

The Due Process Right To Pursue a Lawful Occupation: A Brighter Future Ahead?

David E. Bernstein

For decades, the Supreme Court has rejected arguments that the Fourteenth Amendment's Due Process Clause protects a general right to liberty of contract worthy of more than cursory judicial attention. Instead, the Court, along with most state courts, has reviewed economic regulations that do not implicate the Bill of Rights under a very forgiving version of the rational basis test that leaves little room for successful challenges. Despite remonstrations from libertarian enthusiasts inside and outside of the academy,¹ there is no realistic prospect that judicial protection of liberty of contract will be reasserted anytime soon.

Recent precedent, however, suggests that courts are becoming more protective of what has traditionally been considered a subset of liberty of contract: the right to pursue an occupation. The Texas Supreme Court's opinion in *Patel v. Texas Department of Licensing & Regulation*² is a dramatic example of a court reconsidering decades of judicial deference to all manner of occupational regulations. *Patel* invalidated a law that required individuals who make their living by threading eyebrows to obtain a cosmetology license, which requires costly,

1. See, e.g., 159 CONG. REC. S1160-61 (daily ed. Mar. 6, 2013) (statement of Sen. Rand Paul endorsing *Lochner v. New York*); DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011); CLARK M. NEELY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT (2013); TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW (2010); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

2. 469 S.W.3d 69 (Tex. 2015).

time-consuming training that is almost entirely irrelevant to eyebrow threading. Instead of applying the usual flaccid version of the rational basis test, the court concluded that, under the Texas Constitution, the government cannot meet the test if “the statute’s actual, real-world effect as applied to the challenging party . . . is so burdensome as to be oppressive in light of[] the governmental interest.”³

Meanwhile, a series of federal court opinions has held that mere economic protectionism favoring incumbents does not count as a rational basis that can sustain occupational regulations under the Fourteenth Amendment.⁴ These decisions are consistent with ancient Anglo-American constitutional tradition opposed to governmental grants of monopoly power to aid favored businesspeople and exclude others.⁵ However, they clash with the widespread understanding that economic “substantive due process”⁶ is entirely dead, buried at least since *West Coast Hotel Co. v. Parrish*,⁷ and also clash with the decisions of other federal courts that economic protectionism is a valid rational basis for upholding occupational restrictions.⁸

3. *Id.* at 87.

4. *E.g.*, *Saint Joseph Abbey v. Castille*, 712 F.3d 215, 226-27 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991-92 n.15 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220, 222, 224 (6th Cir. 2002). Several district court decisions have also invalidated occupational regulations on the basis that they served no legitimate government interest. *E.g.*, *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 434 (S.D. Miss. 2000); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. Civ.1:98-CV-3084-MHS, 1999 WL 33651794, at *1 (N.D. Ga. 1999); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1278 (S.D. Cal. 1997); *Santos v. City of Houston*, 852 F. Supp. 601, 608-09 (S.D. Tex. 1994).

5. See Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 314-17 (1985); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983 (2013); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785 (1982); Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 HARV. J.L. & PUB. POL’Y 181, 182 (1997); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

6. The phrase “substantive due process” is anachronistic when applied to the period before the 1940s. The conceptual separation of due process into “substantive” and “procedural” parts arose later. See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 245 (2000); see also JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 103-04 (2d ed. 1998) (discussing economic due process).

7. 300 U.S. 379, 398-400 (1937) (upholding a state minimum wage law for women, and calling into question the viability of the Supreme Court’s liberty-of-contract jurisprudence).

8. *E.g.*, *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 281-82 (2d Cir. 2015); *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004); *Meadows v. Odom*, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, *Meadows v. Odom*, No. 05-30450, 2006 WL 2168631 (5th Cir. 2006).

In this Essay, I explore the prospects for a revival of the right to pursue a lawful occupation under the Due Process Clause. In Part I, I argue that federal courts' decisions that economic protectionism is not a rational basis properly apply the rational basis test and are not precluded by Supreme Court precedent. I also discuss the doctrinal collapse of the Court's longstanding fundamental rights/non-fundamental rights dichotomy in its substantive due process decisions, and suggest that this collapse may provide an opening for litigants to argue for a more robust test for laws that restrict entry to occupations.

In Part II, I discuss the prospects for increased judicial engagement with occupational restrictions under the Due Process Clause if the Supreme Court is controlled in the future by conservative or liberal Justices, respectively. I suggest that in the near term, a conservative Court is unlikely to increase scrutiny of occupational regulations because some of the Court's conservatives are committed to opposing any novel uses of "substantive" due process. I also propose that, counterintuitively, a Court controlled by liberal Justices may be more willing to aggressively review occupational restrictions challenged as violations of the Due Process Clause.

I. WHY SUPREME COURT PRECEDENT DOES NOT PRECLUDE JUDICIAL ENGAGEMENT WITH OCCUPATIONAL RESTRICTIONS

There are two, and only two, Supreme Court cases since the New Deal that have expressly dealt with the substantive right of an individual to pursue an occupation under the Due Process Clause of the Fourteenth Amendment.⁹ *Williamson v. Lee Optical*¹⁰ and *Ferguson v. Skrupa*.¹¹ Both are many decades old. As we shall see, in light of subsequent developments, neither should be read as preventing meaningful judicial review of legislation that denies an individual the right to pursue an occupation.

9. Two other cases that often come up in the context of arbitrary restrictions on an individual's right to pursue a lawful occupation are *City of New Orleans v. Duke*, 427 U.S. 297 (1976), and *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947). These cases, however, involved only the Equal Protection Clause, and not due process. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957), is sometimes invoked as protecting a relatively robust due process right to pursue an occupation, but the opinion is best read as involving "procedural" due process, rather than the "substantive" rights discussed in this Essay. An emerging issue, meanwhile, is whether the First Amendment provides robust protection against occupational restrictions that impinge on freedom of speech, such as requirements that tour guides have a government-issued license. That issue is beyond the scope of this Essay.

10. 348 U.S. 483 (1955).

11. 372 U.S. 726 (1963).

A. *Williamson v. Lee Optical*

Decided in 1955, *Williamson* upheld an Oklahoma law that prohibited opticians from fitting old vision-correcting lenses into new frames and from supplying a lens for vision correction without a prescription, even if the optician was merely duplicating an existing lens. On its face, that provision looks like special-interest legislation benefiting eye doctors. The Court, however, argued that it was sufficient for constitutional purposes that the legislature *may* have decided that the benefits that would arise from implicitly encouraging visits to an eye doctor for an examination outweighed the harms to consumers and opticians.¹² The Court did not require evidence that this was in fact the legislature's motive, nor did it engage in an evaluation of the likelihood that the benefits of the law exceeded the costs.

While often seen as a radical break from the pre-New Deal due process jurisprudence of the so-called *Lochner* era,¹³ *Williamson's* novelty was not its holding or formal reasoning,¹⁴ but its adherence to and elaboration of the Court's pronouncement in 1938 in *United States v. Carolene Products Co.* In that case, the Court proclaimed that ordinary economic legislation challenged as a violation of due process rights will be subject to a rational basis test.¹⁵ The Court wrote in *Williamson* that legislation passes the rational basis test if "there is an evil at hand for correction" and if "it might be thought that the particular legislative measure was a rational way to correct it."¹⁶

Two things should be noted about *Williamson*. First, nothing in it precludes a court from finding that mere economic protectionism is not a "rational basis" for legislation interfering with the pursuit of an occupation. The Court in *Williamson* identified a public health rationale for the law at issue,¹⁷ but it did not address what would have happened if no such rationale had been available. Second, *Williamson* did not directly address a situation like *Patel*, where

12. *Williamson*, 348 U.S. at 487-88.

13. See, e.g., Randy E. Barnett, *Keynote Remarks: Judicial Engagement through the Lens of Lee Optical*, 19 GEO. MASON L. REV. 845, 857, 860 (2012).

14. See Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1096 (2014) ("The formal reasoning of the *Lee Optical* decision was not novel.").

15. 304 U.S. 144, 152 (1938) ("[A] statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.").

16. *Williamson*, 348 U.S. at 488.

17. *Id.* at 487. ("The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses.").

the legislature is not merely regulating industrial and business conditions but is actually precluding an individual from pursuing a lawful vocation.

B. *Ferguson v. Skrupa*

In 1963, the Supreme Court ventured again into substantive due process limitations on regulations of occupational liberty. *Ferguson v. Skrupa* upheld a state law that limited the profession of debt-adjusting to lawyers.¹⁸ Unlike *Williamson*, which favorably cited a pre-New Deal precedent upholding a similar regulation of the provision of eye care, *Ferguson* strongly rejected the 1917 case of *Adams v. Tanner*,¹⁹ which had invalidated a state law banning employment agents from receiving fees from workers in exchange for helping them find a job. *Ferguson* rejected the distinction between regulation and prohibition that was key to *Tanner's* holding.²⁰

Ferguson, moreover, can be read as holding that the Court should defer to any and all legislation, or at least economic legislation, challenged under the Due Process Clause unless a litigant could point to a specific provision of the Constitution guaranteeing the right in question.²¹ That was surely the intent of *Ferguson's* author, Justice Black, who consistently objected to the use of the Due Process Clause to protect unenumerated rights.²²

Ferguson's holding—that the legislature can restrict which categories of professionals may engage in a business seen as prone to exploitation and fraud—is sound today under even a relatively stringent version of the rational basis test that would allow courts to invalidate clearly arbitrary or abusive legislation. Yet if one reads Justice Black's opinion as advocating a judicial stance against enforcing unenumerated rights, that opinion was undermined just two years later in *Griswold v. Connecticut*.²³

Griswold invalidated Connecticut's law restricting the availability of birth control. To almost no one's satisfaction (and certainly not to Justice Black's, as

18. 372 U.S. 726 (1963).

19. 244 U.S. 590 (1917).

20. *Ferguson*, 372 U.S. at 732 (1963) (“Nor are we able or willing to draw lines by calling a law ‘prohibitory’ or ‘regulatory.’”).

21. *Id.* at 730-31 (“It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.”).

22. See David E. Bernstein, Bolling, *Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253, 1278 n.163 (2005).

23. 381 U.S. 479 (1965).

he dissented), *Griswold* purported to be relying on the “penumbras” and “emanations” of enumerated rights, rather than directly on unenumerated rights.²⁴ That doctrinal dodge, however, was put to rest in *Roe v. Wade* in 1973,²⁵ when the Court protected an unenumerated right to terminate pregnancy based solely on its reading of the Due Process Clause. The Court’s recognition of an unenumerated “right of privacy” with regard to decisions related to procreation laid to rest the possibility that *Ferguson v. Skrupa* could be read as rejecting any protection for unenumerated rights.²⁶ This in turn reopened the possibility that the Due Process Clause could be read as protecting substantive but unenumerated economic rights. Critics of *Roe*, unsurprisingly, accused the Court of disinterring *Lochner v. New York*.²⁷

C. Due Process Clause Developments Since *Griswold* and *Roe*

One could argue that *Griswold* and *Roe* are exceptional because the Court recognized the rights at issue as “fundamental,” whereas the Court has not recognized economic rights, including the right to pursue an occupation, as fundamental. In recent years, however, doctrinal coherence in the realm of due process has collapsed. It used to be black letter law that the Court divided due process liberty claims into two categories. Due process claims involving rights the Court recognized as fundamental, such as rights relating to the decision to bear a child, were subject to a very demanding “strict scrutiny” standard. To survive judicial review, infringements on such rights needed to be “narrowly tailored” to serve a “compelling” government interest. Non-fundamental rights claims, including economic rights claims, received cursory review under the rational basis standard.²⁸

This paradigm is no longer an accurate description of the Court’s jurisprudence. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁹ the plurality applied something less than strict scrutiny to infringements on the fundamental right of a woman to terminate her pregnancy. *Casey* replaced the “compelling state interest” test for abortion regulation with an “undue burden”

24. *Id.* at 484.

25. *Roe v. Wade*, 410 U.S. 113 (1973).

26. *Id.* at 152.

27. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-43 (1973).

28. See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 313 (1993) (“Hornbook law posits a distinction between ‘strict’ scrutiny in cases involving ‘fundamental’ rights and ‘rational basis’ review in other disputes . . .”).

29. 505 U.S. 833 (1992).

test.³⁰ In *Troxel v. Granville*,³¹ the plurality found that the right to raise one's children is a fundamental right, but, as Justice Thomas pointed out, failed to articulate the relevant standard of review.³² In *Lawrence v. Texas*,³³ the Court protected the right to engage in homosexual sodomy without identifying it as a fundamental right, while seemingly applying something stricter than the ordinary rational basis test. In *Obergefell v. Hodges*,³⁴ the Court enforced a right to same-sex marriage by creating a due process-equal protection stew, without applying the "compelling interest" test that is supposed to govern infringements on fundamental rights. And, most recently, in *Whole Women's Health v. Hellerstedt*,³⁵ the Court seemed to rewrite the undue burden test as a new test bearing the same name but requiring stricter scrutiny (but not "strict scrutiny") of challenged abortion regulations.³⁶

In short, in cases involving unenumerated rights claims brought under the Due Process Clause, the Court has been ignoring prior doctrine and instead balancing the importance of the right at issue against the government's interest in infringing upon that right. The Court has done so without addressing the formalities of the fundamental/non-fundamental distinctions or the compelling interest/rational basis test. Perhaps ironically, this sort of balancing is what the Court did under the Due Process Clause during the much derided "*Lochner* era."³⁷

At least for now, the collapse of doctrinal orthodoxy presents an opportunity for advocates of a right to pursue an occupation to ask the Court to challenge the notion that all economic regulations deserve only the most minimal scrutiny under the Due Process Clause; restrictions on the right to pursue an occupation can be given meaningful scrutiny without, for example, giving corporations an avenue to object to routine economic regulation.

30. *Id.* at 871, 874.

31. 530 U.S. 57 (2000).

32. *Id.* at 80 (Thomas, J., concurring).

33. 539 U.S. 558 (2003).

34. 135 S. Ct. 2584 (2015).

35. 136 S. Ct. 2292 (2016).

36. *See id.* at 2321 (Thomas, J., dissenting).

37. Rather than rejecting *Lochner's* methodology, the *Casey* plurality instead rejected only its conclusions: "[T]he Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* [a liberty of contract case relying on *Lochner*] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861-62 (1992) (O'Connor, Kennedy, and Souter, JJ., concurring).

Even if that argument receives no traction, the Court could affirm *Williamson*'s rational basis test, and not *Ferguson*'s absolute deference dicta, as the operative standard for judging restrictions on occupational liberty. Such a ruling would permit courts to hold that mere economic protectionism favoring incumbents over new entrants is not a legitimate state interest that constitutes a "rational basis" for purposes of due process litigation.³⁸

II. THE RIGHT TO PURSUE AN OCCUPATION IN THE FUTURE

Whether or to what extent the Court's abandonment of the fundamental/non-fundamental rights dichotomy is doctrinally stable is unclear. One could argue that this abandonment is less a product of "the Court" and more a product of Justice Kennedy's idiosyncratic perspective, combined with the liberal Justices' acquiescence to his perspective because of their need to get his fifth vote to win a majority. If so, once Justice Kennedy is no longer the deciding vote, a liberal or conservative majority may restore the old dichotomy—especially since the Court has not formally acknowledged its abandonment.

A. *The Future of the Right to Pursue an Occupation under a Conservative Supreme Court Majority*

In recent years, support for judicial enforcement of a right to pursue an occupation has come almost entirely from the ideological "right." However, strong opposition to judicial protection of substantive, unenumerated economic rights still lingers in conservative circles.

As a reaction to perceived excesses of the Warren Court, conservative legal theorists like Robert Bork adopted the earlier Progressive movement's hostility to "judicial activism" in general, and to protecting unenumerated rights under the Due Process Clause in particular.³⁹ This hostility became hardened conservative orthodoxy after the Supreme Court declared the abortion laws of all fifty states unconstitutional in *Roe*.⁴⁰ Conservatives coopted the Progressive cri-

38. In *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287 (2d Cir. 2015), the court cited *Williamson* but not *Ferguson*, and still ultimately concluded that economic protectionism is a rational basis for legislation for constitutional purposes. So while *Williamson* hardly precludes the opposite conclusion, it obviously does not require it.

39. See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 117-18 (2011).

40. See *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

tique of *Lochner* and other due process cases reflected in, for example, Justice Black's jurisprudence.⁴¹

In theory, despite hostility to anything that smacks of *Lochner*, the conservative Justices could still support the specific right to pursue an occupation as a fundamental right under *Washington v. Glucksberg*. In *Glucksberg*, the conservative Justices explained that, in order for the Court to recognize an unenumerated right as fundamental, the right must be "deeply rooted in [the] Nation's history and tradition," and must be carefully described and defined.⁴² The right to pursue an occupation free from arbitrary government action is certainly deeply rooted in American history.⁴³ One imagines the Court could also find a way to define the right carefully and narrowly, protecting the specific right to not be excluded from a profession by arbitrary and oppressive licensing rules, and not a broader and much less historically grounded right to be free from occupational regulations that impinge on freedom of contract, such as minimum wage laws. Alternatively, the Court's conservatives could continue to apply the rational basis test but adopt the reasoning of several lower courts that mere economic protection is not a "rational basis" for excluding someone from an otherwise lawful calling.⁴⁴

As long as "substantive" due process with regard to unenumerated rights is associated with abortion and same-sex marriage, however, the use of the Due Process Clause to protect the right to pursue an occupation will likely have difficulty gaining traction among conservatives. The Supreme Court's current

41. Most recently, Chief Justice John Roberts, dissenting in the *Obergefell* same-sex marriage case, accused the Court's majority of reenacting the mistakes of *Lochnerism*. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621-22 (Roberts, C.J., dissenting); see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690-91 (1999) (Scalia, J.) (stating that the Court erred in *Lochner* by trying "to impose a particular economic philosophy upon the Constitution"). In doing so, Chief Justice Roberts repeated a series of myths about *Lochner* that have been undermined by decades of scholarship. See *Patel v. Tex. Dep't. of Licensing & Regulation*, 469 S.W.3d 69, 94 n.11 (Tex. 2015) (Willett, J., concurring) (alluding to this scholarship and rejecting the "*Lochner* bogeyman"); see generally BERNSTEIN, *supra* note 41 (explaining how Progressive hostility to pre-New Deal due process cases was eventually adopted by conservative jurists).

42. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (plurality opinion)).

43. See, e.g., *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."); *Yick Wo v. Hopkins*, 129 U.S. 114 (1886); James W. Ely, Jr., "To Pursue Any Lawful Trade or Avocation": *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917 (2006).

44. See cases cited *supra* note 4.

conservatives, with the possible exception of Justice Kennedy,⁴⁵ will not be willing to use the Due Process Clause to protect economic rights for fear of giving aid to the other side by supposedly resurrecting *Lochner*.

Not all conservative judges share this hostility to anything that remotely resembles *Lochner*. Four years ago, two Republican D.C. Circuit appointees called for the Supreme Court to reconsider the flaccid rational basis test for economic regulations.⁴⁶ One of those judges, Janice Rogers Brown, is an unabashed fan of *Lochner*.⁴⁷ Another prominent conservative D.C. Circuit judge, Senior Judge Douglas Ginsburg, has also questioned the traditional conservative consensus on protection of economic rights through the Due Process Clause.⁴⁸ More generally, the younger generation of elite conservative lawyers seems much less inclined than its elders to favor blind judicial deference to all economic legislation.⁴⁹ It will, however, take a generation or two before these views have an opportunity to be well-represented on the Court.

A revival of the right to pursue an occupation from the conservative side will more likely begin in state courts rather than in the Supreme Court.⁵⁰ State supreme courts generally turn over much faster and their justices do not need to worry about how their decisions affect *Roe* or *Obergefell*. We have already seen the Texas Supreme Court issue an aggressive opinion protecting occupa-

45. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), four Justices concluded that a law making a company retroactively responsible for pension and other costs that accrued to workers before the company challenging the law existed violated the Takings Clause, Four Justices concluded it did not, and Justice Kennedy, providing a fifth vote against the government, held that the “egregious” law violated the Due Process Clause. See also *supra* note 37 and accompanying text (noting that Justice Kennedy joined an opinion accepting *Lochner*’s methodology but rejecting the notion that the Due Process Clause protects a broad right to liberty of contract).

46. *Hettinga v. United States*, 677 F.3d 471, 480-83 (D.C. Cir. 2012) (Brown, Griffith, JJ., concurring).

47. See Janice Rogers Brown, Assoc. Justice, Calif. Supreme Court, “A Whiter Shade of Pale”: Sense and Nonsense—the Pursuit of Perfection in Law and Politics, Address Before the Federalist Society of the University of Chicago Law School (Apr. 20, 2000) (transcript available at <http://ejournalofpoliticalscience.org/janicerogersbrown.html> [<http://perma.cc/6NM2-VNMY>]).

48. Menashi & Ginsburg, *supra* note 14.

49. See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 579 (2015).

50. Remarkably, Clint Bolick, a strong advocate of the constitutional protection of economic liberty and co-founder of the libertarian Institute for Justice, recently was appointed to the Arizona Supreme Court. See Press Release, Governor Doug Ducey, Governor Doug Ducey Announces First Arizona Supreme Court Appointment (Jan. 6, 2016), <http://azgovernor.gov/governor/news/2016/01/governor-doug-ducey-announces-first-arizona-supreme-court-appointment> [<http://perma.cc/4Y7Z-3JT7>].

tional liberty under the Texas Constitution, with three justices explicitly rejecting the “*Lochner* bogeyman.”⁵¹ State court opinions questioning the dogma of deference could very well eventually influence the debate on the U.S. Supreme Court on the issue of occupational liberty, as they have in the context of takings and public use.⁵² State courts might accelerate the process by directly challenging (or at least creatively reinterpreting) existing Supreme Court precedent, rather than relying solely on state constitutional provisions.⁵³

B. The Future of the Right to Pursue an Occupation Under a Liberal Supreme Court Majority

If Democratic appointees come to control the Court, the current era of ad hoc balancing of liberty rights against governmental interests may prove short-lived. Given that a liberal majority has not controlled the Supreme Court for over forty years, one can only speculate about what might be in store. It seems very possible, however, that a liberal majority would choose to define new categories of “fundamental rights,” infringement of which would trigger strict scrutiny, perhaps along with new categories of merely important rights, infringement of which would trigger some sort of intermediate scrutiny.⁵⁴

Of course, liberals also tend to have faith in the capacity of government regulation to serve the public interest, creating a significant ideological barrier to a liberal Supreme Court invalidating occupational regulations. That faith, however, is not absolute, and progressives are increasingly expressing skepticism of occupational rules that have at best a tenuous connection to public welfare.⁵⁵ It is one thing to require a great deal of training and government certification for someone to work as a physician or attorney—occupations where the

51. *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 94 n.11 (Tex. 2015).

52. Justice O'Connor's important dissent in *Kelo v. City of New London*, 545 U.S. 469 (2005), for four Justices seems to have been modeled on the Michigan Supreme Court's unanimous decision in *Wayne County v Hathcock*, 684 N.W.2d 765 (Mich. 2004). See ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 128 (2015) (noting that some of Justice O'Connor's reasoning “may have been borrowed” from *Hathcock*).

53. See Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court's Errors*, 19 GEO. MASON L. REV. 1029 (2012).

54. This, of course, resembles black letter equal protection law, where some classifications, such as race, trigger strict scrutiny, while others, such as sex, trigger intermediate scrutiny.

55. See, e.g., Sebastian Johnson, *The Progressive Case against Occupational Licensing*, UNFETTERED EQUALITY (Feb. 23, 2015), <http://unfetteredequality.com/2015/02/23/the-progressive-case-against-occupational-licensing/> [<http://perma.cc/6XAQ-D4VF>]; Matthew Yglesias, *Obama's War on Excessive Occupational Licensing Highlights His Increasingly Unfashionable Brand of Liberalism*, VOX (June 20, 2016, 9:00 AM), <http://www.vox.com/2016/6/20/11963748/obama-occupational-licensing> [<http://perma.cc/E9A5-HMCP>].

well-being of the public can reasonably be thought to be at stake.⁵⁶ It is quite another for potential florists, African hair-braiders, or casket-sellers—all of whom have sued over occupational restrictions, and none of whom present risks to public well-being—to face expensive, time-consuming and broadly unreasonable barriers to entry.⁵⁷

Moreover, occupational licensing laws that restrict occupational freedom are meant to preserve the advantages of incumbents to a profession—disproportionately entrenched native-born whites—at the expense of newcomers, often immigrants and people of color.⁵⁸ Licensing laws can restrict access to services utilized primarily by members of minority groups, such as African-style hair braiding, and can inhibit efforts to protect vulnerable consumers from price gouging by monopolists. Many licensing laws also gratuitously exclude former convicts from pursuing occupations, even when the connection to public safety is tenuous at best.⁵⁹

It is not surprising, then, that egalitarian liberals concerned with dismantling laws that institutionalize and enforce unearned privilege are growing increasingly mistrustful of licensing laws. Perhaps, it also should not be surprising that the Obama administration came out with a report in 2015 that was strongly critical of the proliferation of licensing laws,⁶⁰ and the Hillary Clinton

56. Note, however, that liberal courts and advocacy groups have been in the forefront of arguing in favor of the right of undocumented individuals to become members of state bars. See, e.g., Jennifer Medina, *Allowed to Join the Bar, but Not to Take a Job*, N.Y. TIMES (Jan. 2, 2014), <http://www.nytimes.com/2014/01/03/us/immigrant-in-us-illegally-may-practice-law-california-court-rules.html> [<http://perma.cc/P8BK-HD45>].

57. See Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 NYU J.L. & LIBERTY 898 (2005).

58. See Stuart Dorsey, *Occupational Licensing and Minorities*, 7 L. & HUM. BEHAV. 171, 173-75 (1983). For some additional history, see David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89 (1994). But see Marc T. Law & Mindy S. Marks, *Effects of Occupational Licensing Laws on Minorities: Evidence from the Progressive Era*, 52 J.L. & ECON. 351 (2009) (claiming occupational licensing actually aided minorities). For a devastating critique of the latter study, see Daniel B. Klein, et al., *Was Occupational Licensing Good for Minorities? A Critique of Marc Law and Mindy Marks*, 9 ECON. J. WATCH 210 (2012).

59. See Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CENT. FOR AM. PROGRESS, (Dec. 2014), <http://www.americanprogress.org/issues/poverty/report/2014/12/02/102308/one-strike-and-youre-out/> [<http://perma.cc/TB9Q-DMLK>].

60. *Occupational Licensing: A Framework for Policy Makers*, DEP'T TREASURY OFF. ECON. POL'Y, ET AL. (July 2015), http://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [<http://perma.cc/YU7C-7HDA>].

campaign promised to reward states that “meaningfully streamline unnecessary licensing programs.”⁶¹

The priorities of Supreme Court Justices over time tend to converge with those of the political coalition that dominates the party with which they are associated.⁶² The fact that both President Obama and Hillary Clinton have questioned the utility and fairness of the current licensing regimes suggests that Democrat-appointed Justices will likely become increasingly sympathetic to challenges to overly broad licensing laws. Indeed, there are signs that this is already occurring. When the Supreme Court in 2015 voted 6-3 that licensing boards that cartelize a profession on behalf of a private interest group are not immune from antitrust scrutiny, all four liberals joined the majority, while the three most conservative Justices—Alito, Scalia, and Thomas—dissented.⁶³

Of course, Supreme Court Justices, even willful Supreme Court Justices, must find plausible constitutional rationales to support doctrinal innovations. The question, then, becomes how occupational liberty might earn more than the utter lack of protection it would get under *Ferguson* or the minimal protection of rational basis review under *Williamson*.

Like conservatives, liberal Justices might be discouraged from protecting occupational freedom due to the fear of resurrecting *Lochner*. Nevertheless, the liberal Justices are perhaps freer than conservatives to reject the traditional *Lochner* narrative. While liberals and conservatives have both used *Lochner* as a negative touchstone, for liberals the problem with *Lochner* is not that it protected an unenumerated right under the Due Process Clause, but that it protected specifically *economic* rights in contexts where democratic decision-making should prevail. The lesson of *Lochner* is to broadly defer to economic regulation that does not infringe on the Bill of Rights, regardless of which clause of the Constitution is at issue.⁶⁴

61. *Hillary Clinton Will Make Life Easier for Small Business at Every Step of the Way*, BRIEFING, <http://www.hillaryclinton.com/briefing/factsheets/2016/08/23/hillary-clinton-will-make-life-easier-for-small-business-at-every-step-of-the-way/> [<http://perma.cc/8QEQ-S4NA>].

62. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066-83 (2001).

63. *N.C. Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101 (2015); see also Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093 (2014) (arguing for the application of antitrust scrutiny to professional licensing boards).

64. See David E. Bernstein, *The Role of Lochner in the Health Care Litigation*, JURIST (Mar. 21, 2012), <http://www.jurist.org/forum/2012/03/david-bernstein-lochner.php> [<http://perma.cc/7T7W-FWZX>] (“With conservatives in control of the Court for the last two decades, liberal justices have attacked their colleagues for aping *Lochner* in cases that invoked the First

Despite concerns about “Lochnerism,” the idea that the Court had gone too far in deferring to oppressive economic legislation once had significant support among liberal luminaries such as Cass Sunstein, Laurence Tribe, Leonard Levy, and Walter Gellhorn.⁶⁵ More recently, because the Supreme Court’s conservative majority began to restrict federal regulatory power using other parts of the Constitution in the 1990s, liberals have feared that giving credence to economic rights in the due process context would encourage conservatives to expand anti-regulatory rulings under the Commerce Clause and other constitutional provisions. However, if the Supreme Court regains a liberal majority in the near future, the threat of a conservative majority limiting the power of government more broadly recedes. A solidly liberal Supreme Court may be willing to revive a more stringent level of scrutiny for the narrow category of economic regulations that unreasonably deny the right to pursue an occupation.

To avoid directly deciding whether some unenumerated economic rights deserve significant constitutional protection—and thus risk direct analogies to *Lochner*—liberal Justices might re-conceptualize licensing laws as concerning personal autonomy rather than economic rights. The right to pursue an occupation is not a mere economic interest akin to being free of government regulation regarding the weight of loaves of bread sold commercially.⁶⁶ Rather, the choice of occupations reflects and affects “personal capacities, values, style of life, social status, and general life prospects in innumerable ways,”⁶⁷ and is a vital form of self-expression.

Amendment, the Commerce Clause, the Takings Clause, the Tenth Amendment, and the Eleventh Amendment to limit the government’s regulatory authority.”).

65. WALTER GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENT RESTRAINT* 105-51 (1968); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1378 (2d ed. 1988); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 6 (1976); Leonard Levy, *Property as a Human Right*, 5 CONST. COMMENTARY 169 (1988); Sunstein, *supra* note 5.
66. See *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (invalidating regulations of bread loaf weight).
67. Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 289 (1987); see also SANDEFUR, *supra* note 1, at 136 (“[M]any people would place a higher value on their freedom to make a living for themselves and their families than on their right to travel to Washington for a chance to lobby a member of Congress.”); TRIBE, *supra* note 65, at 1378 (asserting that the government should “not take away without clear and focused justification . . . a fair opportunity for an individual to realize her identity in a chosen vocation”); Clarence Thomas, Address at the Pacific Forum of the Pacific Research Institute (Aug. 10, 1987) (calling for the protection of the right to profit from one’s labor); Levy, *supra* note 65, at 183 (“With the exception of freedom of religion, nothing is more important than work and a chance at a career or a decent living.”). Even the Supreme Court has occasionally acknowledged the importance of this right. See, e.g., *Conn. v. Gabbert*, 526 U.S. 286, 292 (1999) (noting a “generalized due process right to choose one’s field of private employment” and “the Fourteenth Amendment’s liberty right to choose and follow one’s calling,” but also suggesting that these rights are “nevertheless subject to reasonable government

In fact, re-conceptualizing occupational liberty in this way would fit within an existing tradition in which progressive Justices reinterpret rights they deem important that were once seen as involving “conservative” values to comport with a more progressive agenda. In the famous *Carolene Products* Footnote 4, the Court’s emerging Progressive majority preserved the viability of *Meyer v. Nebraska*,⁶⁸ *Pierce v. Society of Sisters*,⁶⁹ and *Farrington v. Tokushige*⁷⁰—all due process cases in the *Lochner* line of cases—by describing them as cases involving “review of statutes directed at particular religious, or national, or racial minorities”—considerations that played no formal role in any of those cases.⁷¹ In *Griswold v. Connecticut*, *Meyer* and *Pierce* were reinterpreted once again, this time as cases involving a right to privacy—another consideration that played no formal role in the original opinions.⁷² Relatedly, the *Lochner*-like due process anti-segregation case of *Buchanan v. Warley*,⁷³ which focused on property and contract rights, was reinterpreted as an equal protection case.⁷⁴ Other *Lochner*-era due process cases were preserved by anachronistically reinterpreting them as early “incorporation” cases.⁷⁵ Given the emphasis in Supreme Court cases from the McCarthy era on not unjustly excluding individuals from earning a livelihood,⁷⁶ it would be far less of a stretch for progressives to conclude that oppressive licensing laws violate non-economic autonomy rights.

regulation”); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (“[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.”).

68. 262 U.S. 390 (1923).

69. 268 U.S. 510 (1925).

70. 273 U.S. 284 (1927).

71. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

72. 381 U.S. 479, 481-82, 484 (1965) (“The foregoing cases [including *Pierce* and *Meyer*] suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen.”).

73. 245 U.S. 60 (1917).

74. *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 11-12 (1948); *Oyama v. California*, 332 U.S. 633, 663 (1948).

75. *E.g.*, *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 702 (1970) (asserting that *Stromberg v. California*, 283 U.S. 359 (1931), involved the “first direct holding as to the incorporation of the First Amendment into the Fourteenth”); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 568 (1963) (claiming that *Gitlow v. New York*, 268 U.S. 652 (1925), involved the incorporation of the First Amendment into the Fourteenth).

76. *E.g.*, *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

CONCLUSION

The ghost of *Lochner* hangs over due process challenges to laws that restrict entry to occupations. In an attempt to vanquish the remnants of *Lochner* and similar pre-New Deal cases, the Supreme Court established and applied a weak rational basis test to evaluate all economic regulation, leaving very little room for challenges to any such regulations—including occupational restrictions.

The time, however, may be ripe for courts to evince greater skepticism of occupational restrictions. First, revisionist scholarship has shown that widely accepted criticisms of *Lochner* are inaccurate.⁷⁷ As *Lochner* gradually loses its anti-canonical status, fear of repeating the “mistakes of *Lochner*” is diminishing, especially for younger conservative jurists. Second, the Supreme Court’s due process jurisprudence is in a state of doctrinal chaos, presenting an opportunity for advocates of greater occupational freedom to nudge courts beyond the collapsing fundamental/non-fundamental rights dichotomy that dominated due process jurisprudence for decades. Third, the prospect of a liberal-dominated Supreme Court more inclined to recognize fundamental rights under the Due Process Clause also presents a potential opening for advocates. Fourth, with the massive expansion of occupational licensing to fields that pose little if any threat to public well-being,⁷⁸ skepticism of the necessity and fairness of occupational restrictions is growing, including—and perhaps especially—among progressives who are normally favorably inclined to economic regulations.

Obvious barriers remain. Entrenched precedent, though perhaps not as strong a barrier as some courts imagine, is hardly friendly to occupational liberty. Many conservative jurists remain hostile to any effort to use the Due Process Clause to protect substantive rights. Many liberals, meanwhile, remain instinctively hostile to using the Constitution for libertarian economic purposes.

Nevertheless, the gradual undermining of standard critiques of *Lochner* and its progeny on the one hand, and the spread of costly and restrictive occupational licensing to jobs that pose minimal risk to public well-being on the other, have ignited debate over whether strict judicial deference to even the most

77. See BERNSTEIN, REHABILITATING LOCHNER, *supra* note 41.

78. See *Occupational Licensing, A Framework for Policy Makers*, *supra* note 60; Dick M. Carpenter II et al., *License To Work: A National Study Of Burdens From Occupational Licensing*, INST. FOR JUST. (May 2012), http://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf [<http://perma.cc/KVK6-2RLA>]; Morris M. Kleiner, *Reforming Occupational Licensing Policies*, BROOKINGS INST. (Mar.2015), http://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf [<http://perma.cc/RS5Z-7V4V>]; Adam B. Summers, *Occupational Licensing: Ranking the States and Exploring Alternatives*, REASON FOUND. (Aug. 2007), <http://reason.org/files/762c8fe96431b6fa5e27ca64caa1818b.pdf> [<http://perma.cc/6TH3-JJSB>].

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arbitrary and abusive licensing laws is appropriate.⁷⁹ Meanwhile, the unofficial demise of the fundamental/non-fundamental rights dichotomy in the Supreme Court's due process jurisprudence, combined with a rising generation of judges, liberal and conservative, who may not share their predecessors' reflexive hostility to meaningful judicial oversight of occupational restrictions, provide a glimmer of hope that the right to pursue a lawful occupation free from unreasonable government regulation will soon be rescued from constitutional purgatory.

David E. Bernstein is George Mason University Foundation Professor, Antonin Scalia Law School at George Mason University. He thanks his colleagues at the Scalia Law School for providing exceptionally helpful comments on this paper at a faculty workshop.

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79. See, e.g., Evan Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 *GEO. MASON L. REV.* 479, 502-03 (2016) (calling for stronger judicial protection of a right to pursue a livelihood); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 *HARV. J.L. & PUB. POL'Y* 209, 216-18 (2016) (same); Alexandra L. Klein, Note, *The Freedom To Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 *WASH. & LEE L. REV.* 411 (2016) (same); Marc P. Florman, Comment, *The Harmless Pursuit of Happiness: Why 'Rational Basis with Bite' Review Makes Sense for Challenges to Occupational Licensing*, 58 *LOY. L. REV.* 721, 725 (2012) (same); Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 *VA. L. REV.* 1065, 1069 (2013) (same).