargaining power as a [rationale for abridging contractual liberty]. Inequality of bargaining power between capitalists and laborers affected the distribution of wealth *between* the bargaining parties, but the court saw no effect on anyone else.").

138. For example, in *Coppage v. Kansas*, 236 U.S. 1 (1915), the Court noted:

Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

*Id.* at 17.

139. See *id.* at 18 ("The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.").

140. Cf. Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 402 (1997) (contending that courts that treat all changed circumstances as relevant variables will inevitably place themselves in the position of altering the relevant constitutional principle).

141. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992) (arguing that a departure from precedent must be justified by something more than mere disagreement with it).

the police power in order to achieve distributional objectives. More precisely, the Court regularly enforced, against vigorous due process challenges, price regulation and antitrust regulation designed to assure that consumers would receive the prices produced by a competitive market. In *Munn v. Illinois*,<sup>142</sup> for instance, the Court—in an opinion joined by Justice Bradley—sustained the regulation of prices charged by grain elevators, treating prices above the competitive level as a “harm” redressable under the police power.<sup>143</sup> Later in the century, both the Supreme Court and numerous state courts upheld the prohibition of horizontal price fixing contracts, concluding that such antitrust statutes were justified as attempts to assure consumers competitive prices.<sup>144</sup> Indeed, some courts explicitly noted that such statutes were designed to ensure that buyers and sellers bargained on terms of relative equality.<sup>145</sup> If the state could act to redress inequality of bargaining power between producers and consumers, surely it could act to redress inequality of bargaining power between employers and employees.<sup>146</sup> The

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142. 94 U.S. 113 (1876).

143. See *id.* at 124-26, 132; accord *Budd v. New York*, 143 U.S. 517 (1892). Compare Charles Fairman, *The So-called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 587, 651-59 (1953) (describing Justice Bradley's influence on majority opinion in *Munn*), with COOLEY, *supra* note 81, at 742-46 (criticizing *Munn*).

144. See, e.g., *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 411-12 (1905) (sustaining state antitrust statute against due process challenge); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 246 (1899) (upholding antitrust statute); *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 52 S.W. 595, 607-09 (Mo. 1899) (upholding antitrust legislation). See generally CUSHMAN, *supra* note 18, at 89-91; Meese, *supra* note 135, at 68-80 (discussing federal and state decisions).

145. See, e.g., *Firemen's Fund Ins.*, 52 S.W. at 608 (sustaining antitrust statutes against due process challenges). As Justice Harlan stated:

If, in the judgment of the State, the people who desire insurance upon their property are put at a disadvantage when confronted by a combination or agreement among insurance companies, I do not perceive any sound reason why, preserving the individual right of contracting, it may not forbid such combinations and agreements, and thereby enable the insured and insurer to meet on terms of equality.

*Greenwich Ins. Co.*, 199 U.S. at 414 (Harlan, J., concurring).

146. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 632-33 (1936) (Stone, J., dissenting) (equating minimum wage regulation with the regulation of prices in decisions such as *Munn*); Hand, *supra* note 2, at 506 (analogizing the regulation of hours of employment to the price regulation sustained in *Munn* and *Budd*); Thomas Reed Powell, *The Supreme Court and State Police Power, 1922-1930* (pt. 7),

realization that employers and employees did not bargain on terms of relative equality, it seems, should have justified a new application of the Due Process Clause and the concomitant expansion of the scope of the police power.<sup>147</sup>

One may concede for the sake of argument that legislation designed to counteract unequal bargaining power in the employment relationship is consistent with liberty of contract, for the same reason that, for instance, antitrust regulation survived due process challenges.<sup>148</sup> Still, this argument for abandoning *Lochner* and *Adkins* fails for lack of factual proof. For, whatever else might be said of those decisions, they did not involve unequal bargaining power of the sort that justified antitrust regulation or regulation of businesses such as the grain elevators in *Munn* "affected with a public interest."<sup>149</sup> Indeed, *Lochner* itself is a

18 VA. L. REV. 379, 400 (1932) (noting that "[r]egulation of methods of competition are aimed to prevent the powerful from using their power to secure bargains deemed undesirable" and criticizing courts for voiding attempts to redress unequal bargaining power in the employment context).

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[Changed economic conditions] made it more likely that judges could see the differentials in bargaining power in the employment context—the disparity in market power between the providers of employment opportunity and the consumers of such opportunity—in the same way they had always viewed such exaggerated differentials between producers and consumers of certain other "indispensable" goods and services.

CUSHMAN, *supra* note 18, at 91; see GILLMAN, *supra* note 24, at 136-37, 148, 152-53, 176-77, 203; RUDOLPH PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992*, at 46-47 (1996) (criticizing *Lochner* for refusing to recognize purported bargaining disparities between employees and employers); Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1, 85-86 (1997) (discussing "serious flaws in [Justice Sutherland's] jurisprudence of economic liberty" including its failure to recognize "tremendous changes in industrial society after the Civil War," which brought about "considerable discrepancy between those few who enjoyed significant economic power and the vast majority" as well as "inequities in the bargaining process"); see also *Coppage v. Kansas*, 236 U.S. 1, 38 (1915) (Day, J., dissenting) (arguing that yellow dog contracts were "coercive," and the result of unequal bargaining power).

148. See *supra* note 144 and accompanying text.

149. *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 540 (1923) (absent monopoly, private business is not "affected with a public interest" so as to justify wage or price regulation). Even Justice Stone agreed with this description of the limits of the police power. See *Tyson & Brother v. Banton*, 273 U.S. 418, 451-52 (1927) (Stone, J., dissenting).

An examination of the decisions of this Court in which price regula-

decision often criticized for its failure to recognize the presence of unequal bargaining power.<sup>150</sup> However, Professor Siegan has found that in 1905 there were over three thousand bakeries in New York State.<sup>151</sup> Nearly all of these firms were individual concerns that employed production processes unchanged since the colonial era.<sup>152</sup> These sole proprietorships, which accounted for over sixty percent of the industry's output, employed an averaged of 3.76 workers per firm.<sup>153</sup> There is no indication that these three thousand bakeries were colluding so as to eliminate competition over wages and other terms of employment, and such collusion would find no shelter in liberty of contract.<sup>154</sup> Far from evincing any unequal bargaining power, these circumstances suggest a textbook example of perfect competition.<sup>155</sup> Unlike the nine colluding grain elevators in *Munn*, or cartelists who fell prey to antitrust statutes, no bakery in New York State possessed market power in 1905.<sup>156</sup> Not only would bakeries have to compete against each other for employees; they would also have to compete against firms in other industries where bakers might work.<sup>157</sup> In a market such as this, no individual

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tion has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community.

*Id.*

150. See, e.g., PERITZ, *supra* note 147, at 46-47; SEIDMAN & TUSHNET, *supra* note 6, at 113-14, 149-50, 180; Hand, *supra* note 2, at 506-07; Olken, *supra* note 147, at 29-30.

151. See SIEGAN, *supra* note 4, at 116.

152. See *id.* (relying on census data for the conclusion that, of the 3164 bakeries then operating in New York, 2870 were owned by individuals).

153. See *id.*

154. See *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 412 (1905) (holding that state could outlaw horizontal price fixing agreements "to keep up competition").

155. See generally GEORGE J. STIGLER, *THE THEORY OF PRICE* 176-90 (1966) (defining competitive market).

156. Cf. *Munn v. Illinois*, 94 U.S. 113, 131 (1877) (relying upon fact that elevators set rates collectively to support finding that price regulation was within the police power); Meese, *supra* note 135, at 88.

157. See *Western & Atlantic R.R. v. Bishop*, 50 Ga. 465, 472 (1873) (refusing to void liability waiver as product of unequal bargaining power because the railroad company had no monopoly in the labor market. It was "only one of a million of

firm would have *any* power over wages or other terms of employment; instead, any firm that attempted to depress wages below the competitive level or impose other non-competitive terms would find itself unable to hire anyone.<sup>158</sup> Similarly, it is difficult to believe that the hotels employing elevator operators, or the hospitals employing scrubwomen, possessed the power to set non-competitive terms in the larger labor market at issue in *Adkins*.<sup>159</sup> The yeoman farmers and hardy proprietors of 1868, to whom Justice Bradley and Thomas Cooley would have granted liberty of occupation and contract, worked very hard and sold the fruit of their labor into a competitive market.<sup>160</sup> The employees of New York's three thousand bakeries,<sup>161</sup> and the elevator operators and washerwomen of Washington, D.C. did the same.<sup>162</sup>

To be sure, inequalities of wealth characterized the employment relationships at issue in *Lochner* and *Adkins*. The small baker in *Lochner* and the hospital in *Adkins* certainly owned more property than most, if not all, of their employees.<sup>163</sup> Many

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employers with whom . . . the plaintiff might have sought employment."), *quoted in* CUSHMAN, *supra* note 18, at 116.

158. See DON BELLANTE & MARK JACKSON, LABOR ECONOMICS—CHOICE IN LABOR MARKETS 31-47 (1979); ALLAN M. CARTER & F. RAY MARSHALL, LABOR ECONOMICS 215-16 (1972).

159. See *Adkins v. Children's Hosp.*, 261 U.S. 525, 542 (1923) (noting that one of the plaintiffs, "a woman [of] twenty-one years of age, was employed by the Congress Hall Hotel Company as an elevator operator"); Brief for Appellees at 5, *Adkins* (Nos. 795 and 796), *reprinted in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 5 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS] (noting that one plaintiff, a hospital employed "scrubwomen, washerwomen, attendants, etc.").

160. See Glickstein, *supra* note 118, *passim* (noting that abolitionists equated "liberty" with the right to sell one's labor in a competitive market); *supra* notes 117-18 and accompanying text.

161. See *Lochner v. New York*, 198 U.S. 45 (1905); see also SIEGAN, *supra* note 4, at 116 (indicating that there were 3164 bakery establishments in New York State in 1905).

162. See *Adkins*, 261 U.S. at 542.

163. *But see* PAUL KENS, *LOCHNER V. NEW YORK* 7 (1998).

[Bakery owners were typically] former journeymen workers who had broken away from their employers to form their own small bakeries. By taking that step, however, they were not transformed into captains of industry, nor did they even reach the status of a successful shopkeeper. At least in major urban areas, their lives more closely

view this disparity as a source of unequal bargaining power justifying abridgement of contractual liberty.<sup>164</sup> Still, there is no logical relationship between an employer's wealth and its bargaining power. Instead, bargaining power, defined as the ability to demand and obtain terms that depart from the competitive norm, is a function of market concentration and the presence or absence of collusion.<sup>165</sup> A market with one hundred participants, each with a small share of the industry's sales, will produce competitive wages and prices even if each participant is a millionaire.<sup>166</sup> Indeed, to the extent that the unequal distribution of property on which some scholars rely was associated with the

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resembled those of jobbers in the tenement garment industry than those of shopkeepers or entrepreneurs.

*Id.*

164. See GILLMAN, *supra* note 24, at 159-60 (arguing that the *Lochner* Court improperly rejected the argument that "the maturation of capitalist forms of production had resulted in more coercive market relations and less freedom for vulnerable groups"); MILLER, *supra* note 129, at 57-60 (asserting that unequal bargaining power characterized the employment relationships addressed by the *Lochner* Court because individual employees bargained with "a collectivity, a corporation" and that the Court "failed to see that freedom could be limited by centers of economic power—the corporation—as well as by government"); see also PERITZ, *supra* note 147, at 46 (claiming that bakeries in *Lochner* had superior bargaining power because they were "corporate or otherwise aggregated employers" who "as a class [were] propertied and relatively scarce"); Ernst, *supra* note 123, at 261-63, 266 (quoting former U.S. Attorney General Richard Olney to the effect that "the individual worker could no longer be expected to pit 'his single, feeble strength against the might of organized capital'").

165. See generally STIGLER, *supra* note 155, at 29-63.

166. Judge Easterbrook recently made a similar point in the antitrust context, holding that a firm's market power is unrelated to its sales:

A dollar yardstick never measured market power. . . . Proof that GE sells \$5 million, or \$5 billion, worth of industrial lighting products every year is irrelevant to the market power issue. To show market power, a plaintiff must establish that the defendant's sales loom so large in relation to rivals' sales and production capacity that a reduction in output by the defendant could not quickly be made up by other firms' increased output.

L.A.P.D., Inc. v. General Elec. Corp., 132 F.3d 402, 405 (7th Cir. 1997); see also UNITED STATES DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES § 1.5 (1992), reprinted in PHILLIP A. PROPER & BRIAN R. HENRY, ANTITRUST ASPECTS OF MERGERS AND ACQUISITIONS, 56-2nd C.P.S. (BNA), Worksheet 2 (treating market with ten firms, each of equal size, as "unconcentrated" and likely to produce competitive prices). It should be noted that these guidelines do not take into account the wealth of the firms in question.

"aggregation of capital" and maturing "capitalist forms of production,"<sup>167</sup> this inequality increased the productivity of labor and enhanced working conditions. Real wages also rose, thus fortifying the case for protection of liberty of contract.<sup>168</sup> This, of course, was exactly the trend that wages followed between 1868 and 1930.<sup>169</sup> Thus, although economic circumstances, namely, the scale of industrial operations, changed between 1868 and 1937, they did not change in a manner that undermined *Lochner* or *Adkins*.<sup>170</sup>

Now, of course, there may be some labor markets in which employers do have sufficient market power to foist non-competitive terms on their employees.<sup>171</sup> Moreover, there may have been more such markets in 1905 than there were in 1868.<sup>172</sup> If so, then perhaps the *Lochner* Court was too aggressive in protecting contractual liberty in some cases. Still, the presence of bargaining power in some instances does not justify the equation of *Lochner* with *Dred Scott* and the concomitant failure to protect liberty of contract in *all* cases. Any attempt to repudiate contractual liberty wholesale through this "translation" must fail.<sup>173</sup>

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167. GILLMAN, *supra* note 24, at 159 (arguing that "maturation of capitalist forms of production" conferred additional bargaining power on employers); *see also* PERTZ, *supra* note 147, at 46.

168. *See* SIEGAN, *supra* note 4, at 124-25 (reporting increase in wages and reduction in working hours during this period); *see also* Klarman, *supra* note 140, at 406 (noting that changed circumstances can often suggest more than one translation).

169. *See* CUSHMAN, *supra* note 18, at 116-17; SIEGAN, *supra* note 4, at 125 (reporting that real wages tripled between 1840 and 1915). Indeed, in *Adkins*, the Court expressly took note of the rise in real wages as evidence that minimum wage laws were not necessary to enhance the lot of workers. *See Adkins v. Children's Hosp.*, 261 U.S. 525, 560 (1923) ("We cannot close our eyes to the notorious fact that earnings everywhere in all occupations have greatly increased—not alone in States where the minimum wage law obtains but in the country generally.").

170. *See* Klarman, *supra* note 140, at 402-03.

171. *See* CARTER & MARSHALL, *supra* note 158, at 219-21 (describing how firms with power in the labor market can impose non-competitive terms on workers).

172. On the other hand, it seems possible that increased mobility of labor may have broadened the scope of labor markets and thus reduced the number of firms that possessed significant bargaining power over their employees.

173. Indeed, to the extent that the *Lochner* Court did sustain abridgements of liberty of contract in some instances where employers possessed bargaining power, such a translation would work only marginal changes in the decisional law of that era. *See, e.g., Holden v. Hardy*, 169 U.S. 366, 389-90 (1898) (sustaining maximum hour legislation for miners based in part on the presence of unequal bargaining power).

There is, perhaps, one last arrow in the quiver of Justice Souter and others, that is, one last sense in which *Lochner* may be deemed the "echo" of *Dred Scott*. Industrial conditions were not the only thing that changed between 1868 and 1905; the notion of law changed as well. Although those who wrote and ratified the Fourteenth Amendment viewed the common law, and the distribution of resources that it protected, as natural, pre-political, and inevitable, legal theorists in the early twentieth century "recognized" that these rules and entitlements were the product of state choices.<sup>174</sup> Some scholars have argued that these choices largely determined the outcome of the bargain between employers and employees.<sup>175</sup> By defining liberty against this background, one could argue, the Court imposed a controversial policy choice under the guise of constitutional interpretation.<sup>176</sup> Once it became clear that the "liberty" constructed by the common law was simply a product of positive law, the Court could no longer maintain that common law liberty had a privileged status vis-à-vis other conceptions of liberty—such as the liberty of employees to work for a living wage—that legislatures may construct by statute.<sup>177</sup>

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But see HOVENKAMP, *supra* note 89, at 201-02 (asserting that, during the *Lochner* Era, unequal bargaining power could not, by itself, justify interference with liberty of contract).

174. See SEIDMAN & TUSHNET, *supra* note 6, at 149-50 ("*Lochner*'s critics pointed out that bakers 'chose' to enter such contracts while caught in a social and economic setting that dictated a particular outcome. Government intervention was justified to control private forces that coerced workers and other vulnerable groups to act in certain ways."); SUNSTEIN, *supra* note 6, at 50; Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); see also *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign . . .").

175. See SUNSTEIN, *supra* note 6, at 51-53 (suggesting that bargaining power would not exist without government protection); cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1098-99 (1972) (noting that the initial allocation of a right or entitlement can affect the distribution of income).

176. See SEIDMAN & TUSHNET, *supra* note 6, at 149-50; SUNSTEIN, *supra* note 6, at 51-53.

177. See GILLMAN, *supra* note 24, at 156-57; SEIDMAN & TUSHNET, *supra* note 6, at 149-50; SUNSTEIN, *supra* note 6, at 50-51; Lessig, *supra* note 18, at 451-53.

Unlike the fact-based translation described above, this argument suffers from a threshold theoretical weakness. The Constitution must assume *some* baseline distribution of rights and entitlements, independent from those determined by the legislature.<sup>178</sup> Were it otherwise, many of its protections would make no sense. For instance, the Takings Clause by its very nature implicitly assumes a common law baseline; otherwise, the legislature could avoid its requirements simply by redefining the baseline in its favor.<sup>179</sup> Similarly, the Constitution's explicit protection against retroactive abridgement of contracts, the Contracts Clause, can only make sense if the legislature cannot redefine the relevant baseline to render all contracts subject to retroactive abridgement.<sup>180</sup>

Undoubtedly, these baselines rest upon policy choices, as do the constitutional provisions they help construct. Without more, however, this realization—if it really is one—does not render economic liberties nugatory.<sup>181</sup> Instead, the contractual liberty championed by Thomas Cooley, Justice Bradley, and others ought to be defined against the baseline extant when the Fourteenth Amendment was ratified. Absent a showing that this baseline guaranteed certain minimum working conditions, *Lochner* and its progeny should survive.<sup>182</sup>

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178. Even Professor Sunstein, the most enthusiastic proponent of this critique of *Lochner*, concedes this point. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 903 (1987) ("Without some foundations or baselines from which to make measurements, legal analysis cannot go forward, and in some cases it is hard to dispute that understandings like those reflected in the common law or the status quo are the appropriate baseline.").

179. See *id.* at 891 ("It would be difficult, however, to abandon [common law] baselines altogether without reading the contracts and takings clauses out of the Constitution."); cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-32 (1992) (holding that a state may not redefine the common law definition of nuisance without providing compensation); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) (suggesting that the Due Process Clause would itself forbid certain attempts to redefine or abolish property rights).

180. Indeed, Professor Sunstein concedes that the Contracts Clause depends upon a common law baseline. See Sunstein, *supra* note 178, at 890-91. He does not explain why the contractual liberty protected by the Fourteenth Amendment should rest on a different footing.

181. Thomas Cooley, for instance, apparently recognized that positive law constructed liberty of contract long before the New Deal. See Thomas Cooley, *Limits to State Control of Private Business*, 1 PRINCETON REV. 233, 238 (Mar. 1878).

182. I do not mean to suggest that such a showing would be impossible. Perhaps

Even if such a showing could be made, however, there would be no justification for abandoning liberty of contract altogether. Not all abridgements of contractual liberty are designed to strike a blow against the status quo by reconstructing an unjust baseline distribution of wealth. Here again, the facts of *Lochner* are instructive. Like many labor laws, the law in *Lochner* apparently was designed to protect the corporate bakeries of the status quo against competitive pressure from sole proprietorships, many of them owned by recent immigrants.<sup>183</sup> These larger corporate bakeries employed capital-intensive production processes that allowed them to bake bread without employing workers for more than ten hours per day.<sup>184</sup> Proprietorships, by contrast, relied on technology that required more labor per unit of output and involved at least twelve-hour shifts for efficient operation.<sup>185</sup> By foisting ten-hour workdays on their competitors, the larger firms could raise the costs of these smaller rivals, putting many of them out of business and throwing their employees out of work.<sup>186</sup> Were such a result achieved by private contract, it

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one could demonstrate that those who wrote and ratified the Fourteenth Amendment assumed that mere enforcement of the common law baseline and the resulting operation of markets would result in a distribution of resources that assured a living wage for those who worked. However, neither Justice Souter nor any other proponent of this translation has made such a showing.

183. See SIEGAN, *supra* note 4, at 117; Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5, 17 (1988).

184. See SIEGAN, *supra* note 4, at 116-18; see also KENS, *supra* note 163, at 7-8 (reporting that, in 1899, only ten percent of the bakeries in New York used power machinery such as mechanical mixers and molders).

185. See SIEGAN, *supra* note 4, at 116-17.

186. See Epstein, *supra* note 183, at 17; see also SIEGAN, *supra* note 4, at 117-18. According to Professor Siegan, the president of one small bakers' association criticized the law at issue in *Lochner* on these grounds: "It is impossible for the small bakeries to comply with all the laws. The laws are all in favor of the large bakeries and the aim seems to be to drive the small bakeries out of business." SIEGAN, *supra* note 4, at 117. This was, by no means an isolated case; scholars have identified other instances in which maximum hour legislation was employed to disadvantage labor-intensive firms, often to the detriment of unpopular minorities. For instance, in *In re Jacobs*, 98 N.Y. 98 (1885), the New York Court of Appeals voided New York's ban on the manufacture of cigars in tenement houses. See *id.* at 113-15. Passed at the behest of the cigarmaker's union, the ban sought to eliminate competition that unionized, capital-intensive firms faced from smaller non-union shops. See Forbath, *supra* note 77, at 795-96; Roche, *supra* note 132, at 23-25; see also David Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 231-

would violate the antitrust laws.<sup>187</sup> It can hardly be said that such a statute alters the status quo in favor of the less powerful or enhances the "liberty" of employees.

Of course, maximum hour laws are not the only purportedly redistributionist abridgements of liberty of contract that can backfire.<sup>188</sup> Basic price theory predicts that an increase in the minimum wage, for instance, will reduce employment among unskilled workers.<sup>189</sup> Moreover, by making capital-intensive production processes relatively less expensive, such laws enhance the demand for skilled workers, who labor well above the minimum rate.<sup>190</sup> As a result, far from redistributing wealth and

44 (1999) (recounting use of maximum hour laws to disadvantage labor-intensive Chinese laundries in 1880s); Elisabeth M. Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 J. POL. ECON. 476, 476 (1980) (concluding that state laws limiting the hours worked by women reduced employment opportunities for immigrant women by up to thirty percent in some states). Indeed, the campaign to enact the limitations at issue in *Lochner* was led by an anti-Chinese agitator, whom California had once imprisoned for possession of explosives. See KENS, *supra* note 163, at 53-66.

187. See *United Mine Workers v. Pennington*, 381 U.S. 657, 668 (1965) (declaring a conspiracy by unions and large coal mines to impose higher wages on small operations per se unlawful); Robert H. Lande & Richard O. Zerbo, Jr., *Anticonsumer Effects of Union Mergers: An Antitrust Solution*, 46 DUKE L.J. 197, 220-24 (1996) (describing various conspiracies by unions and employers to raise rivals' costs); Oliver Williamson, *Wage Rates as a Barrier to Entry: The Pennington Case In Perspective*, 82 Q.J. ECON. 85 (1968). See generally Thomas G. Krattenmaker & Stephen C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

188. See generally David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993) (describing how various forms of New Deal labor regulation promoted white labor unions at the expense of non-unionized blacks).

189. See *Adkins v. Children's Hosp.*, 261 U.S. 525, 560 (1923) ("[I]n periods of depression and struggle for employment . . . the efficient will be employed at the minimum rate, while the less capable may not be employed at all."); WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 544 (1998); Epstein, *supra* note 183, at 19-20 (arguing that "the 'protection' of all low-paid workers [via a minimum wage] may benefit other higher paid workers, often union workers, in competition with firms that use cheaper labor. Or the minimum wage laws may benefit rival firms that have heavier dependence on capital").

190. See Williamson, *supra* note 187, at 113-15. Similarly, one historian reports that so-called "yellow dog" contracts were most often adopted by smaller proprietorships who faced stiff competition from larger, often unionized corporate concerns. See Ernst, *supra* note 123, at 251-52, 256. To the extent that the firms employed labor-intensive production processes, they suffered disproportionately at the hands of col-

opportunities toward the less fortunate, such laws will sometimes benefit the status quo, that is, the skilled workers who have greater access to the political process than those who are less skilled and more vulnerable.<sup>191</sup>

This is not to say that *all* labor legislation necessarily harms those whom it purports to protect. Some labor legislation enhances the welfare of the less fortunate, and the *Lochner* Court was receptive to statutes that actually improved health and safety.<sup>192</sup> Still, the fact that *some* such legislation may advance the general welfare cannot justify the wholesale repudiation of economic liberty, any more than the efficacy of *some* restrictions on speech can justify the complete evisceration of the First Amendment. If, in fact, those who adopted the Fourteenth Amendment agreed with Thomas Cooley and Justice Bradley that "liberty" includes the right to sell one's labor, and if legislatures may abridge that liberty for purely redistributive purposes, it seems incumbent upon Justice Souter and others who would invoke substantive due process to develop doctrinal tools for distinguishing truly redistributive abridgements from those that simply serve the status quo.

#### IV. CASEY, THE DEPRESSION, AND MINIMAL LEVELS OF HUMAN WELFARE

Even before analogizing *Lochner* to *Dred Scott*, Justice Souter suggested a different explanation for his unwillingness to protect economic liberties against arbitrary abridgement, an explanation

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lective bargaining arrangements that raised the price of labor. *See id.* at 257-58.

191. *See* CHARLES F. ROOS, NRA ECONOMIC PLANNING 173 (1937) (asserting that the National Industrial Recovery Act (NIRA) put one-half million blacks out of work); Bernstein, *supra* note 186, at 282 n.524 (describing how minimum wages placed unskilled minorities at a disadvantage in the labor market, causing many to lose their jobs); Peter Linneman, *The Economic Impacts of Minimum Wage Laws: A New Look at an Old Question*, 90 J. POL. ECON. 443, 462 (1982) (finding that 1974 increases in the federal minimum wage increased the incomes of unionized workers who already earned well over the minimum wage, while reducing the incomes of unskilled workers, particularly women); *see also* Williamson, *supra* note 187, at 113-15.

192. *See* *Lochner v. New York*, 198 U.S. 45, 61-62 (1905) (acknowledging that health and safety regulation of bakery premises was a proper form of regulation); Epstein, *supra* note 183, at 15 ("The comprehensive acceptance of health regulation in the pre-1937 period was too broad.").

that also required a form of translation. In *Planned Parenthood v. Casey*,<sup>193</sup> the Justice coauthored an opinion with Justices Kennedy and O'Connor explaining their collective refusal to overrule *Roe v. Wade*.<sup>194</sup> In so doing, the three Justices thought it necessary, in a portion of the opinion that Justice Souter read from the bench, to explain why *Roe* was immune from the sort of treatment that the principle of liberty of contract and liberty of occupation had received at the hands of *West Coast Hotel* and *Caroline Products*.<sup>195</sup>

The opinion was more explicit than the Justice's *Glucksberg* concurrence about the rationale for the dichotomy between economic and other liberties. In *Casey*, the Justice suggested a form of translation, albeit one quite different from that implicit in his equation of *Lochner* with *Dred Scott*.<sup>196</sup> To be precise, Justice Souter argued that the nation's experience during the Great Depression established that the sort of liberty of contract protected by *Lochner* was inconsistent with the achievement of "minimal levels of human welfare."<sup>197</sup> Thus, it was not only appropriate but imperative that the Court reverse itself in *West Coast Hotel*.<sup>198</sup> Justice Souter's statement is worth quoting in full:

The *Lochner* decisions were exemplified by *Adkins v. Childrens Hospital of District of Columbia*, 261 U.S. 525 (1923), in which the Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signaled the demise of *Lochner* by overruling *Adkins*. In the meantime, the Depression had come

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193. 505 U.S. 833 (1992).

194. 410 U.S. 113 (1973).

195. See David Savage, *High Court Affirms Right to Abortion*, L.A. TIMES, June 30, 1992, at A1 (reporting that Justice Souter announced that the portion of the joint opinion asserting that adherence to *Roe* was required by *stare decisis*); see also TRIBE, *supra* note 3, at 567 n.2 (noting that, between 1899 and 1937, the Court voided nearly 200 laws as abridging liberty of occupation or liberty of contract).

196. See *Casey*, 505 U.S. at 861-62 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

197. *Id.* at 862.

198. See *id.* at 861.

and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. . . . [T]he clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.<sup>199</sup>

Like the equation of *Lochner* with *Dred Scott*, this translation suggested by Justice Souter has also been offered by several scholars.<sup>200</sup> Moreover, it is theoretically coherent. No one, after all, would defend a conception of liberty that led to massive unemployment or threatened economic collapse.<sup>201</sup> *Salus Populi Est Suprema Lex*.

Theoretical coherence or not, however, this translation is simply not supported by the "facts of economic life."<sup>202</sup> Protection of liberty of contract did not produce the Depression, nor did abridgement of this freedom counteract it. Like many other programs associated with the New Deal, the regulation of wages,

199. *Id.* at 861-62.

200. Indeed, no less an authority than Professor Tribe states:

In large measure, however, it was the economic realities of the Depression that graphically undermined *Lochner's* premises. No longer could it be argued with great conviction that the invisible hand of economics was functioning simultaneously to protect individual rights and produce a social optimum. The legal 'freedom' of contract and property came increasingly to be seen as an illusion, subject as it was to impersonal economic forces. Positive government intervention came to be more widely accepted as essential to economic survival, and legal doctrines would henceforth have to operate from that premise.

TRIBE, *supra* note 3, at 578; see also Lessig, *supra* note 18, at 460-61; Wayne McCormack, *Property and Liberty—Institutional Competence and the Functions of Rights*, 51 WASH. & LEE L. REV. 1, 10 (1994) ("The protections [for economic rights] thus developed withered when the Great Depression showed that unregulated industrialization represented risks too great to be borne by a sensible society."); Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1545 (1998) (lecture) ("[W]e have since the great depression come to view economic transactions in the way that Sutherland viewed urban land in *Euclid*.").

201. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.").

202. *Casey*, 505 U.S. at 862 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

hours, and other facets of working conditions began long before the Great Depression, often in times of full employment, and has continued long after it.<sup>203</sup> To be sure, in the 1930s, some economists did believe that aggregate demand, and thus Gross National Product (GNP), could be stimulated by regulating wages and prices so as to restore "purchasing power" among those consumers—wage workers and small businesses—likely to spend a high proportion of their income.<sup>204</sup> This belief was expressed in the government-sponsored wage and price fixing of the National Industrial Recovery Act (NIRA).<sup>205</sup> Indeed, defending the NIRA in the Supreme Court, the United States argued that the minimum wage provisions of the statute were necessary to achieve "a prompt increase in total wage distributions [in order to] provide a necessary stimulus to start in motion the cumulative forces making for expanding commercial activity."<sup>206</sup>

203. See *id.* at 960-61 (Rehnquist, C.J., concurring in part and dissenting in part).

204. See ROBERT F. HIMMELBERG, *THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION 190-92, 197* (1993) (describing these theories); THEODORE ROSENOF, *DOGMA, DEPRESSION, AND THE NEW DEAL 39-43* (1975) (same); HERBERT STEIN, *THE FISCAL REVOLUTION IN AMERICA 48-49* (1969) (same); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 306-11 (1932) (Brandeis, J., dissenting) (suggesting that limitations on entry were necessary to control overproduction). Similarly, Professor Corwin believed that protection for liberty of contract would hinder the sort of "social planning" necessary to defeat the Depression. See Edward S. Corwin, *Social Planning Under the Constitution - A Study in Perspectives*, 26 AM. POL. SCI. REV. 1, 26-27 (1932). Finally, some believed that, by encouraging the formation of unions and thus the cartelization of labor, the government could raise purchasing power and enhance aggregate demand. See Ernst, *supra* note 123, at 270-73.

205. See HIMMELBERG, *supra* note 204, at 190-92; STEIN, *supra* note 204, at 48-49; see also Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 653 (1946) (asserting that one purpose of the NIRA was to restore "deflated purchasing power of the masses").

206. Brief for United States at 90-91, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (Nos. 854 and 864), reprinted in *LANDMARK BRIEFS, supra* note 159; see also CUSHMAN, *supra* note 18, at 158 (discussing government's reliance upon the purchasing power theory in *Schechter*). Similarly, the United States defended the Agricultural Adjustment Act (AAA) of 1933, which taxed "overproduction" of farm products, by claiming that such de facto cartelization was necessary to raise farm prices and thus "agricultural purchasing power," thereby stimulating the demand for farm implements, credit, fuel and the like. See *United States v. Butler*, 297 U.S. 1, 74-75, 78 (1936) (voiding the AAA); Brief for the United States, *United States v. Butler* (No. 401), reprinted in *LANDMARK BRIEFS, supra* note 159, at 332-80; ROBERT JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY 125-37* (1941) (arguing that the Court thwarted economic recovery when it voided the

The NIRA, of course, was declared unconstitutional by a unanimous Court, and the nation climbed out of the Depression anyway.<sup>207</sup> Few, if any, modern economists believe that minimum wage laws would have averted the Great Depression, or that the regulation of working conditions is an effective tool of macroeconomic stabilization. A higher wage for some translates into unemployment and/or higher prices for others, and many of those negatively impacted are even more destitute—and thus more prone to consume—than the beneficiaries of the legislation.<sup>208</sup> Whatever the original cause of the downturn, economists agree it was accelerated by the government's failure to pursue effective monetary and fiscal policies.<sup>209</sup> Moreover, far from counteracting the Depression, the sort of minimum wage regulations sustained in *West Coast Hotel* may well have exacerbated the situation by clogging the mechanisms of natural economic adjustment. As John Maynard Keynes observed in 1935, recessions occur because wages are "sticky downwards," thus preventing reductions in costs and prices that would, in turn, increase the real money supply and enhance aggregate demand.<sup>210</sup> Before the NIRA and other schemes to set minimum wages, prices and wages were sticky;<sup>211</sup> afterwards, they were stuck. Liberty of

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AAA).

207. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550-51 (1935) (voiding NIRA on the grounds of excessive delegation); see also Lessig, *supra* note 18, at 465 & 466 n.319 (suggesting that the Court saw in the NIRA the seeds of fascism).

208. See Bernstein, *supra* note 186, at 282 n.524.

209. See, e.g., MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES, 1867-1960*, at 300-01 (1963) (arguing that the Federal Reserve's tight monetary policies caused and exacerbated the Depression); David C. Wheelock, *Monetary Policy in the Great Depression and Beyond: The Sources of the Fed's Inflation Bias*, in *THE ECONOMICS OF THE GREAT DEPRESSION* 129 (Mark Wheeler ed., 1998) ("By almost any measure, monetary policy during the period 1929-1933 was a disaster: the money supply and price level both fell by one-third.").

210. See GARDNER ACKLEY, *MACROECONOMIC THEORY* 135 (1961) (arguing that policies such as minimum wage legislation will "create unemployment" if the wage is set above the market rate); WENDY CARLIN & DAVID SOSKICE, *MACROECONOMICS AND THE WAGE BARGAIN: A MODERN APPROACH TO EMPLOYMENT, INFLATION, AND THE EXCHANGE RATE* 49 (1990) ("In Keynes's model, . . . the failure of money wages to fall . . . led, in the context of a fall in autonomous demand, to the real wage rising and the consequent fall in employment and output . . ."); STEIN, *supra* note 204, at 149 (noting that Keynes thought the NIRA impeded national recovery).

211. According to Keynes, government could counteract depression through mas-

contract and full employment are not mutually exclusive. It is ironic that the Depression, prolonged and deepened by the central government's failure to discharge its core function of macro-economic stabilization, has been used to justify an *expansion* of state power, power that when exercised actually prolonged economic collapse.<sup>212</sup>

Of course, one cannot criticize Justice Souter's account of a 1937 translation based upon (slightly) more modern economic theories. Perhaps, in the mid-1930s, when some economists actually believed low wages were responsible for the Depression, courts should have stepped aside and allowed legislatures to have their way.<sup>213</sup> On the other hand the Court, under the ban-

sive deficit spending. See JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 128-29 (1935) (arguing that deficit-financed public works could bring an economy out of depression). Indeed, according to Alvin Hansen, one of President Roosevelt's chief economic advisors, there was very little overlap between Keynesian economics and the New Deal. See ALVIN H. HANSEN, *THE AMERICAN ECONOMY* 159 (1957). As Hansen put it: "It is often said that the New Deal had little or nothing to do with Keynes's teaching. This is for the most part true." *Id.* at 159 n.6. Hansen, of course, shared Keynes's view that what had cured the Depression was massive deficit spending, and not any abridgement of liberty of occupation or contract. According to many economists, that is exactly what happened. See RUDIGER DORNBUSCH & STANLEY FISCHER, *MACRO-ECONOMICS* 423-24 (4<sup>th</sup> ed. 1987) (describing so-called "Keynesian" explanation for Great Depression and subsequent recovery). Others, however, disagree, attributing the defeat of the Depression to a more enlightened monetary policy. See *id.* at 546-47 (describing this school of thought); FRIEDMAN & SCHWARTZ, *supra* note 209, at 493-545. Neither explanation, of course, has anything to do with minimum wages or other regulations of the employment relation. Thus, economics textbooks discuss the causes and cures of the Great Depression without mentioning such abridgements of contractual liberty. See, e.g., ANTHONY S. CAMPAGNA, *MACROECONOMICS* 294-95 (1981); DORNBUSCH & FISCHER, *supra*, at 422-26; PAUL A. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 375 (5th ed. 1961) ("Everywhere in the free world governments and central banks have shown they can win the battle of the slump. They have the weapons of fiscal policy (expenditure and taxes) and of monetary policy (open-market operations, discount-rate policy, legal reserve ratio policy) to shift the schedules that determine national income and employment. Just as we no longer meekly accept disease, we no longer need accept mass unemployment."); STEIN, *supra* note 204, at 169-240 (describing the emergence of a post-World War II consensus that fiscal policy could stabilize the macro-economy).

212. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 50 (1962) ("The Great Depression in the United States, far from being a sign of the inherent instability of the private enterprise system, is a testament to how much harm can be done by mistakes on the part of [The Federal Reserve] when they wield vast power over the monetary system of a country.").

213. See *Washington v. Glucksberg*, 521 U.S. 702, 765-68 (1997) (Souter, J., con-

ner of substantive due process, has second-guessed more complicated legislative judgments. In *Roe v. Wade*, for instance, the Justices rejected the determination by the State of Texas that life begins at conception.<sup>214</sup> Determining whether legislative wage fixing will stabilize the economy would seem easy by comparison.

Let us assume for a moment, however, that the belief that legislative wage fixing would stabilize the economy justified *West Coast Hotel's* repudiation of *Lochner* and *Adkins*. Let us also assume that the state attempted to justify legislative wage fixing on this ground.<sup>215</sup> Even if this were the case, the subsequent realization that these perceptions were false would justify, indeed *require*, the repudiation of *West Coast Hotel* and reinstatement of *Lochner* and *Adkins*.<sup>216</sup> At the very most, the occurrence of the Depression should have led the Court to abandon its hostility to minimum wage laws only temporarily, until it became clear to all that other tools of economic stabilization were more effective. Translation, after all, is not a ratchet; it presumably works both ways.<sup>217</sup>

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curing) (arguing that, where the factual basis of claimed liberty is arguable, court should defer to the legislature). Presumably, of course, proponents of the laws in question would have to attempt to justify them in this manner. In this regard it should be noted that neither Washington nor New York attempted to justify their minimum wage laws as methods of macroeconomic stabilization. See Brief Amicus Curiae for the State of Washington, *passim*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (No. 293), reprinted in 33 LANDMARK BRIEFS, *supra* note 159, at 137-61; Brief for the State of New York, *passim*, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (No. 838).

214. See *Roe v. Wade*, 410 U.S. 113, 159-62 (1973) (holding that a legislature cannot conclude life begins at conception).

215. It did not. See *supra* note 213 (noting that Washington did not attempt to justify its minimum wage as a method of macroeconomic stabilization).

216. See *Planned Parenthood v. Casey*, 505 U.S. 833, 861-62 (1992) (concluding that the Court was bound to overrule *Adkins* and *Lochner* in light of changed circumstances).

217. Indeed, the chief proponent of translation theory, Professor Lessig, concedes as much in a different context. Specifically, Lessig argues that the adoption of the exclusionary rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), was a faithful translation of the Fourth Amendment's values in light of the inadequacy of modern remedies for Fourth Amendment violations. See Lessig, *supra* note 24, at 1232-33. He also notes, however, that the Court would have to abandon *Mapp* if, in fact, a legislature created a suitable remedy other than exclusion. See *id.*

In response, Justice Souter and others might point out that the presence of full employment does not, ipso facto, guarantee minimum levels of human welfare. Absent a minimum wage, for instance, some workers may not earn enough to provide for their own basic subsistence. The Depression, it might be said, demonstrated that some regulation of the employment relationship may be necessary to prevent our fellow citizens from starving. *Lochner* and its progeny may indeed be inconsistent with maintaining minimum levels of human welfare.

This argument for repudiation of *Lochner* is unpersuasive on several grounds. Certainly Justice Bradley, Thomas Cooley, and the *Lochner* Justices would not have been surprised to learn that an unregulated market left some people behind. The real wage was lower in 1870 than it would be in the *Lochner* Era.<sup>218</sup> Nothing about the "facts of economic life," then, had changed in a way that suggested a repudiation of liberty of contract. To be sure, rising real wages left some people behind, people that can only be helped by state action. Yet, full and vigorous enforcement of liberty of contract still leaves the state perfectly free to assure minimal levels of human welfare through taxing and spending.<sup>219</sup> Thus, while a state operating under the injunction of *Adkins* could not impose a minimum wage, it could, for instance, adopt an earned income tax credit, or make cash payments directly to the poor. In light of these alternatives, it is difficult to assert that the protection of liberty of contract prevents a more just distribution of resources and is therefore inconsistent with "minimal levels of human welfare."<sup>220</sup>

Of course, one could respond that the choice between taxing and spending, and promulgating a minimum wage law should be left to the legislature.<sup>221</sup> When the state abridges fundamental liberties, however, it must, at a minimum, demonstrate that the

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218. See CUSHMAN, *supra* note 18, at 116 (reporting that real wages grew 37% between 1890-1914).

219. See Sunstein, *supra* note 178, at 878 n.27 (noting that *Lochner* evinced a "preference for redistribution through taxation rather than regulation").

220. *Casey*, 505 U.S. at 862 (joint opinion of O'Connor, Kennedy, and Souter, JJ).

221. Cf. *Washington v. Glucksberg*, 521 U.S. 702, 765-68 (1997) (Souter, J., concurring) (arguing that Court should not, under the guise of substantive due process review, prefer one reasonable legislative choice to another).

abridgement is the least restrictive means of achieving the objective in question.<sup>222</sup> Because the alternative of direct payments from the public fisc can achieve the same objectives without interfering with a protected liberty, a decision by the legislature to abridge liberty of contract would seem to be unreasonable.<sup>223</sup>

This result follows naturally from the scope of the police power envisioned by Thomas Cooley, Justice Bradley, and other contemporaries of the Fourteenth Amendment. According to these jurists, a law that offended liberty simply to transfer resources from one class to another did not fall within the police power and consequently was void.<sup>224</sup> This was simply an application of the more general assumption that the state could not take property from A and give it to B.<sup>225</sup> The occurrence of the Great Depression did not call for a different application of this principle.

Ironically, however, the availability of such a less restrictive alternative has, for some, provided the most convincing rationale for rejecting *Lochner's* protection for liberty of contract. Once the state has in place programs that are designed to aid the poor, an employer's failure to pay a sufficiently high wage can be viewed as casting upon the state the burden of an employee's subsistence.<sup>226</sup> To the extent that this burden can be characterized as an externality, this "realization" suggests that interference with contractual liberty can, in fact, be within the police power.<sup>227</sup> This reasoning formed at least part of the rationale of *West*

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222. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 128 (1989) (voiding ban on telephone pornography in light of less restrictive, albeit slightly less effective, alternatives).

223. See Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 474 (1997) ("The earned income tax credit (EITC) is considerably better than the minimum wage as a device for both progressive redistribution and encouraging workforce participation among the poor.").

224. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 120 (1872) (Bradley, J., dissenting); *Wynehamer v. New York*, 13 N.Y. 378, 390-91 (1856); COOLEY, *supra* note 81, at 487-99; see also GILLMAN, *supra* note 24, at 56-59 (describing Cooley's views on class legislation); HOVENKAMP, *supra* note 89, at 200-01.

225. See *Calder v. Bull*, 3 U.S. (3 Dall.) 385, 388 (1798) (Chase, J.).

226. See SUNSTEIN, *supra* note 6, at 49-50; Lessig, *supra* note 18, at 460-61.

227. See Lessig, *supra* note 18, at 460-61. See generally HOVENKAMP, *supra* note 89, at 200-01; SUNSTEIN, *supra* note 6, at 49-50; *supra* notes 88-90, 136-47 (describing police power as concerned with externality regulation).

*Coast Hotel*, which Justice Souter cited in both *Glucksberg* and *Casey* as an example of the proper approach to economic due process.<sup>228</sup>

Although appealing, this argument falls short as a faithful translation of the Due Process Clause. As an initial matter, it is not clear that this rationale for sustaining wage regulation can be characterized properly as a translation. Poor laws, after all, have been with us for a long time; they did not spring up shortly before or after 1937. Moreover, those who wrote and ratified the Fourteenth Amendment did appreciate the interaction between contractual liberty and the public fisc. Here, we must look to, of all places, the common law of trade restraints. Under this body of law, courts refused to enforce so-called general restraints, that is, contracts by which an individual agreed not to pursue his or her calling anywhere within the jurisdiction.<sup>229</sup> The most potent rationale for such refusal was the fear that individuals, having contracted away their right to work, would pursue less productive occupations, or become paupers and, thus, charges of the state.<sup>230</sup> Refusal to enforce these contracts protected the state from an externality—lower output and higher relief payments—and thus was consistent with the scope of the police power.<sup>231</sup>

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228. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937), cited in *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring); *Planned Parenthood v. Casey*, 505 U.S. 833, 861-62 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

229. See *Oregon Steam Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64, 68-69 (1873) (Bradley, J.); *Alger v. Thacher*, 36 Mass. (19 Pick.) 51, 54 (1837).

230. See *Union Strawboard Co. v. Bonfield*, 61 N.E. 1038, 1040 (Ill. 1901) ("The state regulates its internal affairs, supports those who become public charges, and is interested in the industries of its citizens."); *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525-26 (1880) ("When the avenues to trade and employment were impeded by artificial barriers, so that if one engaged not to practice his craft, no other occupation was free to him, and he was likely to remain an idle and useless, and to become a dangerous member of society, the court looked with grave displeasure upon any agreement by which one bound himself not to exercise his trade or mystery . . ."); CHARLES FISK BEACH, SR., A TREATISE ON THE LAW OF MONOPOLIES AND INDUSTRIAL TRUSTS 108 (1898) (noting that the law against general trade restraints "takes account of the interest of the community in providing that it shall not be deprived of the benefit of his business, or exposed to the burden of his support, as a result of his lack of employment"). One nineteenth-century commentator traced the law of trade restraints' concern with pauperism to fifteenth-century England. See 2 THEOPHILOUS PARSONS, THE LAW OF CONTRACTS 254-58 (3d ed. 1857).

231. See *Winsor*, 87 U.S. at 68 (stating that "general restraints" injured the public

The *Lochner* Justices presumably understood the law of trade restraints as well as the link between contractual liberty and the public fisc. Yet, even when advocates of minimum wage laws pointed out that the alternative to such regulation was state expenditure, the Court balked at validating such interference with private agreements.<sup>232</sup> There is, after all, an important distinction between the law of trade restraints and minimum wage laws. Where trade restraints are concerned, there is a clear basis for treating the parties in question as the source of harm. They have, after all, refused to work and now come to the state for assistance. Alternatively, where wages are concerned the employer has done no such thing. Instead, the employer has simply hired labor at a price that the market will bear, and is no more or less the source of the drain on the public fisc, than the grocer who has refused to give these same individuals food for a reduced price. Requiring the employer to bear the brunt of any "externality" appears, in a word, random, maybe even "arbitrary."<sup>233</sup> Indeed, the rationale for forcing an employer to bear such a burden would prove too much, justifying, as it would, a translation of the Takings Clause that allowed the state to protect the fisc by confiscating the home of a rich man and transferring it to a pauper.<sup>234</sup> Treating a low wage as producing an externality can hardly be described as a "translation"; it is in-

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by depriving it of "the restricted party's industry"); Meese, *supra* note 135, at 13-14 (analogizing refusal to enforce general restraints to police power regulation).

232. See *Adkins v. Children's Hosp.*, 261 U.S. 525, 528-29 (1923) (reproducing arguments of the United States). As Justice Stone put it, dissenting from the Court's decision to void New York's minimum wage, one year before *West Coast Hotel*:

In the years which have intervened since the *Adkins* case . . . [w]e have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and . . . that it casts on every taxpayer, and on government itself, the burden of solving problems of poverty, in subsistence, health, and morals of large numbers the community.

*Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 635 (1936) (Stone, J., dissenting). The Court, however, disagreed.

233. This, of course, was one of Justice Sutherland's many answers to those who sought to justify minimum wages for women on the grounds that higher wages would lead women toward chastity and good health. See *Adkins*, 261 U.S. at 555-59.

234. GILLMAN, *supra* note 24, at 46-47, 49-60 (concluding that such a statute would be outside the police power as conceived by antebellum courts).

stead a repudiation of the principle articulated by Bradley, Cooley, and others.

Still, defenders of *West Coast Hotel* have continued to press the argument that forcing employers to compensate the public for this "externality" is not arbitrary. If employees do not earn enough to feed themselves, these advocates point out, presumably they will not be able to work at all. By requiring the state to aid the underpaid from the public fisc, protection for liberty of contract essentially subsidizes employers who pay low wages.<sup>235</sup> Requiring an employer to pay a living wage, they argue, eliminates this subsidy and thus qualifies as a valid police regulation.

Here again, the conclusion that the failure to impose a minimum wage is the equivalent of a subsidy seems to require a rejection of any coherent principle supporting liberty of contract.<sup>236</sup> There is no reason to assume that employers are the only individuals who benefit from the labor of their employees. Customers also benefit from this labor which, after all, creates the products that consumers purchase. Moreover, most customers are so-called "inframarginal consumers" who pay less for a product than they receive in utility from it.<sup>237</sup> Failure to require a living wage for employees is as much a "subsidy" to the general consuming public—who pay a price that is a function of wages—as it is for employers. As a result, assigning to the employer the burden of the employee's support appears arbitrary after all. In light of the onerous effects of minimum wage legislation de-

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235. See SUNSTEIN, *supra* note 6, at 46 ("In *West Coast Hotel*, however, it is the failure of a state to have minimum wage legislation that amounts to a subsidy—this time, from the public to the employer."); Thomas Reed Powell, *Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 565-66 (1924) ("The conception that the need of the employee to live in health is 'extraneous' to the employment is sufficiently answered by pointing out that only by living in health can she furnish the labor which he chooses to use. . . . To say that the responsibility of the employer is in no sense 'peculiar' overlooks the fact that he alone is making use of the labor of the employee."); see also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (noting that although regulation infringes on liberty, it may be justified to protect the community).

236. Cf. *Washington v. Glucksberg*, 521 U.S. 702, 760 (1997) (Souter, J., concurring) (stating that principle of liberty of contract announced by *Allgeyer* was "unobjectionable").

237. See ARMEN ALCHIAN & WILLIAM ALLEN, *EXCHANGE AND PRODUCTION: THEORY AND USE* 22-23 (1969).

scribed above, such an abridgement of contractual liberty is an unduly restrictive method of achieving the objective in question.<sup>238</sup>

Ultimately, however, not much turns on the outcome of this argument. The "realization," if it is that, that firms are "subsidized" by state assistance to their employees does not justify plenary legislative control of wages, let alone the general authority to abridge liberty of contract and liberty of occupation. Instead, it merely supports interference with wages to the extent necessary to ensure that employees are fit to work, and nothing more.<sup>239</sup> In other words, although *West Coast Hotel* may have properly overruled *Adkins*, it did not, and based on its rationale could not, overrule *Lochner* or any liberty of occupation case not involving an attempt to require a subsistence wage.<sup>240</sup>

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238. See *supra* notes 183-87 (describing tendency of minimum wage to price unskilled workers out of the labor market).

239. Cf. SUNSTEIN, *supra* note 6, at 50-51 (noting that *West Coast Hotel* determined that the proper baseline was one in which employees received a living wage).

240. Of course, to the extent that certain occupations are dangerous and the state has in place systems to compensate those who are injured, the state may well have an interest in regulating the terms of employment. After all, individuals who know they will be compensated if injured will be less likely to negotiate for contractual protection against dangerous conditions. Cf. Meese, *supra* note 135, at 21-22 (arguing that the rule against general restraints was designed to redress market failure that arose given the availability of state assistance).

This recognition, however, does not justify the wholesale repudiation of liberty of contract. Indeed, the *Lochner* Court recognized just such a rationale for infringing liberty of contract, and would have sustained the law in question if, in fact, the State had shown that maximum hour laws were necessary to protect the health of the employees involved. See *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 206 (1917) ("The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare."); *Holden v. Hardy*, 169 U.S. 366, 396-97 (1898) ("The State still retains an interest in [the miner's] welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State must suffer." (quoting lower court opinion)). Of course, the *Lochner* Court may have erred when it held that baking was not an unhealthy occupation, or that health concerns could be addressed via a less restrictive means. See *Lochner v. New York*, 198 U.S. 45, 65-74 (1905) (Harlan, J., dissenting). The fact that the *Lochner* Court may have drawn the line in the wrong place does not mean that there was or is no line to be drawn.

## V. THE BABY AND THE BATHWATER

This Article thus far has evaluated and rejected each of the translations suggested or adumbrated by Justice Souter in *Glucksberg* and *Casey* as justification for the refusal to protect economic liberties under the aegis of substantive due process. Some may take issue with portions of the reasoning employed herein; others may reject most or all of it. Ultimately, however, whether one accepts or rejects the arguments offered thus far is in part beside the point, as none of Justice Souter's suggested translations can justify the abandonment of economic liberty generally.

Each of the translations discussed in this Article purports to justify the abandonment of liberty of contract as deployed in cases such as *Lochner* and *Adkins* to thwart regulation of wages and other aspects of the employment relationship. Yet, as noted earlier, liberty of contract was simply derivative of a larger right, liberty of occupation, deemed by Thomas Cooley, Justice Bradley, and the *Wynehamer* decision to be part of the liberty protected against arbitrary abridgement under the Due Process Clause.<sup>241</sup> Any argument for abandoning "economic due process" in its entirety must do more than undermine the results in *Lochner* and *Adkins*: it must also explain why, for instance, the state has the authority to prevent an individual from pursuing his or her chosen occupation, or to unduly interfere with that pursuit.<sup>242</sup>

Justice Souter, it should be emphasized, has simply not offered any such explanation. Neither the *Glucksberg* nor the *Casey* opinion suggested a rationale for abandoning liberty of occupation in its entirety. This failure is not surprising. Although the Justice seemed to be aware in *Glucksberg* that economic due process had its origin in the sort of liberty of occupa-

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241. See *supra* notes 93-98 and accompanying text.

242. Cf. *City of New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) (sustaining ordinance that excluded recent entrants in the push-cart vending business); *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (upholding a law regulating the practice of opticians); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (sustaining Louisiana law delegating control over entry into harbor pilot profession to incumbent pilots who typically excluded individuals who were not their relatives).

tion championed by Justice Bradley in the *Slaughter-House Cases*,<sup>243</sup> he persisted in his assertion that economic due process consisted simply of the aggressive scrutiny of laws regulating the employment relationship under the doctrine of liberty of contract.<sup>244</sup> Similar narrow characterizations of the doctrine are advanced by others hostile to the protection of economic liberty.<sup>245</sup>

This oversight has important implications for the success of Justice Souter's attempt to explain cases such as *West Coast Hotel* and *Carolene Products* as faithful applications of the original conception of the doctrine of substantive due process. Close analysis of the sort of translations offered or adumbrated by Justice Souter suggests that none of them even purports to explain why the abridgement of liberty of occupation falls within the police power and thus constitutes "due process of law" as understood by the Framers. None of the rationales for abandoning *Lochner* or *Adkins* canvassed in this Article support the failure to grant substantive due process protection to the right of an individual to pursue his or her calling, or the right to engage in a business that is not harmful to the public.<sup>246</sup>

Consider in this regard *Carolene Products*, which Justice Souter cited as evincing the proper approach to substantive due process.<sup>247</sup> There, the Court evaluated a federal statute banning the sale of so-called filled milk, a mixture of skim milk and vege-

243. See *Washington v. Glucksberg*, 521 U.S. 702, 759 (1997) (Souter, J., concurring) (describing Justice Bradley's dissent in the *Slaughter-House Cases* as advocating protection of liberty of occupation).

244. See *id.* at 761 (Souter, J., concurring) (asserting that *Adkins* and *Lochner* exemplified "deviant economic due process cases"); *Planned Parenthood v. Casey*, 505 U.S. 833, 861-62 (1992) (joint opinion of O'Connor, Kennedy and Souter, JJ.) (asserting that *Lochner* and *Adkins* exemplified the *Lochner* Era's protection for economic interests).

245. Professor Sunstein, for instance, describes the era of economic due process without mentioning liberty of occupation: "In the so-called *Lochner* period, covering 1905 to 1937, the Supreme Court struck down a large number of state laws attempting to regulate relations between employers and employees." SUNSTEIN, *supra* note 6, at 40, 45.

246. See Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 GEO. MASON L. REV. 405, 415-16 (1996) (suggesting that repudiation of *Lochner* due to "unequal bargaining power" did not justify repudiation of economic liberty generally).

247. See *Glucksberg*, 521 U.S. at 766 (Souter, J., concurring) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)); see also *supra* note 87 and accompanying text.

table oil, thus putting an entire class of entrepreneurs out of business.<sup>248</sup> In a decision most constitutional scholars have deemed "easy,"<sup>249</sup> the Court sustained this abridgement of occupational liberty, purportedly on the grounds that it furthered the health of consumers.<sup>250</sup> As one scholar has shown, however, the statute in question was unrelated to any bona fide health concerns but was instead a thinly disguised effort by the dairy industry to destroy a more nutritious and inexpensive competing product.<sup>251</sup> It is difficult to take the Court's suggestion to the contrary seriously.<sup>252</sup> *Carolene Products*, of course, paved the way for many other similar decisions validating arbitrary limits on occupational liberty. In *Ferguson v. Skupra*,<sup>253</sup> for instance, the Court sustained a statute that excluded non-lawyers from the occupation of debt-adjusting.<sup>254</sup> Similarly, in *New Orleans v. Dukes*,<sup>255</sup> the court sustained an ordinance that excluded recent entrants from the push-cart vending business, leaving the business in the hands of two individuals.<sup>256</sup> Such limits, it seems,

248. See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 398.

249. See *id.* at 398, nn.12-14 (collecting quotations of scholars calling the decision "easy," "straightforward," and "unexceptional").

250. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

251. As Professor Miller has put it:

If the preference embodied by this statute was not 'naked,' it was clothed in only gossamer rationalizations. The consequence of the decision was to expropriate the property of a lawful and beneficial industry; to deprive working and poor people of a healthful, nutritious, and low cost food, and to impair the health of the nation's children by encouraging the use as baby food of a sweetened condensed milk product that was 42 percent sugar.

Miller, *supra* note 248, at 399; see also SIEGAN, *supra* note 4, at 188-89 (suggesting that the law was passed to placate "the milk bloc").

252. See Miller, *supra* note 248, at 399 ("It is difficult to believe that members of the Court were unaware of the true motivation behind this legislation.").

253. 372 U.S. 726 (1963).

254. See *id.* at 732-33.

255. 427 U.S. 297 (1976).

256. See *id.* at 305; see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473-74 (1981) (sustaining state law that banned sale of milk in certain plastic containers despite finding by state courts that the law was motivated by desire to protect economic interests of local dairies); *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (sustaining a law regulating the practice of opticians); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 557-64 (1947) (sustaining a state law regulating entry into the harbor pilot profession); *Olsen v. Nebraska ex rel. Western Ref. &*

simply cannot be squared with the conception of liberty embraced by the sources on which Justice Souter relied for the existence of substantive due process.<sup>257</sup> Instead, they would be deemed "arbitrary and unjust laws made in the interest of a few scheming individuals."<sup>258</sup>

None of the various translations advanced in support of the repudiation of *Lochner* and *Adkins* purport to justify the Court's failure to void this sort of naked abridgement of the harmless businesses involved in *Carolene Products* and its progeny. There can be no assertion, for example, that eliminating an entire industry somehow enhances the bargaining position of consumers vis a vis sellers of dairy products.<sup>259</sup> To the contrary, the enactment, like other state-imposed restrictions on entry, likely raised consumer prices.<sup>260</sup> Nor can there be any assertion that the statute, passed well before the Depression, was a method of ensuring macro-economic stability.

Indeed, many of the translations advanced to justify abandonment of liberty of contract actually buttress the case for protecting liberty of occupation in cases such as *Carolene Products*. For instance, by eliminating the filled milk industry, Congress likely threw thousands of individuals out of work, rendering them burdens on the community as a whole. Moreover, filled milk was a less expensive substitute for condensed milk, thereby allowing

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Bond Assoc., 313 U.S. 236 (1941) (sustaining price regulation of apparently competitive business). To be sure, decisions such as *Dukes* and *Kotch* relied upon the Equal Protection Clause, and not the Due Process Clause. Still, each decision rested upon an explicit or implicit assumption that the pursuit of one's chosen occupation is not an important liberty. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976); *Kotch*, 330 U.S. at 557-64. This assumption, of course, can be traced to *Carolene Products*. See *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1937).

257. Cf. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 116 (1872) (Bradley, J., dissenting); COOLEY, *supra* note 81, at 357 (arguing that a law designed to transfer wealth from one group to another could not constitute due process of law).

258. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 120.

259. See *supra* notes 136-47 (canvassing sources suggesting that *Lochner* and *Adkins* were incorrect given presence of unequal bargaining power).

260. See Miller, *supra* note 248, at 427 (pointing out that even though the statute increased costs to *Carolene Products*, it also eliminated *Carolene Products*' competition). See generally Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976) (noting that licensing of professions is often accompanied by undesirable consequences).

the poor to stretch their food dollars farther and enhance their health.<sup>261</sup> Not only did the law in question destroy the occupational liberty of thousands, it also created externalities of the sort that opponents of *Lochner* have relied upon to justify the repudiation of liberty of contract.<sup>262</sup>

Of course, not all manufacturers of filled milk became penurious as a result of the statute validated in *Carolene Products*. Presumably, some were able to find employment elsewhere, in callings other than the one they had chosen initially. Yet, to the extent such employment involved working for others and not for themselves, the law in question resulted in "wage slavery" of the type that to some justified the abridgements of liberty of contract like those voided in *Lochner* and *Adkins*.<sup>263</sup> In other words, to the extent the "liberty" protected by the Fourteenth Amendment consisted solely of the liberty of an entrepreneur to ply his or her trade, a prohibition on the sale of filled milk would seem to be the most blatant possible violation of its terms.<sup>264</sup>

261. One cannot help but recall Justice McReynolds's powerful dissent in *Nebbia v. New York*, 291 U.S. 502 (1934), where the Court sustained state regulations fixing the retail price of milk at above-market prices:

[The statute] imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others. . . . A superabundance [of milk]; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters!

*Id.* at 557-58 (McReynolds, J., dissenting).

262. See *supra* notes 88-89 and accompanying text (explaining that the "police power" consisted of the authority to regulate externalities).

263. See *supra* notes 122-24 and accompanying text.

264. Cf. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 119-20 (1872) (Bradley, J., dissenting) ("To compel a butcher, or rather all the butchers of a large city and an extensive district, to slaughter their cattle in another person's slaughterhouse and pay him a toll therefor, is such a restriction upon the trade as materially to interfere with its prosecution. It is onerous, unreasonable, arbitrary, and unjust. It has none of the qualities of a police regulation."); *People v. Marx*, 99 N.Y. 377, 385-86 (1885) (voiding law similar to that sustained in *Carolene Products*).

In *Marx*, it should be noted, the New York Court of Appeals cited Justice Field's dissent as persuasive authority for the "firmly settled" proposition that "it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit." *Marx*, 99 N.Y. at 386 (citing the *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 106 (Field, J., dissenting)). The court went on to conclude:

Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an

Thus, even if it were appropriate for the Court to overrule *Lochner* and *Adkins*, there was no justification for contemporaneously abandoning that line of decisions carefully scrutinizing statutes abridging individual occupational liberty.<sup>265</sup> Absent some new forms of "translation" different from those suggested by Justice Souter and others, the departure from these decisions cannot be explained as an act of fidelity to the original meaning of the Due Process Clause, if that provision is deemed to have a substantive component.

### CONCLUSION

Unlike some devotees of substantive due process, Justice Souter has expressly grounded his support for that doctrine in the original meaning of the Fourteenth Amendment. Ironically, however, the Justice has made it clear that he would abjure any protection for economic liberties, even though it appears that those who wrote and ratified the amendment deemed such rights an important component of "liberty" that could be abridged only in narrow circumstances. This selective enforcement of the Due Process Clause raises serious questions about Justice Souter's claim that, in conducting substantive due process review, courts are merely carrying out the mandate of the Constitution's text in a manner consistent with "reasoned judgment" and not "will."

For some scholars, this apparent inconsistency is easy to explain. Whatever the original meaning of the Due Process Clause,

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important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race.

*Id.* at 385.

265. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 279-80 (1932) (voiding state limits on entry into the ice business); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 113 (1928) (voiding state statute prohibiting chain drug stores); *Adams v. Tanner*, 244 U.S. 590, 596-97 (1917) (voiding state limits on conduct of employment agencies); *Smith v. Texas*, 233 U.S. 630, 642 (1914) (voiding a statute that made it unlawful to serve as a train conductor without two years prior experience as a brakeman or conductor); see also *Marx*, 99 N.Y. at 387 (voiding a law that forbade sale of dairy products produced from adulterated milk or cream); *In re Jacobs*, 98 N.Y. 98, 113-15 (1885) (voiding a law that forbade manufacture of cigars in tenement houses).

they say, the events of 1937 amended the Constitution so as to make it clear that the sort of economic liberties recognized by *Lochner* and its progeny should not receive constitutional protection. This "constitutional moment," they emphasize, did not reject substantive due process as such, but instead left the Court free to recognize new rights outside the economic arena.

In attempting to justify his failure to accord protection to economic liberties, Justice Souter has not relied on the occurrence of a constitutional moment; nor has he questioned the commitment of the Framers to economic liberties. Instead, he has attempted to portray the abandonment of economic due process as a faithful implementation of the Fourteenth Amendment in light of subsequent developments. Such an approach, which scholars have referred to as "translation," is an accepted method of ensuring that values enshrined by the Framers are kept up to date in a rapidly changing society. Various translations, Justice Souter has argued, justify the sort of lenient protection for economic liberties evinced by cases such as *West Coast Hotel* and *Carolene Products*.

As this Article has shown, each of the translations suggested by Justice Souter and others is of questionable validity. Moreover, even if taken on their own terms, the suggested translations do not justify the repudiation of liberty of contract as such; instead, they simply mandate the repudiation of particular applications of it. Finally, even if one or more of these suggested translations does, somehow, justify the wholesale abandonment of liberty of contract, none of them even purports to offer a rationale for failing to protect occupational liberty of the sort that initially formed the basis for liberty of contract.

Justice Souter and other proponents of "translation" thus have failed to offer a convincing rationale for their admitted unwillingness to protect the sort of economic liberties valued by the Framers. Unless some new explanation is forthcoming, the refusal to enforce those rights will necessarily call into question the Justice's assertion that the current scope of liberty protected under the aegis of substantive due process can be explained as a faithful application of the original meaning of the Fourteenth Amendment. Absent an embrace of the theory of constitutional moments, or abandonment of substantive due process altogether,

the Justice and others who take a similar approach will properly be subject to the charge that they are exercising will and not judgment.