"TO PURSUE ANY LAWFUL TRADE OR AVOCATION": THE EVOLUTION OF UNENUMERATED ECONOMIC RIGHTS IN THE NINETEENTH CENTURY

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A conference dedicated to exploring the future of unenumerated rights stands to profit from a consideration of how this concept evolved from a natural law background, and how it came to include the right to follow ordinary trades and contractual freedom by the end of the nineteenth century. Constitutional thought in the early years of the American Republic was permeated with appeals to natural law and fundamental principles of justice. For our purposes, it is especially noteworthy that there was a close affinity between such pleas and high regard for the rights of property owners. This connection, of course, reflected the tenets of English constitutionalism, which had long treated property and liberty as interdependent concepts. As John Phillip Reid has explained: "In the eighteenth-century pantheon of British liberty there was no right more changeless and timeless than the right to property." Reid added:

There may have been no eighteenth-century educated American who did not associate defense of liberty with defense of property. Like their British contemporaries, Americans believed that just as private rights in property could not exist without constitutional procedures, liberty could be lost if private rights in property were not protected. It followed that the framers of the Constitution and Bill of Rights did not differentiate between the right to own property and other per-

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2 Id. at 33.
sonal liberties. Indeed, property ownership was regarded as among the most important rights.

I. NATURAL LAW TRADITION

Resorting to the natural law tradition had deep roots in the American polity. Natural law theory, which stressed limitations on governmental power, played a pivotal role in Revolutionary discourse. Thomas Jefferson wove natural law rhetoric into the Declaration of Independence, claiming for the new nation a right to assume “the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.” In addition, he famously declared the “self-evident” truth that individuals were “endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

State constitutions of the Revolutionary era made explicit references to natural law. For example, the influential Virginia Bill of Rights of 1776 asserted that all persons “have certain inherent rights, of which . . . they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.” Similarly, the New Hampshire Constitution of 1784 proclaimed: “All men have certain natural, essential, and in-

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5 See Walter Dellinger, The Indivisibility of Economic Rights and Personal Liberty, 2003-2004 CATO SUP. CT. REV. 9, 19 (“Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding.”).
4 See KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 58 (1989) (“Natural law theory held that the positive law of a state, in order to be regarded as worthy of being obeyed, had to embody or affirm certain eternal principles inherent in the structure of the universe.”); 1 ALFRED H. KELLY ET AL, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 35-38 (7th ed. 1991) (describing natural law theory and its impact on pre-revolutionary American political thought).
6 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
7 Id. at para. 2. Jefferson’s use of the phrase “pursuit of Happiness” was in no sense a rejection of the central place of property rights in the constitutional order. See WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (Rita & Robert Kimber trans., Univ. of N.C. Press 1980) (1973) (“[T]he acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both.”); 1 KELLY ET AL, supra note 4, at 60-61 (“Property and liberty were thus inextricably related, and were considered necessary for the attainment of happiness. It is inaccurate, therefore, to see in the Declaration of Independence a distinction between property rights and human rights.”).
8 VA. CONST. of 1776, Bill of Rights, § 1, reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW AND HERETOFORE FORMING THE UNITED STATES OF AMERICA, 3813 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].
herent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness. Thus, a number of the first state constitutions both stressed the importance of property and recognized that property rights were founded upon natural law norms. It bears emphasis, moreover, that such constitutional language went beyond the security of existing ownership patterns, and affirmed the right to obtain property. Further, the text of these documents suggests that the drafters were recognizing existing rights, not fashioning new ones.

Recall also that many Federalists initially opposed a Bill of Rights for the federal Constitution. Part of their concern was that a specification of some rights was potentially dangerous. Federalists argued that it was impossible to enumerate all rights, and that the omission of other rights would imply that they did not exist. James Wilson, for example, insisted at the Pennsylvania ratifying convention:

In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence

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10 Virtually identical language affirming the natural right to acquire property appeared in several other early constitutions. See, e.g., DEL. CONST. of 1792, pmbl., reprinted in 1 FEDERAL AND STATE CONSTITUTIONS, supra note 8, at 568 (“[A]ll men have, by nature, the rights of... acquiring and protecting reputation and property...”); MASS. CONST. of 1780, pt. I, art. I, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, supra note 8, at 1889 (“All men are born free and equal, and have certain natural, inherent and unalienable rights; among which may be reckoned... that of acquiring, possessing, and protecting property...”); PA. CONST. of 1776, Declaration of Rights, § I, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra note 8, at 3082 (“That all men are born equally free and independent, and have certain natural, inherent and inalienable rights; amongst which are... acquiring, possessing and protecting property...”); VT. CONST. of 1776, ch. 1, § I, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, supra note 8, at 3751 (“That all men are born equally free and independent, and have certain natural, inherent and unalienable rights; amongst which are... acquiring, possessing and protecting property...”); VT. CONST. of 1777, ch. 1, § I, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, supra note 8, at 3739 (“That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are... acquiring, possessing and protecting property...”).

11 See ADAMS, supra note 7, at 194 (“The first state constitutions thus clearly emphasized the individual’s claim to legal protection of his property. The self-imposed limits on sovereign power that the constitutions articulated derived from a desire to guarantee not only freedom of expression and of religious exercise but also the freedom to acquire property.”).

is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.\(^\text{13}\)

Likewise, James Iredell argued before the North Carolina ratifying convention:

\text{[1]}: would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.\(^\text{14}\)

James Madison made a similar argument to the Virginia ratifying convention.\(^\text{15}\) Many felt that it was safer to rely on lawmakers and courts to respect natural rights. When it became apparent that this argument would not prevail, the Federalists promised to support a bill of rights in order to secure ratification of the Constitution.\(^\text{16}\) It was in this context that the Ninth Amendment was born. As Madison explained in discussing a precursor of the Ninth Amendment:

\begin{quote}
It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.
\end{quote}

A number of scholars have concluded that the command of the Ninth Amendment—“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”\(^\text{17}\)—was crafted to incorporate protection for unenumerated rights.\(^\text{18}\) Randy E. Barnett has insisted that “both the

\(^{13}\) 2 \text{THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION} 436 (Jonathan Elliot ed., J.B. Lippincott Co. 2d ed. 1901) (1836) [hereinafter DEBATES].

\(^{14}\) 4 \text{DEBATES, supra note 13, at 167.}

\(^{15}\) See 3 \text{DEBATES, supra note 13, at 626 (saying that a bill of rights was both unnecessary and dangerous “because an enumeration which is not complete is not safe”).}

\(^{16}\) See \text{RUTLAND, supra note 12, at 159–89 (describing the compromise that led to the adoption of the Bill of Rights).}

\(^{17}\) 1 \text{ANNALS OF CONG.} 456 (Joseph Gales ed., 1834).

\(^{18}\) U.S. CONST. amend. IX.

plain and original meanings of the Ninth Amendment require the strict construction of any power that restricts the exercise of individual liberty, whether that liberty is enumerated or unenumerated. Courts, however, have paid little heed to the Ninth Amendment as a basis for individual rights. But the Amendment is further evidence of the importance of natural rights to the founding generation.

II. COURT DECISIONS IN THE EARLY REPUBLIC

To be sure, there was uncertainty over the precise role of natural law in the new constitutional order. Nearly everyone recognized that individuals relinquished some of their natural rights when they entered civil society. Moreover, there was a tendency for Americans to conflate natural law with the traditional "rights of Englishmen" and common law guarantees. Still other questions remained. Could the precepts of natural law prevail over inconsistent positive law? Was it appropriate for judges, when positive law was silent, to go outside the written text of constitutions and invoke fundamental principles not expressly set forth in such documents? In other words, did written constitutions supplement or replace natural law? Or was appropriate use of natural law confined to illuminating judicial construction of express constitutional and statutory provisions? Despite these uncertainties, the notion that individuals possessed certain rights that predated government and positive law found repeated expression in early American jurisprudence. Nonetheless, the place of natural law in constitutional theory has been the subject of a prolonged controversy, starting with the Supreme Court's 1798 decision in Calder v. Bull.

An issue in Calder was the validity of an act by the Connecticut legislature setting aside a decree in a probate case and directing a new
The Connecticut Court of Errors upheld the grant of probate which resulted from the rehearing. The law was challenged before the Supreme Court as a violation of the constitutional provision prohibiting states from enacting *ex post facto* laws. Although Justice Samuel Chase sustained the actions of the Connecticut court, he asserted that legislative power was limited by fundamental principles not explicitly set forth in the State’s constitution:

> I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control [sic]; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the law permit. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law, or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.24

In this often-cited language, Chase seemingly asserted authority to strike down laws inconsistent with natural law. Justice James Iredell concurred in the result, but expressed alarm over Chase’s willingness to invoke unenumerated rights. Iredell reasoned:

> If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act

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which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.

He indicated that the legislature could enact any law not inconsistent with the written constitution.

The Chase-Iredell debate has resonated throughout American constitutional history. Chase's views found immediate favor. As discussed below, both federal and state courts relied on the doctrine of fundamental inherent rights to trim state legislative power in the early decades of the nineteenth century. But Iredell also raised some enduring points. Even if one accepts the existence of unenumerated rights based on fundamental principles, difficult problems remain in ascertaining which rights are protected against legislative interference. Since inevitably people will answer this question differently, the result may well be that at the end of the day the declaration of unenumerated rights simply reflects the values of a particular court majority. Iredell's warning is thus echoed by modern critics of the concept of fundamental rights jurisprudence, who charge that this doctrine circumvents majority rule and vests judges with virtually boundless authority.

Justice William Paterson, who had been a leading member of the constitutional convention, also considered the connection between natural rights and property ownership in the well-known case of Vanhorne's Lessee v. Dorrance. The conflict originated in a dispute over land claims in the Wyoming Valley of Pennsylvania. Paterson's charge to the jury has the character of a philosophical address on the nature of constitutional government. After making reference to the Pennsylvania Constitution, Paterson broadly declared:

From these passages it is evident; that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social com-

23 Calder, 3 U.S. (3 Dall.) at 399 (Iredell, J., concurring).
26 2 U.S. (2 Dall.) 304 (1795).
Two points are noteworthy about Paterson's jury charge. First, the Lockean overtones are clear. As one scholar explained, Paterson "resorted to the Lockean idea of the social compact." Second, Paterson viewed the right to acquire property not only as a natural right but also as one of the primary incentives for the formation of organized society.

In the early decades of the nineteenth century prominent jurists continued to invoke fundamental natural rights as a basis for constitutional decisions, especially to protect property rights. A few examples illustrate this practice. Several state courts relied on unwritten fundamental principles to require the payment of compensation when private property was appropriated for public use in the absence of a state constitutional provision. The leading decision in this respect was *Gardner v. Trustees of Newburgh*. In order to establish a water supply, the Village of Newburgh planned to divert a stream away from the plaintiff's farm. The governing statute made no mention of compensation, and the landowner sued for an injunction to halt the diversion. The New York Constitution did not contain a compensation requirement and the Fifth Amendment was not deemed applicable to the states at that time. Acknowledging that a riparian owner was entitled to utilize a watercourse flowing through his land, Chancellor James Kent insisted that an owner could not be deprived of property without compensation. He maintained that the payment of compensation was "a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice." After pointing out that the written constitutions of the federal government and several other states contained an express requirement for the payment of compensation, Kent added: "Until, then, some provision be made for affording him compensation, it would be unjust, and contrary to the first principles of gov-

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27 Id. at 310.
30 See J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 71–81 (1930–1931) (listing a series of cases in which principles of natural justice were invoked to require payment of compensation when property was appropriated).
31 2 Johns. Ch. *162* (N.Y. Ch. 1816).
32 Id. at *166.
ernment . . . to take from the plaintiff his undoubted and prescriptive right to the use and enjoyment of the stream of water."35 Likewise, in 1847 the Supreme Court of Georgia employed the language of natural law in analyzing the basis of the just compensation norm. The court stated that the Takings Clause of the Fifth Amendment "does not create or declare any new principle of restriction . . . but simply recognized the existence of a great common law principle, founded in natural justice, especially applicable to all republican governments . . . ."34 The court proceeded, in the absence of an express compensation requirement in the state constitution, to insist that the taking of property without just compensation would violate fundamental principles grounded on natural equity.

Other courts reached a similar result by blending principles of natural law with written constitutional provisions. In Crenshaw v. Slate River Co.,35 the Court of Appeals of Virginia ruled that a river improvement statute unconstitutionally deprived mill owners of compensation if mills were taken down in order to make the river navigable. Judge Dabney Carr reasoned that "whether we judge this Law by the principles of all Civilized Governments, by the Federal Constitution, or that of our own State, it is unconstitutional and void."36

The early constitutional decisions of the Marshall Court also combined appeals to natural law with invocation of explicit textual language. It has been a topic of debate among historians whether the Supreme Court under John Marshall's leadership resorted to natural law simply to interpret the express text of the Constitution or as an additional source of constitutional principles.37 Consider the ambiguous basis of the decision in the famous case of Fletcher v. Peck,38 in which the Court invalidated a Georgia statute that repealed an earlier grant of land. Writing for the Court, Marshall voided the repeal act because it violated "general principles which are common to our free institutions" and the Contract Clause that barred state interference with agreements.39 Scholars cannot agree whether Marshall's refer-

35 Id. at *168. In his Commentaries Kent insisted that certain rights, including "the right to acquire and enjoy property . . . have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (photo. reprint 1986) (New York, O. Halsted 1827).
34 Young v. McKenzie, 3 Ga. 31, 44 (1847).
35 27 Va. (6 Rand.) 245 (1828).
36 Id. at 265.
38 10 U.S. (6 Cranch) 87 (1810).
39 Id. at 139.
ence to "general principles" just strengthened his reliance on the Contract Clause or indicated that courts could invalidate laws contrary to fundamental principles of justice. Nevertheless, the *Fletcher* opinion contains other language suggesting unwritten restrictions on legislative power grounded in natural law. Marshall observed:

> It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

One of Marshall's colleagues, Justice William Johnson, was more explicit in resting decisions on extra-textual fundamental rights. Concurring in *Fletcher*, Johnson emphasized that his opinion was not based on the Contract Clause. Rather, he declared the Georgia repeal act void "on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity."

Although later opinions by the Marshall Court tended to rely more heavily on the written Constitution, the Justices never entirely abandoned natural law as a source of fundamental rights. The leading case in which the Marshall Court looked to extra-textual principles to restrain legislative authority was *Terrett v. Taylor*. The case grew out of an attempt by the Virginia legislature to seize and sell certain lands previously granted to the Episcopal Church. Justice Joseph Story, speaking for the Court, invalidated Virginia's actions in an opinion that did not reference any specific provision in the Constitution. Instead, Story repeatedly invoked notions of natural justice. Denying that a legislative land grant was revocable, he insisted: "Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of republican government, the right of the citizens to the free enjoyment of their property legally acquired."

Story also questioned the validity of another act repealing a statute that incorporated Episcopal churches. In reaching this result, he again pointed to unwritten rights:

> But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations

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40 *Id.* at 135–36.
41 *Id.* at 143 (Johnson, J., concurring).
42 13 U.S. (9 Cranch) 43 (1815).
43 *Id.* at 50–51.
exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.  

In Terrett, Story clearly expounded his belief that land titles and corporate charters were safeguarded by inherent principles of free government.

The Marshall Court continued to occasionally rely on natural law concepts into the 1820s. In Wilkinson v. Leland⁴⁵ the Court showed its willingness to give weight to unenumerated fundamental principles. Although Justice Story, writing for the Court, rejected a challenge to a Rhode Island law retroactively authorizing an executor to sell land in the state to pay the debts of the deceased, he stressed that governmental power over property was limited by natural justice:

That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention. In Terrett vs. Taylor, it was held by this Court, that a grant or title to lands once made by the legislature to any person or corporation is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared therefore to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. ⁴⁶

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⁴⁴ Id. at 52.
⁴⁶ Id. at 657-58 (internal citation omitted).
Further, and of particular significance for this investigation, Marshall himself maintained that property and contractual rights were based on pre-existing natural rights, not state laws. In his only dissent in an important case, Marshall declared:

that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society but are brought into it.\(^{47}\)

Clearly natural law remained a component of Marshall Court constitutional jurisprudence.\(^{48}\) To be sure, it was often convenient to link appeals to natural justice with express language in the Constitution. But this does not undercut the significance of reliance on fundamental principles as a buttress for economic rights.

The existence of unenumerated rights was also broached by Justice Bushrod Washington in *Corfield v. Coryell*,\(^ {49}\) the first case to address the Privileges and Immunities Clause of Article IV, section 2 of the Constitution. This provision was crafted to insure equality of privileges between residents and non-residents in the same state, but it did not define the "Privileges and Immunities of Citizens in the several States."\(^ {50}\) Washington, in often-quoted language, invoked extra-textual fundamental rights to determine the content of such privileges:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may

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48 See Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 537-38 (1987) ("Marshall argued that the right to contract is a natural right protected by the Contract Clause; therefore, any law that interferes with the right to contract, whether it operates prospectively or retrospectively, violates the Clause.") (footnote omitted).
50 U.S. CONST. art. IV, § 2.
This brief sketch of constitutional thought in the early decades of the newly independent nation suggests two conclusions: 1) jurists were prepared to invoke unenumerated rights, both to explicate constitutional text and to provide a basis of decision absent a textual provision, and 2) the rights identified as fundamental were largely economic in nature.

During the antebellum era state courts increasingly fused unenumerated rights with the concept of due process of law. Historians have long debated whether the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as their counterparts in state constitutions, were intended to impose substantive restraints on government. This contested issue will not be examined in detail here. It is clear, however, that state courts before the Civil War began to interpret due process as barring arbitrary deprivations of property. As Earl M. Maltz has noted, "[a] substantial number of states . . . also imbued their respective Due Process Clauses with a substantive content." To decide which liberty and property interests were protected by due process, courts not surprisingly looked to fundamental principles of natural justice.

III. RIGHT TO PURSUE A CALLING

Most of the early due process cases dealt with deprivations of vested property interests, usually in land. Yet, as we have seen, property was understood as encompassing the right to acquire economic interests. We now turn to consider how the concept of due process came to safeguard the practical steps necessary to obtain property—the pursuit of lawful trades and the right to make contracts.

These emerging themes drew upon both the tenets of Revolutionary constitutionalism and currents of economic thought in England. The theory of property rights articulated by the English philosopher John Locke did much to shape thinking about the relationship between labor and property. In his Second Treatise of Government Locke explained the origins of private property in terms of labor, observing:

\[51\] Corfield, 6 F. Cas. at 551–52.

\[52\] See James W. Ely, Jr., The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 CONST. COMMENT. 315, 327–42 (1999) (discussing due process as a limit on legislatures during the antebellum era); see also Grant, supra note 30, at 82–83 ("[Some courts] deftly blend[ed] the doctrines of natural law and due process.").

\[53\] See, e.g., Wynehamer v. People, 13 N.Y. 378, 385 (1856) (finding that prohibition law constituted a deprivation of property without due process with respect to liquor already acquired).

yet every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.

He also famously insisted that the very purpose of government was the preservation of "lives, liberties, and estates." Locke had an enormous impact on constitutional thought. "By the late eighteenth century," Pauline Maier has cogently noted, "'Lockean' ideas on government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition." The ideas of the Scottish political economist Adam Smith, whose landmark treatise *Wealth of Nations* was published in 1776, also had a strong appeal to Americans. A proponent of entrepreneurial freedom and market economy, Smith urged minimal government oversight of economic activity. In particular, he maintained that the matrix of property could be traced to labor, and he was critical of restrictions on the ability of individuals to engage in work. Smith asserted:

The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman, and of those who might be disposed to employ him.

Abridgement of the rights to follow ordinary callings or to acquire property were early pictured in American constitutional dialogue as destructive of liberty. A number of initial state constitutions banned grants of monopoly. The North Carolina Constitution of 1776, for

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56 *Id.* at 155.
59 See *id.* at 69–70 ("Smith and his successors explained how the 'invisible hand' of self-interest in the marketplace produced general well-being in the economy and augmented national wealth.").
60 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 137 (Edwin Cannan ed., Arlington House 1966) (1776); *see also Huston, supra* note 58, at 71 ("[Smith]... emphasized liberty, in particular the right of each person to seek employment in accordance with his desires.").
instance, proclaimed that monopolies "are contrary to the genius of a free State, and ought not be allowed." The Revolutionary Era aversion to grants of exclusive economic privilege underscored a widespread commitment to economic liberty and equality of opportunity. In the same vein, four state conventions which ratified the proposed federal constitution recommended an amendment banning monopolies. The Massachusetts convention urged an amendment "[t]hat Congress erect no company of merchants with exclusive advantages of commerce." Reflecting this sentiment, in 1792 Madison stressed the right of individuals to follow vocations of their choice. He declared:

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. Madison recognized that the freedom to choose a line of work was essential to improve one's economic circumstances.

John Marshall carried this line of thinking a step further. Dissenting in Ogden v. Saunders, he argued that the Contract Clause should be read to bar prospective as well as retrospective interference with contractual arrangements. Marshall insisted that, if state laws governed contractual expectations, a legislative act "declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract..." Under this analysis parties would possess only those contractual rights that legislators decided to acknowledge. Marshall could not win acceptance of his broad construction of the Contract Clause, but his understanding of the fun-

61 N.C. CONST. of 1776, Declaration of Rights, § XXIII, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, supra note 8, at 2788; see also MD. CONST. of 1776, Declaration of Rights, § XXXIX, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, supra note 8, at 1690 ("[M]onopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered.").

62 1 DEBATES, supra note 13, at 323.


64 See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 357 (1827) (Marshall, C.J., dissenting) ("It is also worthy of consideration, that those laws which had effected all that mischief the constitution intended to prevent, were prospective as well as retrospective, in their operation. . . . There is the less reason for imputing to the Convention an intention, not manifested by their language, to confine a restriction intended to guard against the recurrence of those mischiefs, to retrospective legislation.").

65 Id. at 339.
damental importance of contractual freedom found expression in the due process norm after the Civil War.\textsuperscript{66}

The nascent notions of a right to work at lawful trades and to enter contracts without legislative abridgement were strengthened by the anti-slavery movement and the "free labor" ideology of the Civil War era.\textsuperscript{67} The idea of "free labor" powerfully distinguished the economic system of the North from the slave labor of the southern states. The core of the "free labor" ideology was that individuals could decide where they would work, and on what terms. Seeking to impose this concept on the defeated South, Congress treated the ability to make contracts and acquire property as essential to the ability of former slaves to take part in the market economy.\textsuperscript{68} The Civil Rights Act of 1866, passed in reaction to the black codes in southern states, specifically included the rights "to make and enforce contracts" and to gain property among the liberties guaranteed to freed persons.\textsuperscript{69} The Fourteenth Amendment was intended in part to eliminate questions about the constitutionality of the 1866 Act and thus protect the economic rights of former slaves.\textsuperscript{70} From its very inception, therefore, there was an economic rights component to the Fourteenth Amendment.\textsuperscript{71} "No one who sat in Congress or in the state legislatures that dealt with the Fourteenth Amendment," William E. Nelson observed, "doubted that section one was designed to put to rest any doubt about the power of the federal government to protect basic common law rights of property and contract."\textsuperscript{72}

Thomas M. Cooley, the most influential constitutional theorist of the late nineteenth century, reinforced the notion that liberty included the right to follow a common occupation. In his seminal work, \textit{A Treatise on the Constitutional Limitations Which Rest upon the Leg-}

\textsuperscript{66} See Benjamin Fletcher Wright, Jr., The Contract Clause of the Constitution 50 (1938) ("[Marshall's opinion in \textit{Ogden}] might have given to the Court a power of supervision over legislation under the contract clause comparable with that developed late in the century under the Due Process Clause.").


\textsuperscript{68} See Herman Belz, Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era 109-10 (1978) (detailing the work of Congress in protecting freed slaves with regard to contract and property rights).

\textsuperscript{69} Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866).

\textsuperscript{70} See William E. Nelson, \textit{The Fourteenth Amendment: From Political Principle to Judicial Doctrine} 40-63 (1988) (describing the drafting and adoption of the Fourteenth Amendment).


\textsuperscript{72} Nelson, supra note 70, at 163.
islative Power of the States of the American Union, first published in 1868, Cooley urged a substantive understanding of the due process norm. He linked Jacksonian principles of equal rights and hostility towards special economic privileges with due process protection, and maintained that the due process guarantee was to safeguard individuals from the arbitrary exercise of governmental power. Stressing the right to pursue lawful employment, Cooley declared: “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.’” Cooley was instrumental in opening the door for a broad reading of the Due Process Clause of the Fourteenth Amendment.

The contention that the Fourteenth Amendment safeguarded the right of individuals to follow lawful callings without governmental interference was first presented to the Supreme Court in the famous Slaughter-House Cases in 1873. A full consideration of this landmark decision is outside the scope of the present inquiry. Briefly stated, the case turned upon a challenge to the validity of a Louisiana statute that granted the Crescent City Company the exclusive right to maintain a facility for butchering animals in and around New Orleans for 25 years. The statute prohibited all other persons from operating slaughterhouses within the specified area. Louisiana defended the measure as an exercise of the police power to protect public health from unsanitary conditions.

John A. Campbell, a former member of the Supreme Court, appeared as counsel for the individual butchers hurt by the monopoly grant. He assailed the statute as a violation of both the Privileges or Immunities Clause and the Due Process Clause of the Fourteenth Amendment. Looking outside the text of the Amendment, Campbell described the Privileges or Immunities Clause of the Fourteenth Amendment.

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74 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 393 (photo. reprint 1972) (Boston, Little, Brown, & Co. 1868).

75 83 U.S. (16 Wall.) 36 (1873).


Amendment in terms of "the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country." Of greater long-range significance, Campbell added that, in his view, the Louisiana law deprived the butchers of property without due process of law. He reasoned:

The right to labor, the right to one's self physically and intellectually, and to the product of one's own faculties, is past doubt property, and property of a sacred kind. Yet this property is destroyed by the act; destroyed not by due process of law, but by charter; a grant of privilege, of monopoly.

By a 5 to 4 vote, the Supreme Court rejected Campbell's arguments and sustained the constitutionality of the grant of exclusive privilege to the corporation. Speaking for the Court, Justice Samuel F. Miller concluded that the purpose of the Fourteenth Amendment was to secure the rights of newly freed slaves against discrimination, not enlarge protection for whites or other groups. Distinguishing between the privileges and immunities of citizens of the United States and those rights associated with state citizenship, Miller insisted that the right to exercise a trade was not among the privileges of United States citizens guaranteed by the Fourteenth Amendment. Hence, the grant of a slaughterhouse monopoly was a matter for state governance. Miller's opinion narrowly construed the protection afforded by the Privileges or Immunities Clause of the Fourteenth Amendment, and the provision has subsequently received scant attention from courts.

For our purposes, however, the most significant aspect of the Slaughter-House Cases can be found in the dissenting opinions of Justices Stephen J. Field and Joseph P. Bradley. The dissenters were prepared to recognize a constitutional right to pursue a lawful calling. Suggesting that the Privileges or Immunities Clause "refers to

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79 Id. at 56.
81 See PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 122-25 (1997) (discussing Field's dissent in the Slaughter-House Cases); NELSON, supra note 70, at 156-58 (same); Forbath, supra note 67, at 778-82 (analyzing Field's dissent in the context of the free labor ideology); see also BARNETT, supra note 20, at 203 (noting that the dissenting opinions in the Slaughter-House Cases "understood the liberty to pursue an occupation to be a fundamental right closely related to 'free labor'"); David E. Bernstein, Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism, 92 GEO. L.J. 1, 35 (stressing that the dissenting opinions of Field and Bradley "were laden with natural rights rhetoric"); Wayne McCormack, Lochner, Liberty, Property, and Human Rights, 1 N.Y.U. J.L. & LIBERTY 432, 462 (2005) (declaring that dissenting opinions in the Slaughter-House Cases "were full of natural law thinking").
the natural and inalienable rights which belong to all citizens, Field relied upon the description of such privileges in Corfield case discussed above. He asserted:

The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.

Maintaining that the Fourteenth Amendment provided a national guarantee against hostile and discriminatory legislation, Field declared: "All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness . . ." Quoting Adam Smith, Field concluded that the slaughterhouse monopoly violated "the right of free labor, one of the most sacred and imprescriptible rights of man . . ." As one scholar has aptly pointed out, "[n]atural rights, then, not the language of the Constitution itself provided the means by which Field would transform abstract justice into a tangible constitutional guarantee.

Justice Bradley largely agreed with Field's analysis of the Privileges or Immunities Clause. He explained:

This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed.

It followed that the legislative grant of a monopoly constituted an invasion of the right of others to follow lawful trades. Additionally, Justice Bradley found that the Louisiana statute deprived the butchers of liberty and property in violation of the Due Process Clause of the Fourteenth Amendment. He pointed out:

[A] law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property.

Ultimately, of course, state and federal courts followed the path marked by Bradley and invoked the Due Process Clause rather than

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82 Slaughter-House, 83 U.S. (16 Wall.) at 96 (Field, J., dissenting).
83 See supra notes 49–51 and accompanying text.
84 Slaughter-House, 83 U.S. (16 Wall.) at 97.
85 Id. at 101.
86 Id. at 110.
87 KENS, supra note 81, at 123.
89 Id. at 122.
the Privileges or Immunities Clause to oversee state economic regulations and safeguard the right to follow a calling.  

In sync with the views of Field and Bradley, Cooley in 1879 amplified his affirmation of the freedom to follow ordinary avocations and linked this right to the due process norm. He declared:

But if the constitution does no more than to provide that no person shall be deprived of life, liberty, or property, except by due process of law, it makes an important provision on this subject, because it is an important part of civil liberty to have the right to follow all lawful employments. . . . The following of the ordinary and necessary employments of life is a matter of right, and cannot be made to depend upon the State's permission or license [except when] the business offers temptations to exceptional abuse . . . .

In 1883 Cooley insisted:

The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away.

Despite the outcome in Slaughter-House, it is noteworthy that the Supreme Court was prepared to recognize unenumerated rights in other contexts. At issue in Loan Ass'n v. Topeka was the validity of municipal bonds issued to encourage the establishment of manufacturing enterprises. Holding that taxes could only be levied for "a public purpose," the Court determined that the city could not impose taxes to pay for bonds to assist a private manufacturing concern. The Constitution places no express restriction on the use of the tax power, but Justice Miller, speaking for the Court, observed:

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism.

. . . .

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights,

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90 See Ken I. Kersch, Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law 141 (2004) ("Slaughterhouse proved just the beginning of a constitutional jurisprudence anchored in considerations of callings, property, and labor.").


93 Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 664 (1874) (invoking extra-constitutional principle that the power of taxation is limited to "a public purpose").
without which the social compact could not exist, and which are re-
spected by all governments entitled to the name.\textsuperscript{94}

The Supreme Court revisited the New Orleans slaughterhouse monopoly a decade later in \textit{Butchers' Union Co. v. Crescent City Co.}\textsuperscript{95} In 1879, Louisiana adopted a new constitution which abrogated the monopoly features in most corporate charters. New Orleans then opened the right to engage in butchering to general competition. The Crescent City Company alleged that these steps amounted to an impairment of its corporate charter in violation of the Contract Clause. The Justices unanimously turned aside this argument, but Field and Bradley, in concurring opinions, reiterated their position that the right to follow the common occupations was a fundamental right. Invoking the Declaration of Independence and Adam Smith, Field emphasized that the pursuit of ordinary trades was "a distin-
guishing privilege of citizens of the United States, and an essential
element of that freedom which they claim as their birthright."	extsuperscript{96} Writing for three Justices, including John M. Harlan, Bradley again in-
sisted that the Privileges or Immunities Clause of the Fourteenth Amendment had a broad meaning which encompassed the right to follow common callings. He asserted that "the ordinary pursuits of life, forming the large mass of industrial avocations" should be open to all. A monopoly granted to a few "in any of these common call-
\textsubscript{ings}," he continued, was "necessarily an outrage upon the liberty of the citizen . . . ."\textsuperscript{97} More specifically, Bradley also repeated his conten-
tion that conferral of a monopoly which prohibited individuals from pursuing their line of work deprived them of liberty and property without due process.\textsuperscript{98}

By the mid-1880s at least four members of the Supreme Court had adopted the view that the Fourteenth Amendment protected the right to follow a chosen avocation from state abridgement. But the Court majority stopped short of affirming this principle. With recog-
nition of this right stymied at the federal level, much of the develop-
ment of the right to enter ordinary trades took place at the state level. State courts began to evidence a more skeptical attitude toward regul-

\textsuperscript{94} Id. at 662-63. In reaching this conclusion Justice Miller relied on Cooley's work. \textit{See Cooley, supra} note 74, at 487 (asserting that taxation has "for its only legitimate object the raising of money for public purposes and the proper needs of government"). \textit{See generally} HERBERT HOVENKAMP, \textit{ENTERPRISE AND AMERICAN LAW}, 1836-1937, at 38-39 (1991) (discussing the "un-
written constitutional requirement that taxation could be only for a 'public use'"); \textit{NELSON, su-
pra} note 70, at 169-70 (citing Justice Miller's doctrine-altering decision).

\textsuperscript{95} 111 U.S. 746 (1884).

\textsuperscript{96} Id. at 757 (Field, J., concurring).

\textsuperscript{97} Id. at 763 (Bradley, J., concurring).

\textsuperscript{98} \textit{See id. at 765} ("[T]he law which created the monopoly . . . . did abridge the privileges of all other citizens . . . because [the trades in question] are among those ordinary pursuits and call-
ings which every citizen has a right to follow . . . .").
lations that curtailed the right to pursue a trade. In 1878, the New York Court of Appeals, for example, gravitated toward a comprehensive reading of constitutionally protected liberty and property interests. The court declared that the due process guarantee of the state constitution was not to be "construed in any narrow or technical sense." The right to liberty, the Court observed, included "the right to exercise his facilities and to follow a lawful avocation for the support of life..." Similarly, the concept of property was defined to embrace "the right of property, the right to acquire possess and enjoy it..."  

IV. OCCUPATIONAL FREEDOM ENDORSED

In 1885, the New York Court of Appeals, in the leading case of In re Jacobs,102 squarely embraced the view that liberty included the right to pursue lawful callings. Because this ruling is the subject of a large and contested literature, it warrants careful scrutiny.103 Finding tenement house cigarmakers difficult to organize, the cigarmakers' union in the early 1880s agitated for legislation banning the manufacture of cigars in tenement houses.104 Such a measure was first enacted in 1883, outlawing the manufacture of cigars in any rooms used as a dwelling in New York City. Significantly, the Board of Health opposed the act, maintaining that the health of tenement workers was not jeopardized by cigar-making. This law was declared unconstitutional on grounds that the title did not properly express the subject of the act.105 A revised law was enacted on May 12, 1884. Two days

99 Bertholf v. O'Reilly, 74 N.Y. 509, 515 (1878).
100 Id.
101 Id.
102 98 N.Y. *98 (1885) (holding that the Tenement House Cigar Act of 1884 was unconstitutional and exceeded the scope of the state's use of its police power). For a discussion of Jacobs, see GILLMAN, supra note 73, at 88-89 (describing the New York Court of Appeals decision ruling that a law prohibiting Jacobs from rolling cigars in a residential apartment was unconstitutional); Eric R. Claeys, Takings, Regulations, and Natural Property Rights, 88 CORNELL L. REV. 1549, 1579-81 (2003) (same).
103 Much of the historical debate turns on how one characterizes the trade of cigar manufacturing in tenement dwellings. Critics of the Jacobs decision picture such work as part of an exploitative sweatshop system, not independent labor in a free market. See Forbath, supra note 67, at 795-96 (presenting the residential cigar-making of Jacobs as part of exploitation tactics by landlords).
105 See In re Paul, 94 N.Y. *497 (N.Y. 1884) (holding the first iteration of the act unconstitutional under the New York Constitution because its title was insufficiently descriptive). The Court of Appeals reserved for a future occasion "the question whether the act as a whole is
later, likely based on a report by union investigators, Peter Jacobs was arrested for making cigars in the tenement house apartment in which he resided with his family. The Jacobs family occupied the first floor of the tenement, comprising seven rooms. Jacobs used one room for making cigars. Such activity was in violation of the 1884 state law, which made it a misdemeanor to manufacture cigars in tenement houses located in cities with a population of more than 500,000. The law in effect banned cigarmaking in tenement houses in Brooklyn and New York City, but not elsewhere in the state. Jacobs sought a writ of habeas corpus.

The trial court dismissed the writ, and Jacobs appealed to the Appellate Division. He was represented on the appeal by William M. Evarts, a leading New York attorney and later a United States Senator. Evarts appeared as senior counsel for the New York Cigar Manufacturers Association, an organization of manufacturing firms that owned tenements in which workers produced cigars. Stressing that the right to carry on lawful occupations in one's own residence was a protected property interest, the Appellate Division observed:

[I]t may be stated as a legal and political axiom that since the great laboring masses of our country have little or no property but their labor, and the free right to employ it to their own best interests and advantage, it must be considered that the constitutional inhibition against all invasions of property without due process of law was as fully intended to embrace and protect that property as any of the accumulations it may have gained. It is not constitutionally competent, therefore, for the legislature to deprive by any arbitrary enactment a laborer in any lawful vocation of his right to work and enjoy the fruits of his work in his own residence and in his own way, except for the purposes of police or health regulations as hereinafter considered. It is equally true also that when an artizan or laborer has rented a tenement for the residence of his family, with the right to carry on his trade or occupation therein, he has thereby acquired certain rights of property in the use and enjoyment of his tenement, of which he cannot be deprived without due process of law. An arbitrary

within the police power of the State, and capable of being sustained under the Constitution." *Id.* at *507-08. It is noteworthy that the prominent New York lawyer William M. Evarts appeared on behalf of the appellant challenging the validity of the statute. Commenting on the 1883 measure, *The New York Times* expressed doubt that it was actually driven by health concerns. See Editorial, N.Y. TIMES, Oct. 2, 1883, at 4 (criticizing the measure as monopolistic).


107 *See Chester L. Barrows, William M. Evarts: Lawyer, Diplomat, Statesman* 425-26 (1941) (expounding the successful approach of Evarts in winning the *Jacobs* case). For additional discussion of the role of Evarts in the *Jacobs* case, see Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* 99-108 (1942), stressing the extent to which Evarts derived his argument from the dissenting opinions of Field and Bradley in the *Slaughter-House Cases*. 
law for the mere purposes of such deprivation is absolutely dead at its birth by force of the Constitution of the State.108 Finding that the measure was not a police power regulation to preserve public health, the Appellate Division concluded that the statute was unconstitutional and that the appellant should be released from imprisonment.

The state pursued an appeal to the New York Court of Appeals, which affirmed the Appellate Division. The court concluded that this measure arbitrarily deprived Jacobs of both property and liberty without due process of law.109 It expressed concern that the statute would compel the defendant to abandon carrying on the manufacture of cigars in his home and to work for an employer in another location: "He may choose to do his work where he can have the supervision of his family and their help, and such choice is denied him. He may choose to work for himself rather than for a taskmaster, and he is left without freedom of choice."110 The characterization of the defendant's plight is likely a key to understanding this case. The court pictured Jacobs, not as a victimized worker, but as an aspiring entrepreneur hamstrung by an irrational regulation.

Emphasizing that a law which destroyed the value of property might amount to a deprivation thereof even without a physical taking, the court found that the law interfered with the use of a tenement house by an owner or tenant who was a cigarmaker. The right to use the apartment was seen as a protected property interest. More important for our purposes, the court defined liberty as not only freedom from restraint but as the right "to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."111 It followed that any law which infringed these "fundamental rights of liberty" was unconstitutional unless justified as an exercise of the police power.112

The court next considered whether the law at issue was a measure to promote public health. It took the position that judges must guard fundamental rights against invasion on pretextual grounds:

Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citi-

108 See In re Jacobs, 2 Cow. Cr. at 370. See also Notes, The New York Tenement House Cigar Act, 18 AM. L. REV. 1021, 1021 (1884) (summarizing the outcome of the Jacobs case).
109 In re Jacobs, 98 N.Y. *98, *115 (N.Y 1885) ("[W]e have not been able to see in this law [a relation to public health], and we must, therefore, pronounce it unconstitutional and void [as a violation of due process].").
110 See id. at *104.
111 Id. at *106.
112 Id. at *107.
zen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health.\footnote{Id. at *110.}

The court found the public health rationale unpersuasive. First, the court was not convinced that the manufacture of tobacco products was injurious to health. Second, it pointed out that the statute was not crafted to eliminate the supposed health hazard. The law did not ban cigarmaking in factories and shops, or even in tenement houses in other parts of the state. Lastly, the court expressed concern that under the guise of public health the legislature might "have placed under a similar ban the trade of a baker, of a tailor, of a shoemaker, of a woodcarver, or of any other of the innocuous trades carried on by artisans in their own homes."\footnote{Id. at *114.}

The court's skepticism about the health rationale supposedly behind the tenement house cigar act was shared by many contemporary observers. The New York Times, for example, opined in December of 1883:

> The real question is whether cigar-making in tenement-houses is injurious to the public health in the sense that justifies an interference by the State to prevent it, or whether the real object of the law is not to prevent the competition of tenement-houses with the regular factories in cigarmaking.\footnote{Editorial, N.Y. TIMES, Dec. 7, 1883, at 4.}

After the Jacobs decision, the Times maintained that "the legislation was really demanded by the trades unions, which desired to keep up a supervision and control over all persons employed in making cigars."\footnote{Editorial, Three Important Decisions, N.Y. TIMES, Jan. 21, 1885, at 4.} In the same vein, the Albany Law Journal insisted:

> In our opinion a more glaringly indefensible act was never passed under the guise of a police measure. It was a reproach to our legislation that such oppression could be exerted by the power of a few trade monopolists.\footnote{Current Topics, 31 ALB. L. J. 81, 82 (1885). See BARROWS, supra note 107, at 425, for a discussion of the union pressure to enact the ban on tenement cigarmaking.}

The Nation also applauded the court's ruling and attributed passage of the tenement house cigar act to union pressure:

> The act in question was alleged to be, and probably was, a trades-union bill, favored by the workmen in the large manufactories in order that their work might not be undersold. They painted a terrible picture of the taskmasters who, to save a few pennies, turned small family living apartments into reeking workshops. And they were to a certain extent encouraged by the philanthropists of this city, who did not reflect that, as this labor was better paid than most others and had fewer expenses, so
the tenements in which it was carried on belonged to the better class of such houses. And further, that any such law would drive industry to neighboring parts like Jersey City, where no such restrictions are imposed, and the sanitary arrangements are not so good as here. This sanitary question is of course the question at issue. It further expressed approval of the "broad view" taken by the court with respect to "the special class [of] legislation of which there is now so much on our statute-books."

On the other hand, one prominent scholar offered a health justification for the measure. Christopher G. Tiedeman, generally a critic of governmental regulation of business, asserted:

It can not be questioned that the State has the power to prohibit the prosecution of all unwholesome or injurious trades and employments in these large tenement houses in our metropolitan cities, in which the people are often huddled together like cattle. The manufacture of cigars is considered by some to so taint the atmosphere as to endanger the health of the occupants of the house. If this be true, then the legislature has undoubtedly the power to prohibit the prosecution of this trade in a tenement house occupied by three or more families. The injurious effect upon the health of the cigarmaker's family may not furnish the proper justification for legislative interference, except in behalf of minor children. For since the wife and grown children, in the theory of law, if not in fact, voluntarily subject themselves to the unwholesome odors of tobacco, they do not need and cannot demand the protection of the law. But where a house is occupied by more than one family, the other families have a right to enjoy the possession of their parts of the house, free from the unwholesome or disagreeable odors of a trade that is being plied by another in the same house.

Another commentator agreed that there was "abundant evidence to show that conditions in these tenement workshops were bad," but concluded that "the stronger motive" behind the law was the desire of the union to control the cigarmaking trade. Historians can debate what elements were foremost in securing passage of the tenement house cigar act. The crucial point for this study is that there was room for the court to fairly conclude that the ostensible health measure masked a legislative assault on the right to follow an ordinary calling enacted at the behest of an economic interest group.

Some additional observations about Jacobs are in order. To buttress its conclusion that liberty included the pursuit of lawful trades, the court quoted from the concurring opinions of Field and Bradley.

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118 *This Week*, 40 NATION, Jan. 29, 1885, at 85.
119 *Id.*
in Butchers’ Union Co., treating these opinions as correct statements of constitutional norms. In Jacobs the court applied this doctrine of occupational freedom in a context very different from the monopoly setting in Slaughter-House. The decision in Jacobs clearly marked a turning point. The right to follow a calling would find increased, but never complete, judicial acceptance, and Jacobs would be widely cited in the late nineteenth century.

Only months after Jacobs, the New York Court of Appeals invoked the right to follow lawful pursuits to invalidate an anti-competitive restriction upon an entire line of work. A state law prohibiting the manufacture and sale of oleomargarine as a substitute for butter or cheese made from milk was challenged in People v. Marx. Citing Jacobs, the court stressed “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.” It concluded that this principle was breached “by an enactment which absolutely prohibits an 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.” Harking back to long-standing anti-monopoly concerns, the court pointed out that the effect of this ban was to exclude one class of citizens from otherwise lawful occupations in order to protect another class against competition.

A few years later the Supreme Court gave a cautious sanction to the right to follow ordinary occupations. At issue in Powell v. Pennsylvania was a state law prohibiting the manufacture and sale of oleomargarine. Justice Harlan, speaking for the Court, brushed aside the challenge to the law on Fourteenth Amendment grounds. Yet he revealingly noted:

The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law.

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122 See In re Jacobs, 98 N.Y. *98, *107 (N.Y. 1885) (quoting Field and Bradley at length).
124 Marx, 99 N.Y. at *386.
125 Id. at *387.
126 127 U.S. 678 (1888).
127 Id. at 684.
Oddly, Harlan never discussed Marx. Dissenting, Field insisted that the statute amounted to an arbitrary deprivation of liberty and property in violation of due process. In reaching this conclusion, he quoted the capacious definition of liberty in *Jacobs* and *Marx*, treating the cases at length.  

The right to pursue an ordinary calling steadily gained judicial solicitude at the state level toward the end of the nineteenth century. A few examples must suffice. In *State v. Moore*, the Supreme Court of North Carolina invalidated an emigrant agent law which placed a prohibitory license fee on agents assisting southern blacks to find employment outside the region.  

The court quoted the language in *Jacobs* affirming the right to pursue lawful trades, as well as the comments of Justices Field and Bradley. Likewise, the Supreme Court of Illinois, in a line of cases, extolled the right to follow a calling. In *City of Chicago v. Netcher*, for example, the Court invalidated a municipal ordinance prohibiting department stores from selling meat and food products as a deprivation of liberty and property without due process of law. The Court fused the right to acquire property with the freedom to follow a trade:

The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident of the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitution as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and welfare. The state, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations; but the right to acquire

128 See id. at 692 (Field, J., dissenting) (quoting Marx as characterizing "liberty . . . to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare" and noting the holding in *Jacobs* that a health law may not arbitrarily interfere with personal liberty without due process of law).

129 18 S.E. 342, 345 (N.C. 1893) ("[A]n 'emigrant agent' . . . does not belong to that class which is so inherently harmful or dangerous to the public that it may, either directly or indirectly, be restricted or prohibited.").

130 Id. at 344 ("[Justice Field stated] that among the inalienable rights, as proclaimed in the declaration of independence, is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others."). See David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 785 (1998), asserting that judicial protection of economic liberty sometimes assisted blacks faced with discriminatory legislation, for an analysis of state regulation of emigrant agents.

131 55 N.E. 707, 708 (Ill. 1899) (finding no health or safety rationale to justify the sales prohibition by department stores).
and dispose of property is subject only to that power. The individual may pursue, without let or hindrance from any one, all such callings or pursuits as are innocent in themselves, and not injurious to the public. These are fundamental rights of every person living under this government.\textsuperscript{132}

Also, the New York Court of Appeals relied on \textit{Jacobs} and \textit{Marx} to strike down a state statute outlawing the ticket brokerage business in connection with railroad and ship transportation.\textsuperscript{133}

This pattern continued in the early twentieth century. In \textit{Bessette v. People}, the Illinois Supreme Court struck down a law requiring a license in order to engage in the business of horseshoeing.\textsuperscript{134} Finding no health or safety justification for the statute, the court held that the measure abridged the right to pursue a trade. Similarly, the Supreme Court of Tennessee, quoting from \textit{Jacobs}, voided a municipal ordinance providing that all city printing must carry the union label as a deprivation of the right of non-union individuals to pursue ordinary avocations.\textsuperscript{135} Further, the Supreme Court of Nevada invalidated a statute that prohibited individuals from engaging in the banking business as a denial of the right to follow lawful occupations.\textsuperscript{136}

In \textit{Allgeyer v. Louisiana} the Supreme Court forcefully endorsed the proposition that the Due Process Clause of the Fourteenth Amendment safeguarded the right to follow common occupations.\textsuperscript{137} Justice Rufus W. Peckham, writing for the Court, famously declared:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.\textsuperscript{138}

\textsuperscript{132} \textit{Id.} at 708.

\textsuperscript{133} \textit{See People ex rel. v. Warden of City Prison of New York}, 51 N.E. 1006, 1010 (N.Y. 1898) (declaring that state cannot abridge right to engage in ticket brokerage business).

\textsuperscript{134} \textit{See 62 N.E. 215, 219 (Ill. 1901)} (noting that the state's police power did not justify infringing on the liberty of horseshoers); \textit{see also People v. Beattie}, 89 N.Y.S. 193, 198 (N.Y. App. Div. 1904) (invalidating a horseshoe licensing requirement).

\textsuperscript{135} \textit{See Marshall & Bruce Co. v. Nashville}, 71 S.W. 815, 817 (Tenn. 1902) ("This ordinance deprives those not using the union label of the right of pursuing their business avocation, to the extent that their bids for public printing will not be accepted.").

\textsuperscript{136} \textit{See Marymont v. Nev. St. Banking Bd.}, 111 P. 295, 303 (Nev. 1910) (holding that there shall be no blanket denial to all individuals the right to engage in avocations which are beneficial when conducted under proper regulations).

\textsuperscript{137} 165 U.S. 578, 590 (1897) (citing \textit{Butchers' Union} and \textit{Powell v. Pennsylvania} to argue that liberty includes the freedom to "follow any of the ordinary callings of life").

\textsuperscript{138} \textit{Id.} at 589.
By 1900 the right to pursue a calling seemed firmly established as a component of liberty.\(^{139}\) This development represented a vindication of the views of Field and Bradley in *Slaughter-House*. In *Truax v. Raich* the Court reaffirmed its commitment to the right to earn a livelihood. Justice Charles Evans Hughes, speaking for the Court, invalidated a state law that limited the employment of aliens.\(^{140}\) He asserted: "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 [Fourteenth] Amendment to secure."\(^{141}\)

One must be careful, of course, not to overstate the judicial endorsement of occupational freedom as a constitutional norm. During the nineteenth century state legislators imposed licensure requirements, often coupled with requirements of proper qualifications, on many occupations, including architects, auctioneers, barbers, peddlers, physicians, plumbers, and undertakers.\(^{142}\) The spread of occupational licensing would, on its face, seem to be in conflict with the right to pursue ordinary trades.\(^{143}\) How could courts decide which vocations were suitable for licensing, and which were ordinary trades?\(^{144}\) Although occupational licensing produced considerable litigation, state and federal courts sustained most schemes against constitutional challenge.\(^{145}\)

\(^{139}\) See 1 Christopher G. Tiedeman, A Treatise on State and Federal Control of Persons and Property in the United States Considered from Both a Civil and Criminal Standpoint 236 (photo. reprint 1975) (1900) ("No man's liberty is safe, if the legislature can deny him the right to engage in a harmless calling; there is certainly an interference with his right to the pursuit of happiness in such a case; and such a prohibition would be a deprivation of his liberty 'without due process of law.'").

\(^{140}\) See 299 U.S. 33, 41 (1915) ("[T]his admitted authority [under the police power] ... does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood.").

\(^{141}\) Id. at 41.


\(^{143}\) Cooley recognized the tension between license requirements and the pursuit of ordinary callings. See Thomas M. Cooley, Limits to State Control of Private Business, PRINCETON REV., Jan.–June 1878, at 233, 266–67 ("[A] free state has no power to compel the taking out of a license as a condition precedent to the following of the ordinary pursuits of life.").

\(^{144}\) See Tiedeman, supra note 139, at 237 ("Whenever, therefore, the prosecution of a particular calling threatens damage to the public or to other individuals, it is a legitimate subject for police regulation to the extent of preventing the evil. It is always within the discretion of the legislature to institute such regulations when the proper case arises, and to determine upon the character of the regulations. But it is a strictly judicial question, whether the trade or calling is of such a nature, as to require or justify police regulation.").

\(^{145}\) See Friedman, supra note 142, at 511–34 (listing various examples of courts sustaining occupational licensing laws).
The Supreme Court heard few such cases, but in Dent v. West Virginia it upheld a measure governing the practice of medicine. Justice Field, a champion of the right to follow common callings, spoke for the Court. He emphatically affirmed the right to pursue ordinary vocations:

It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.

Nonetheless, Field had no difficulty in finding that states could protect society by setting qualifications for physicians. To be sure, the practice of medicine had long been viewed as a learned profession rather than an ordinary trade and so generalizations based on the Dent opinion are difficult. But the Court in Dent, despite rhetoric about the right to pursue ordinary callings, signaled its receptivity to occupational licensing. Field made no attempt to reconcile his earlier defense of occupational freedom, as exemplified by his Slaughter-House dissent, with licensing requirements broadly.

As this record makes clear, the liberty to follow lawful callings did not always prevail over employment regulations imposed by the states. For our purposes, however, the crucial point is that state and federal courts in the late nineteenth century articulated an unenumerated right to follow ordinary callings.

V. RISE OF LIBERTY OF CONTRACT

The growth of freedom of contract as a constitutional right was linked to the right to pursue ordinary trades. Contractual freedom had deep roots in American legal culture. Contracts were central to
the market economy and allowed individuals to bargain for their own advantage. The prominent legal historian J. Willard Hurst emphasized "the overwhelming predominance of the law of contract in all of its ramifications in the legal growth of the first seventy-five years of the nineteenth century." Moreover, the emerging contract system represented a move away from a hierarchical social order in which relationships were governed by birth and status. Since private law increasingly elevated the importance of contract law, it was only a short step for courts to constitutionalize the right to make contracts in a free market. Recall that Marshall, dissenting in *Ogden*, maintained that the right to enter agreements was grounded in natural law which pre-existed governments. Marshall did not carry the day in *Ogden*, but his notion of the fundamental nature of contractual freedom would powerfully reappear later in our constitutional history. As we have previously discussed, the "free labor" ideology of the Civil War era and the Civil Rights Act of 1866 underscored the right to make contracts and acquire property.\(^{151}\)

Once courts recognized that the right of individuals to pursue common occupations was constitutionally protected, the next logical step was to uphold freedom of contract to achieve this end. The idea that freedom of contract was protected against arbitrary state abridgement was broadly endorsed as an element of state constitutional law before the Supreme Court tackled the issue. Lawrence M. Friedman aptly pointed out that "there were important forerunners of *Lochner* on the state level. It was in the state supreme courts that some important doctrines of constitutional law first saw the light of day—doctrines of due process, or liberty of contract."\(^{152}\)

The Supreme Court first hinted its acceptance of a constitutional right to enter contracts in *Frisbie v. United States*.\(^{153}\) Justice David J. Brewer, speaking for the Court, observed that "generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal." He added that "generally speaking, every citizen has a right freely to contract..."\(^{154}\)

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\(^{150}\) JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 10 (1956).


\(^{152}\) LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 25 (2002); see also Bernstein, *supra* note 81, at 42–44 (discussing emergence of liberty of contract doctrine).

\(^{153}\) 157 U.S. 160, 165 (1895) (stating that the liberty of contract, while not an absolute right, is one of the inalienable rights of citizens of the United States).

\(^{154}\) Id.
for the price of his labor, services, or property.\textsuperscript{155} Significantly, Brewer did not invoke the Due Process Clause or any express constitutional language as a basis for these remarks. He appears to have relied on the evolving view that contractual freedom was a fundamental, if unenumerated, right.

This development culminated in the \textit{Allgeyer} decision. Giving an expansive reading to liberty under the Due Process Clause of the Fourteenth Amendment, the Court affirmed freedom of contract as well as the right to follow ordinary occupations.\textsuperscript{156} Scholars have debated how vigorously the Supreme Court actually applied the liberty of contract doctrine to invalidate state regulations,\textsuperscript{157} but this inquiry is outside the scope of this paper. All the same, courts viewed contractual freedom as the constitutional baseline, and expected lawmakers to justify restrictions on this right.\textsuperscript{158} As Barnett explained, in liberty of contract cases the Supreme Court "would not accept the 'mere assertion' by a legislature that a statute was necessary and proper. Instead, it required a showing that a restriction of liberty have a 'direct relation, as a means to an end,' and that 'the end itself must be appropriate and legitimate.'\textsuperscript{159}

\section*{VI. Implications of Unenumerated Economic Rights for Constitutional History}

The existence of unenumerated economic rights have been of little interest to jurists for decades. Only the most optimistic or foolhardy person would predict a revival of such rights in the near future.\textsuperscript{160} Indeed, the reality in current constitutional jurisprudence

\textsuperscript{155} Id. at 166.

\textsuperscript{156} Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) ("The liberty mentioned [includes the right] . . . to earn his livelihood by any lawful calling . . . and for that purpose to enter into all contracts which may be proper, necessary and essential to his [success].").

\textsuperscript{157} See Gregory S. Alexander, \textit{The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism, in The Fall and Rise of Freedom of Contract} 103, 108 (F.H. Buckley ed., 1999) ("[E]ven during the period between 1885 and 1930, the supposed height of laissez-faire constitutionalism, the courts, federal and state, did not uniformly sustain the liberty of contract principle."); Ely, supra note 149, at 387–93 (contending that the Supreme Court was not a consistent defender of contractual freedom and rejected numerous challenges to state economic regulations based on liberty of contract grounds).

\textsuperscript{158} See, e.g., Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923) ("But freedom of contract is . . . the general rule and restrain the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.").

\textsuperscript{159} BARNETT, supra note 20, at 214.

\textsuperscript{160} It should be noted, however, that some federal and state courts in the post-World War II era have recognized a constitutionally protected right to pursue lawful callings. See, e.g., Cowan v. Corley, 814 F.3d 223, 227 (5th Cir. 1987) (recognizing the right to pursue livelihood as a constitutionally protected liberty interest); Santos v. City of Houston, 852 F. Supp. 601, 607 (S.D. Tex. 1994) ("[T]he courts have consistently held that the opportunity to pursue one's livelihood is a constitutionally protected liberty interest, which may not be arbitrarily denied."); State
regarding economic rights is that courts do not even meaningfully enforce the express provisions, such as the Contract Clause and the Takings Clause, much less claims of unenumerated rights. Notwithstanding this bleak assessment, I wish to briefly develop three points that will hopefully facilitate a better understanding of the role of unenumerated rights in our constitutional past.

1) By 1900 there was broad agreement that courts could appropriately give effect to certain fundamental principles of justice even if not spelled out in the federal or state constitutions. This was not a license for courts to impose their view of desirable social or economic policy on the public. Rather, courts were expected to enforce those unenumerated rights deemed essential to a free society and deeply grounded in the nation's history.

By the end of the nineteenth century, then, both federal and state jurists widely believed that there were judicially-enforceable unenumerated rights, which were largely economic in character. This stress upon property and contractual rights may be striking to modern eyes, but courts defined liberty primarily in economic terms. As Stephen A. Siegel has perceptively noted: "Civil liberties encompass both personal and property rights. Indeed, in nineteenth-century America, property was considered among the most important civil liberties."\(^\text{161}\)
The due process guarantee served to protect these fundamental economic rights.\(^\text{162}\) There were differences, of course, over the extent of such rights and what states must demonstrate to defend legislative interference with them. It bears emphasis, however, that the debate concerned the scope of the substantive rights guaranteed by due process, not the notion later popularized by the Progressives and New Dealers that due process merely referred to matters of procedure.\(^\text{163}\)

\(^{161}\) Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 33 n.154 (1991). In the same footnote, Siegel commented that "[i]t was not until the twentieth century that legal scholars began to contrast civil liberties with economic liberties." *Id.*

\(^{162}\) See Bernstein, supra note 81, at 37 ("By the time the Court decided *Lochner*, a virtual consensus seems to have developed among the Justices that due process principles protected fundamental rights that were antecedent to government.").

\(^{163}\) See 2 Louis B. Boudin, *Government by Judiciary* 374–96 (1932) (discussing the meaning of the term "due process of law"); Edward S. Corwin, *The Twilight of the Supreme Court: A History of Our Constitutional Theory* 68–69 (photo. reprint 1970) (1934) (arguing that "due process of law" pertains to trial procedures and does not limit legislatures); see also Horwitz, supra note 149, at 158 ("It was easy to confuse the controversial expansion of federal judicial power under the Fourteenth Amendment with a supposed change in constitutional methodology from 'procedural' to 'substantive' due process. That confusion was largely produced by later critical Progressive historians intent on delegitimizing the *Lochner* court."); Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 Ky. L.J. 397,
There was no precise prescription for ascertaining which unspecified rights were essential to a free republican government. While a number of provisions in the Constitution and Bill of Rights protect against despoliation of economic interests, the concept of property is not defined by the Constitution.\textsuperscript{164} Resorting to extra-textual principles was essential if the constitutional principles were to have any meaning.\textsuperscript{165} Property was not understood as a static concept that just protected existing economic arrangements. At least since the Revolutionary era, the concept of property encompassed the right to acquire property. How was a person to obtain property? In time, courts perceived that the right to pursue lawful callings was a direct offshoot of the right to acquire property. The next logical step was recognition of the affinity between acquisition of property, following common occupations, and contractual freedom.\textsuperscript{166} As Peckham succinctly explained in \textit{Allgeyer}, "[i]n 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..."

Both the right to follow common avocations and the liberty to make contracts were classic examples of unenumerated rights. To be sure, they were founded on the proposition that property—expressly protected by the Constitution—included the right to acquire property. But ultimately they rested upon extra-textual ideas of fundamental rights deeply rooted in American history. In 1906 the Court of Errors and Appeals of New Jersey explained the evolution of these rights:

\begin{quote}
The common law has long recognized as a part of the boasted liberty of the citizen the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow men, saving such as may result from the exercise of equal or superior rights on their part, such, for instance, as the right of fair competition in the like field of human effort, and saving, of course, such other hindrance or obstruction as may be legally excused or justified. This right is declared by our Constitution to be unalienable. The
\end{quote}

\textsuperscript{404} (1994) ("No recognized distinction between procedural and substantive due process existed until after the New Deal eliminated the substantive protections.").


\textsuperscript{165} See Dellinger, \textit{supra} note 3, at 13 ("[E]ven the text of the Constitution contemplates the enforcement of rights not specified in the text.").

\textsuperscript{166} See James L. Kainen, \textit{The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights}, 79 CORNELL L. REV. 87, 126–27 (1993) ("This expansion of [right to acquire property] led directly to the \textit{Lochner} era's protection of freedom of contract.").

\textsuperscript{167} \textit{Allgeyer v. Louisiana}, 165 U.S. 578, 591 (1897).
first section of the Bill of Rights sets forth that "all men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness. As a part of the right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services which amount to the purchase and sale of labor. It makes little difference whether the right that underlies contracts of the latter sort is called a personal right or a property right. It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community, which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property, once it is acquired, but left unprotected by the law in his efforts to acquire it.\(^\text{168}\)

As historians well know, in *West Coast Hotel v. Parrish* Chief Justice Hughes ruled that the due process guarantee did not protect contractual freedom.\(^\text{169}\) He pointedly observed that "'[t]he Constitution does not speak of freedom of contract."\(^\text{170}\) This somewhat glib observation is correct, but it does not markedly advance our understanding of the place of unenumerated rights in constitutional jurisprudence. The Constitution also does not mention privacy or dignity, but courts have fashioned a jurisprudence of unenumerated rights based on these concepts.\(^\text{171}\) So the observation by Hughes could be turned on its head. As Michael J. Phillips tellingly asked:

On its face, liberty is a capacious word, one easily broad enough to include freedom of contract. By now, moreover, it has been read as including the right to an abortion. If so nontraditional a right resides within due process liberty, why should freedom of contract not dwell there as well?\(^\text{172}\)

The answer to why unenumerated economic rights were singled out for rejection is complex, and must be reserved for another day. But


\(^{169}\) 300 U.S. 379, 391–93 (1937) (discussing the government’s power to regulate contracts under the Constitution).

\(^{170}\) Id. at 391.

\(^{171}\) See KERSCH, supra note 90, at 32 ("The value of 'privacy' itself was reimagined as being protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, which now guaranteed a 'right to privacy,' a right which came to be associated primarily with claims to sexual and reproductive autonomy."). Justice William J. Brennan, Jr., sought to fashion a constitutional jurisprudence of human dignity. See William J. Brennan, Jr., Assoc. Justice, U.S. Sup. Ct., The Constitution of the United States: Contemporary Ratification (Oct. 12, 1985), in 19 U.C. Davis L. Rev. 2, 8 (1985) ("[T]he Constitution is a sublime oration on the dignity of man . . . .").

Phillips reminds us that the right to pursue callings and make contracts can be traced far into the past, and have better historical grounding than more recent claims of right that have found judicial favor.

2) The unenumerated economic rights recognized during the late nineteenth century—callings, contracting—were congruent with the entrepreneurial ethic of the Gilded Age. This symmetry underscores the fact that courts generally tend to reflect the values of the dominant political coalition of the day. The prominence of unenumerated economic rights was entirely consistent with this rule. In fact, courts of the late nineteenth century were championing values broadly shared by Americans.

3) This account of the growth of unenumerated economic rights flies directly in the face of the Progressive historiography. Progressives, and later historians who reflect their views, have cast judicial solicitude for economic rights in a harsh light. They took particular aim at the notion of unenumerated rights, picturing the rights to pursue callings and make contracts as doctrines invented to assist business interests and impose laissez-faire ideology. Revisionist scholarship has increasingly challenged, and to my mind largely demolished, the conventional wisdom that once dominated the literature. This article provides additional ammunition for the revisionist camp. As the record makes clear, the right to acquire property and aversion to state-sponsored monopoly were long-standing themes in American constitutional thought. These notions in turn were folded into the broader idea that the natural law tradition placed limits on governmental power. By defending the right to pursue a calling and the liberty of contract, courts were seeking to protect fundamental rights of individuals, not safeguard large corporations.

Justice Field, who was instrumental in promoting judicial affirmation of the right to pursue a calling as well as contractual freedom, exemplified this overriding concern with liberty. In Field's mind, his jurisprudence was crafted to "give 'the under fellow a show in this life." He was never a doctrinaire champion of business interests.

173 See ELY, supra note 73, at 82–100 (discussing the Supreme Court jurisprudence and popular sentiment of the era).

174 See JAMES W. ELY JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910, at 213 (1995) (maintaining that the Supreme Court under Fuller "shared the economic and social views of the age and spoke for the dominant political alliance").

175 See, e.g., WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 15 (1988) ("When the formalist approach to judging produced doctrines of substantive due process and liberty of contract that sanctioned class oppression, . . . we justly suspect that the formalist method was a cover for a hidden agenda.").

176 See Bernstein, supra note 81, at 5–13 (discussing revisionist scholarship).

As Morton Keller has noted, "Field adhered to old American values of private right and individual freedom that led him to be as ill at ease with corporate power as he was with legislative activism." 178

VII. FINAL THOUGHT

It warrants investigation whether there is a close link between the fundamental rights jurisprudence of the nineteenth century, focused on economic rights, and the revival of unenumerated rights doctrine starting in the 1960s. 179 Such a tie would perhaps not make champions of either economic rights or privacy rights entirely comfortable. Indeed, a great deal of ink has been spilt by scholars seeking to differentiate "bad" judicial enforcement of unenumerated economic rights from "good" judicial solicitude for civil liberties. 180 This is all the more reason for historians to rethink the question of continuity in the development of unenumerated rights.

One could persuasively contend that judicial abandonment of unenumerated economic rights has produced unhappy results for other individual liberties. Walter Dellinger has cogently maintained: "The New Deal Court's elimination of any effective protection of economic rights seriously weakened the bases for protecting personal liberty as well." 181

In this connection, it would be profitable to revisit the important, if often overlooked, decision of Buchanan v. Warley. 182 At issue was a residential segregation ordinance which in effect barred blacks from occupying homes in predominately white neighborhoods. Although decided at a time when segregationist attitudes were dominant in American society, the Supreme Court struck down the ordinance as a deprivation of property without due process of law. In reaching this result, the Court invoked a broad definition of property: "Property is more than the mere thing which a person owns. It is elementary that

179 See Bernstein, supra note 81, at 52-58 ("For better or for worse, Griswold and Roe's protection of the unenumerated right to privacy raises many of the same issues as Lochner's protection of the unenumerated right to liberty of contract ....").
180 See HORWITZ, supra note 149, at 247-68 (describing post-World War II thinkers' attempt to reconcile judicial activism in review of civil liberties with judicial restraint in area of economic regulation). See Morton J. Horwitz, The Jurisprudence of Brown and the Dilemmas of Liberalism, 14 HARV. C.R.-C.L. L. REV. 599, 602-04 (1979), which stated that "[i]n some sense, all of American constitutional law [recently] ... has revolved around trying to justify the judicial role in Brown while trying simultaneously to show that such a course will not lead to another Lochner era", for a discussion of the dilemma of potential judicial activism posed by Brown.
181 Dellinger, supra note 3, at 16.
182 245 U.S. 60, 81-82 (1917) (finding that a law that banned African-Americans from residential property ownership was unconstitutional because of the Fourteenth Amendment's Due Process Clause).
it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Combining protection of individual property rights with regard for racial minorities, Buchanan demonstrates that economic rights are concerned as much with getting property as with safeguarding the interests of existing owners. It is of a piece, therefore, with earlier decisions recognizing the right to pursue avocations or make contracts. It may also be a bridge between two chapters in the evolution of fundamental rights jurisprudence.

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183 Id. at 74.

184 See James W. Ely, Jr., Reflections on Buchanan v. Warley, Property Rights, and Race, 51 VAND. L. REV. 953, 964 (1998) ("Buchanan forcefully demonstrates that regard for property rights is not an end in itself, but is also important for securing individual autonomy and other personal liberties.").

185 Consider the expansion of unenumerated rights under due process to civil liberties in Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (establishing the fundamental right of parents and guardians to control the upbringing and education of their children) and Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (finding that parents have a fundamental right to make decisions about private school attendance). Although both of these decisions were based in part on the protection of property interests, they contain broad language about personal freedoms. See William G. Ross, Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927, at 188 (1994) ("Taken together, the Court's vagueness about the economic liberties that it was protecting and its robust language concerning human freedoms indicate that Meyer and Pierce represent the application of a doctrine of substantive due process to personal liberties that go beyond economic rights.").