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## The "New Judicial Federalism" Before its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for its Recent Decline

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# The "New Judicial Federalism" Before its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for its Recent Decline

## **Abstract**

The coming of the New Deal may have spelled the end of the *Lochner* era in the federal courts, but in the state courts *Lochner*'s doctrine of economic substantive due process lives on. Since the New Deal, courts in almost every state have rebuffed the United States Supreme Court and have interpreted their own state constitutions' due process clauses to provide substantive protections to economic liberties. This Article presents a comprehensive survey of state court use of economic substantive due process since the New Deal. It includes an enumeration of every instance since 1940 of a state court of highest review protecting economic liberties through state constitutional economic substantive due process. Previous work on the subject has examined this post-New Deal rejection of the United States Supreme Court's jurisprudence, but this is the first study to comprehensively analyze the trends of that rejection.

This comprehensive analysis reveals an intriguing, and potentially controversial, discovery. The discovery is that although state courts still to some degree apply state constitutional economic substantive due process in protecting economic liberties, the rate of that application declined dramatically in the 1970s and 1980s. The decline is surprising considering that through the 1940s, 1950s, and even 1960s, a full thirty years after the New Deal, state courts did not shy from invoking the long-past ghost of *Lochner*. This Article argues that the reason for this relatively sudden decline is that many state judges were comfortable applying economic substantive due process until the coming of *Roe v. Wade* and its related right to privacy cases. Because the right to privacy cases utilized substantive due process, but of the non-economic variety, a continued use of economic substantive due process provided legitimacy to their holdings. Faced with either legitimizing opinions legalizing abortion and other privacy rights, or rejecting substantive due process altogether, conservative state jurists chose the latter. These conservatives joined with progressive jurists who were already hostile toward the protection of economic liberties. Thus, with these strange bedfellows aligned, the use of economic substantive due process under state constitutional law quickly withered into the rare, but not quite extinct, doctrine that it is today.

## **Keywords**

State constitutional law, economic substantive due process, *Lochner*, new judicial federalism, *Roe v. Wade*

THE “NEW JUDICIAL FEDERALISM” BEFORE  
ITS TIME: A COMPREHENSIVE REVIEW OF  
ECONOMIC SUBSTANTIVE DUE PROCESS  
UNDER STATE CONSTITUTIONAL LAW  
SINCE 1940 AND THE REASONS FOR ITS  
RECENT DECLINE

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TABLE OF CONTENTS

Introduction .....	458
I. Defining Economic Substantive Due Process: What is Included in This Study and What is Not.....	463
A. What Falls Under the “Economic Substantive Due Process” Umbrella .....	464
B. What is not Included in This Study .....	468
II. Background: The Rise and Fall of Lochner and How the Doctrine Survived in State Courts .....	471
A. Early Protections of Economic Liberty and the Lochner Era.....	471
B. Persistence in the State Courts after the Lochner Era.....	475
1. The inability of state courts to let go .....	475
2. Areas of protection extended under state economic substantive due process.....	479
a. Fair trade acts .....	480
b. Advertising restrictions .....	481
c. Price controls .....	483

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458	AMERICAN UNIVERSITY LAW REVIEW	[Vol. 55:457
	d. Occupational licensing.....	484
	e. Sunday closing laws.....	486
III.	Which States Have Enforced Economic Substantive Due Process Protections and When.....	487
	A. States That Were Active in Applying Economic Substantive Due Process After 1940, and Have Continued to Since 1980.....	489
	1. Florida! Florida! Florida!.....	489
	2. Illinois.....	491
	3. Georgia.....	492
	B. States That Were Active After 1940, but Have not Utilized Economic Substantive Due Process Since 1980.....	494
	1. Indiana.....	494
	2. Massachusetts.....	496
	3. South Carolina.....	498
IV.	Why Such a Precipitous Decline? Was <i>Roe v. Wade</i> The Fly in the Conservative Ointment?.....	499
	A. The Old Judges Die Hard, and Judicial Experimentation, Hypothesis.....	500
	B. The Convergence Hypothesis.....	502
	Conclusion.....	511
	Appendix A.....	513
	Appendix B.....	540

#### INTRODUCTION

Justice Brennan could not have been more wrong. In a famous 1977 article for the Harvard Law Review, Justice William J. Brennan exhorted state courts to pick up some of the protection of individual liberties that the U.S. Supreme Court had vigorously employed during the 1960s, but had retreated from in the 1970s.<sup>1</sup> In his “call to arms” Justice Brennan emphasized a fundamental cornerstone of state constitutional law: that states may interpret their own constitutions to afford greater protection of individual liberties than the U.S. Constitution, even when the constitutional provisions in question are worded identically.<sup>2</sup> Justice Brennan focused on

1. Justice Brennan was inviting state courts to protect individual liberties when the federal courts would not, and he gave credit to the work that state courts were already pursuing in this task. See William J. Brennan, Jr., *State Constitutions & the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) (noting with approval that “more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased”); see also G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1112 (1997) (stating that Justice Brennan’s “disagreement with the conservative majority on the U.S. Supreme Court gave him reason to encourage the development of state constitutional law”).

2. Brennan, *supra* note 1, at 495. State courts repeatedly emphasize their independent ability to afford greater protection under their own constitutions than is federally required. See, e.g., *People v. Dunn*, 564 N.E.2d 1054, 1057 (N.Y. 1990) (“[T]his Court has not hesitated to interpret article I, § 12 independently of its Federal counterpart when the

three areas in his article: equal protection,<sup>3</sup> procedural due process protections of governmental benefits<sup>4</sup> (often labeled the “new property”<sup>5</sup>), and the “specific guarantees of the Bill of Rights against encroachment by state action.”<sup>6</sup> In these areas, Brennan saw state courts “beginning to emphasize the protections of their states’ own bills of rights,” a development he considered to be of recent vintage, and something that needed to grow.<sup>7</sup> Other writings of the time recognized this development and entitled it the “New Judicial Federalism.”<sup>8</sup>

Justice Brennan’s exhortation was a needed recognition of the importance of state constitutions in our system of federalism and a timely reminder to the legal community not to forget our dual system of constitutionalism.<sup>9</sup> That being said, for some inexplicable reason Justice Brennan completely omitted a field of state constitutional law in which states had been actively pursuing this “New Judicial Federalism” for years. The omission is truly staggering. The field he neglected to include among the three mentioned above is the protection of economic liberties. These liberties include the right to contract and the right to make a living, especially as protected through the doctrine of “economic substantive due

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analysis by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions.”).

3. See Brennan, *supra* note 1, at 491 (noting that state courts should be particularly concerned with cases involving state legislative classifications that impermissibly interfere with fundamental rights, such as “the rights to vote, to travel interstate, or to bear or beget a child”).

4. See *id.* at 492 (explaining that “[t]he root requirement of due process is that, except for some extraordinary situations, an individual be given an opportunity for a hearing before he is deprived of any significant ‘liberty’ or ‘property’ interest”).

5. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (noting that welfare entitlements and other contractual governmental benefits are today widely considered to be property rather than a gratuity of the state (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964))).

6. See Brennan, *supra* note 1, at 492 (noting that the incorporation of many aspects of the Bill of Rights against the states has been particularly strong in “the administration of the criminal justice system”).

7. *Id.* at 495.

8. See, e.g., Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1192-94 (1977) (describing the trend towards U.S. Supreme Court deference to state adjudication); see also Tarr, *supra* note 1, at 1099 (developing an understanding of the causes and magnitude of the shift towards protection of rights by state constitutional guarantees).

9. In fact, Justice Brennan called himself “a devout believer” in “our concept of federalism.” Brennan, *supra* note 1, at 502. Brennan was emphatically correct in diagnosing the general lack of importance placed upon state constitutional law. Law school curricula of the time reflected the paucity of interest in state constitutional law: “Law schools . . . must share the blame for the failure by counsel and the courts to do justice to state constitutions. The typical course in constitutional law now virtually ignores the existence of state constitutions.” James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241, 243, 246 (1981). Whether instruction is now better after thirty years of the “New Judicial Federalism” is beyond the scope of this article.

process.”<sup>10</sup> Justice Brennan even went so far as to suggest that this field did not exist, asserting that “courts do not today substitute their personal economic beliefs for the judgments of our democratically elected legislatures.”<sup>11</sup> In using the phrase “do not today,” Brennan was distinguishing modern jurisprudence from the practices of the Supreme Court during the “*Lochner* era,” in which the Court utilized the Federal Constitution’s Due Process Clauses<sup>12</sup> to strike down economic regulations and protect economic liberties.<sup>13</sup>

This last assertion ignored forty years of state courts wielding the doctrine of economic substantive due process in the face of the Supreme Court’s renunciation of the *Lochner* era.<sup>14</sup> It is even more perplexing that Justice Brennan did not discuss this history given that its existence was no mystery by 1977.<sup>15</sup> As will be discussed in detail throughout this Article,

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10. See *infra* Part I.A (defining economic substantive due process and discussing the ways in which courts have used the doctrine).

11. Brennan, *supra* note 1, at 490-91 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), which held that a Kansas statute implicating economic rights did not violate due process and noting that the Kansas Legislature was free to decide that such legislation was needed to deal with a particular industry). While it might be suggested that Justice Brennan was referring only to federal courts’ refusal to supplant the judgment of legislatures, he fails to make any reference to contemporaneous state court decisions protecting economic liberties.

12. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”); U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”).

13. The phrase “*Lochner* era” refers to a period characterized by Supreme Court decisions like that of its namesake, *Lochner v. New York*, 198 U.S. 45, 53, 64 (1905), in which the U.S. Supreme Court struck down legislation limiting employment in New York bakeries to sixty hours per week and ten hours per day as a violation of the Fourteenth Amendment’s Due Process Clause. See *infra* Part II.A (discussing the growth and decline of economic substantive due process jurisprudence during the *Lochner* era).

14. See *infra* notes 83-97 and accompanying text (describing the transition from protection of economic liberties through substantive due process during the *Lochner* era to application of a lower “rational basis” standard for determining the validity of state economic regulations).

15. Many scholarly articles have documented the preservation of economic substantive due process in state courts. See, e.g., John A.C. Hetherington, *State Economic Regulation & Substantive Due Process of Law*, 53 NW. U. L. REV. 226, 226-27 (1958-1959) (“Since the abandonment by the Supreme Court of substantive due process as a test of the validity of state economic regulation, there have been many conflicting decisions in the substantive due process field in the state courts.”); John A. Hoskins & David A. Katz, *Substantive Due Process in the States Revisited*, 18 OHIO ST. L.J. 384, 386 (1957) (“These state courts continue to insist, as did the pre-1934 federal judiciary, that legislative enactment of state public policy be tempered by what the state courts believe to be desirable, effective and proper.”); A.E. Dick Howard, *State Courts & Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 883 (1976) (“[N]otwithstanding the Supreme Court’s post-1937 ‘hands-off’ posture in the economic sphere, studies of state court decisions have made it clear that substantive due process has lived on in the states.”); Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 92 (1950) (“[S]ome state supreme courts when interpreting the due process clause or its equivalent in their state constitutions have continued to interfere freely with legislative policies.”); Note, *Counterrevolution in State Constitutional Law*, 15 STAN. L. REV. 309, 321 (1963) (“The increasing frequency of such decisions indicates that economic due process is neither dead

from 1937 through the present day, almost every state court of highest review has interpreted its own constitution’s Due Process Clause and similar provisions, to strike down economic regulations. These state courts have done so even when explicitly acknowledging that the U.S. Supreme Court has interpreted the equivalent language in the U.S. Constitution to not extend such protection of economic liberties.<sup>16</sup> This protection includes the invalidation of economic regulations in many different areas of economic affairs, such as occupational licensing, advertising, and price controls.<sup>17</sup>

Past studies of this phenomenon have covered all of these areas of economic activity and have performed in-depth analysis of specific state court decisions that is beyond the scope of this Article.<sup>18</sup> What all past studies have lacked, however, is a systematic attempt to catalog every economic substantive due process opinion under state constitutional law since the close of the *Lochner* era. This Article does just that. It presents every instance of a state court of highest review protecting economic liberties through the use of the doctrine of economic substantive due process, as that term is defined in Part I, under state constitutional law since 1940.<sup>19</sup>

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nor dying and that it is the United States Supreme Court, rather than the state courts, which is resisting the current drift in constitutional interpretation.”)

The fact that numerous studies exist has not prevented more recent studies from ignoring post-New Deal economic substantive due process under state constitutional law. *See, e.g.*, Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1412 n.5 (1999). Schapiro cites G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 165-66 (1998), for the proposition that “from 1950 to 1969, state courts relied on state constitutions to afford greater protection than was available under the [United States] constitution only 10 times.” As this Article illustrates, that proposition is completely false. It may stem from an understanding of “rights” that only encompasses those embraced by Justice Brennan, ignoring those related to economic liberties. *See supra* notes 3-7 and accompanying text (noting that Brennan’s article discussed equal protection, procedural due process, and the provisions of the Bill of Rights prohibiting the states from encroaching upon certain rights of individuals). If that is so, it would be helpful for such studies to point out that underlying assumption.

16. *See infra* Appendix A (listing all cases uncovered by this study where state courts have used economic substantive due process to protect economic liberties, with the exception of land use zoning cases); *see also infra* Part III.A (providing examples of state courts protecting economic liberties and acknowledging that other courts might not take the same position).

17. *See infra* Part II.B.2 (providing specific examples of enforcement of economic substantive due process rights to demonstrate the scope of the doctrine’s impact on disparate areas of commerce).

18. *See, e.g.*, Joshua A. Newberg, *In Defense of Aston Park: The Case For State Substantive Due Process Review of Health Care Regulation*, 68 N.C. L. REV. 253, 257-59 (1990) (analyzing cases in which state courts have applied economic substantive due process review of healthcare regulations); Gabriella S. Tussusov, *A Modern Look at Substantive Due Process: Judicial Review of State Economic Regulation Under the New York and Federal Constitutions*, 33 N.Y.L. SCH. L. REV. 529, 567 (1988) (focusing on the application of economic substantive due process by New York courts since 1937).

19. Appendix A presents the complete enumeration of relevant cases. The inclusion of only state courts of highest review, which are generically referred to below as “state

The absence of a full-fledged “compendium” of economic substantive due process cases under state constitutional law has frustrated attempts to more deeply inquire into how frequently state courts have protected economic liberty via economic substantive due process, and what the trends in that frequency have been. Admitted one scholar in 1981, “[n]o single study has purported to collect all the state cases in this area . . . .”<sup>20</sup> Another, admitting she lacked the benefit of an overall analysis data set, stated that “an overwhelming majority of states *appear* to have viable precedents for judicial invalidation of economic measures on due process grounds.”<sup>21</sup> Not only this, but because she lacked a comprehensive set of cases in the area, it was reasonable of her to conclude, in 1988, that there was a “*growing* national trend on the state level toward active review” of economic regulation.<sup>22</sup> This study’s data illustrate that by 1988 the actual trend was moving in the opposite direction.

Pursuant to its data, this Article presents the discovery that in the 1970s, and especially the 1980s, state court enforcement of economic substantive due process began to wane.<sup>23</sup> This discovery leads one to believe that perhaps Justice Brennan was correct to omit an area of state constitutional law otherwise worthy of the “New Judicial Federalism.” This does not mean that by 1977 economic substantive due process under state constitutional law was dead, just that it was about to enter a much leaner stage than before.<sup>24</sup>

This Article begins in Part I with the methodology used in determining when a case falls under the definition of “economic substantive due process” used here. Part II opens with a brief history of the doctrine of

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supreme courts,” instead of *all* state courts, is made for reasons of research convenience. The present research includes decisions from fifty courts covering sixty-five years of case law, and although an army of researchers would be needed to scour the state lower courts, the Author suspects that the trends at those levels would not differ significantly.

20. Kirby, *supra* note 9, at 252.

21. Tussusov, *supra* note 18, at 530 n.7 (emphasis added).

22. *Id.* at 567 (emphasis added). The present author also was taken in by the seductive allure of isolated state cases not set against a comprehensive study of trends in the law. See Anthony B. Sanders, Comment, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles v. Giles*, 88 MINN. L. REV. 668, 678 (2004) (arguing that federal *and* state courts have recently enforced the doctrine of economic substantive due process to a greater degree). The trend in lower federal courts, however, does appear (but, yes, only “appear”) to be on the upswing, despite the Supreme Court’s apparent refusal to revive it. See *id.* at 678-80 (listing recent federal cases striking down economic regulations under a substantive reading of the Fourteenth Amendment’s Due Process Clause).

23. See *infra* notes 169-176 and accompanying text (indicating that state supreme courts decided sixty-seven cases involving economic substantive due process in the 1960s, eleven cases in the 1980s, and eight cases in the 1990s); see also *infra* Appendix B (presenting data regarding the use of economic substantive due process by all state supreme courts).

24. See *infra* Part IV (discussing reasons for the decline of economic substantive due process after the 1970s).

economic substantive due process and of how it found favor in the *Lochner* era of the early twentieth century. It then moves on to an overview of state court applications of economic substantive due process since 1940 and of the different contexts in which it has arisen. Part III presents the state-by-state findings of the study, summarizing the data included in the Appendices and highlighting a few states that are particularly revealing of the trends in economic substantive due process at the state level over the last sixty-five years.<sup>25</sup> Finally, in Part IV the Article addresses the question of why the rate at which state courts used economic substantive due process dropped so precipitously in the 1970s and 1980s. The Article suggests that in the wake of the non-economic substantive due process case *Roe v. Wade*,<sup>26</sup> and similar “right to privacy” cases, former defenders of the doctrine recognized its similarity with that underlying *Roe*. These former defenders of economic substantive due process, and otherwise supporters of the free market, chose to then shy away from the doctrine instead of pursuing the more problematic task of distinguishing it from its non-economic cousin.

#### I. DEFINING ECONOMIC SUBSTANTIVE DUE PROCESS: WHAT IS INCLUDED IN THIS STUDY AND WHAT IS NOT

Before diving into the findings of this study, or presenting its historical background, this Part briefly outlines the study’s methodology. The following explains what qualifies a case to be included in the study. This is more complicated than it may at first appear, and is highly contingent on the right that a court protects, and the constitutional basis the court uses in protecting that right.<sup>27</sup>

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25. For those interested in examining the Article’s actual data, Appendix A enumerates, alphabetically by state, every economic substantive due process case since 1940, and Appendix B numerically summarizes these cases by decade and state.

26. 410 U.S. 113 (1973).

27. It should be noted how the cases composing this study were discovered. That has been accomplished through scouring past articles on the subject, reading cases cited by, and those that have cited, opinions known to be economic substantive due process opinions, and through searches of online legal databases such as Lexis-Nexis and Westlaw. The searches have been of the form “‘police power’ w/20 unconstitutional” and “‘due process’ w/20 unconstitutional.” In addition, for states that lack an explicit “due process” clause, a search including the state constitution’s particular language was added. This study does not purport to have found *every* relevant case since 1940. Doubtless there are cases that the Author simply missed, that searches were not open-ended enough to find, or that the Author incorrectly judged to not fall within the definition of “economic substantive due process” used here. As a glance of Appendix B makes clear, the omission of even a few cases in a single state could indeed change the results of this study as regards that state, especially as regards decade-by-decade data. However, as regards national trends over each decade, more than a few omissions would be needed to alter the conclusions.

A. *What Falls Under the “Economic Substantive Due Process” Umbrella*

This study is a comprehensive review of when state courts of highest review have struck down economic regulations through the doctrine of economic substantive due process under state constitutional law since 1940. Simply put, the study has included cases that fall under the rubric of *Lochner* era jurisprudence. The cases that qualify for this understanding are instances of state courts protecting Lockean rights of an economic nature.<sup>28</sup> Whatever the merits of “natural rights theory,” it is these rights, i.e. the right to contract, to hold property, to be free from government-imposed monopolies, et cetera, that the *Lochner* era Court often protected.<sup>29</sup> From the *Lochner* era through the present, the U.S. Supreme Court has protected other “natural rights” of a non-economic nature, but these decisions fall outside of the scope of this study.<sup>30</sup> For the sake of convenience this Article employs the term “economic liberties” in referring to these “natural rights of an economic nature.”

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28. This term, of course, relates back to English philosopher John Locke. Locke argued that prior to the institution of government every man has the right to preserve himself, and lacks the right to “take away or impair the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 101-02 (Ian Shapiro ed., Yale Univ. Press 2003) (1690). That is, without government, one has a right to one’s own life, liberty, and property, but not to governmental protection of them. *Id.* Numerous scholars have discussed “Lockean” rights and their place in interpreting the United States Constitution. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS 10-18 (1985) (attempting to interpret the Takings Clause in a way “which is consistent with the basic Lockean design”); Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 442-43 (2004) (“[T]he basic concept of natural rights was clear: Natural or inherent rights are the rights persons have independent of those they are granted by government . . .”).

29. *See infra* notes 106-107 and accompanying text (providing examples of *Lochner*-era cases that protected economic rights). Some scholars, most notably Professor Sunstein, take the view that the *Lochner*-era Court was not in the business of protecting Lockean rights so much as enforcing the proper scope of the police power set against the baseline of the common law. *See, e.g.*, Cass Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 882 (1987). Other scholars have argued that *Lochner*-era decisions involved the judiciary’s attempt to combat class legislation, and not to preserve a *laissez-faire* economic system. *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE 6-10 (1993) (reviewing revisionist legal historians and their contentions that the courts of the time scrutinized legislation through an equality context). *But see* Barnett, *supra* note 28, at 489 (stating that Gillman misses how “the resistance to class-based legislation was seen as a means to the protection of natural rights, rather than an end in itself”). The Author makes note of these alternate views here, but contends that they do not affect which cases should be included in this study. Whether the cases in Appendix A were decided in order to protect the public from special interests, or in order to defend the rights of certain members of the public, the end result is that the courts struck down economic regulations and in so doing protected economic liberties.

30. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (protecting right to engage in consensual homosexual sodomy); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (protecting right of married couples to purchase contraception); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (protecting right to educate one’s child in a private school); *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923) (protecting right to learn a language of one’s choice).

For the most part the *Lochner* Court protected economic liberties through the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.<sup>31</sup> On the whole, state courts that have struck down economic regulations on the grounds that they violate an individual’s economic liberties have also grounded their opinions in due process clauses.<sup>32</sup> This is not entirely true, however. Many times state courts have struck down economic regulations because the regulations are an illegitimate use of the “police power.”<sup>33</sup> The “police power” plays a central role because the government will usually argue that its actions are justified under its authority to protect the public health, safety, welfare, and morals—otherwise known as its police power authority.<sup>34</sup> This is especially true when it comes to courts examining local ordinances. Often a state’s constitutional structure is such that a local government only possesses the powers ceded to it by the state legislature.<sup>35</sup> One often-ceded power is that of promoting the public health and safety, or some similar public benefit.<sup>36</sup> A court will typically inquire into what this ceded “police power” encompasses and whether the challenged governmental action is a valid, or invalid, use of the power.<sup>37</sup> When a court invalidates an economic

31. See *infra* Part II.A (noting that after the Court narrowly interpreted the Privileges and Immunities Clause, it turned to the Due Process Clauses of the Fifth and Fourteenth Amendments to strike down regulations that infringe upon economic liberties).

32. See Howard, *supra* note 15, at 882-83 (contrasting the unwillingness of federal courts to protect economic activity under substantive due process with aggressive protection in the state courts under due process clauses of state constitutions).

33. See, e.g., *Hand v. H & R Block, Inc.*, 528 S.W.2d 916, 923 (Ark. 1975) (concluding that a franchise regulation was effectively a minimum price requirement and finding that the regulation exceeded the permissible scope of the state’s police power); *United Interchange, Inc. of Mass. v. Harding*, 145 A.2d 94, 97, 99-100 (Me. 1958) (striking down a ban on real estate advertising in magazines as an improper exercise of the state’s police power).

34. The Florida Supreme Court provided a good description of the police power, a term frequently used by courts in various jurisdictions, as illustrated in Appendix A, and its legitimate uses: “It requires no extensive citation of authorities to support the proposition that in order to justify the exercise of the police power the Legislature must be supported by some sound basis of necessity to protect the public morals, health, safety or welfare.” *Larson v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958). *Lochner v. New York* contains similar language:

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State . . . [W]here the protection of the Federal Constitution is sought [against a state’s exercise of police power,] the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . ?

198 U.S. 45, 56 (1905).

35. See, e.g., MONT. CONST. art. XI, §§ 4-6 (ceding limited power to local governments, except when a local government specially petitions for greater powers or when the legislature grants additional powers).

36. See, e.g., *City of Osceola v. Blair*, 2 N.W.2d 83, 84 (Iowa 1942) (recognizing the legislature’s grant of power to municipal corporations “to pass ordinances necessary for the safety, health, prosperity, order, comfort, convenience, etc., of its inhabitants”).

37. See, e.g., *id.* (stating that the test of the validity of a regulation limiting the right of an individual to “pursue his trade or business” pursuant to the state’s power to protect public

regulation in this manner the result is the protection of an economic liberty. For the same reasons this study includes cases that do not mention the words “police power” or “due process” at all but merely conclude that a regulation is “arbitrary and unreasonable,”<sup>38</sup> or “not affected with a public interest.”<sup>39</sup> The same is true for various other formulations state supreme courts have used to strike down economic regulations without citing to specific constitutional regulations.<sup>40</sup> All of these formulations are used to protect Lockean economic rights,<sup>41</sup> and therefore this study includes them.

Lawyers whose entire experience with constitutional law consists of reading the U.S. Constitution and Supreme Court interpretations of it might be surprised to discover that “due process” clauses are only one of the provisions through which state constitutions protect economic liberties. Each state constitution presents, of course, a different text with different clauses to interpret. Not only that, but a few state constitutions lack a “due process” clause entirely.<sup>42</sup> In spite of this, since 1940, courts in all states lacking a due process clause have protected economic liberty through the use of “economic substantive due process,”<sup>43</sup> and courts in many other states have used constitutional clauses to protect economic liberty in addition to their respective due process clauses.

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health or safety is whether the regulation has a “definite relation to the ends sought to be attained”).

38. *See, e.g.*, *City of Jackson v. Murray-Reed-Slone & Co.*, 178 S.W.2d 847, 847-48 (Ky. 1944) (determining that an ordinance preventing a restaurant from opening between midnight and four o’clock a.m. was arbitrary and unreasonable); *Lutz v. Armour*, 151 A.2d 108, 109-11 (Pa. 1959) (finding that an ordinance banning the importation of garbage into a town was arbitrary and unreasonable).

39. *See, e.g.*, *Estell v. City of Birmingham*, 286 So. 2d 872, 874, 876 (Ala. 1973) (finding that an anti-ticket scalping law was not affected with a public interest and thus was an unconstitutional limitation upon ticket resellers); *Strickland v. Ports Petroleum Co., Inc.*, 353 S.E.2d 17, 18 (Ga. 1987) (finding that the “right to contract” is a property right within the scope of the due process clause of the Georgia Constitution and stating that the Georgia legislature may not abridge that right unless the business being regulated is “affected with a public interest”).

40. *See, e.g.*, *Dep’t of Ins. v. Motors Ins. Corp.*, 138 N.E.2d 157, 165 (Ind. 1956) (striking down law prohibiting automobile dealers from selling auto insurance on grounds that there was no “good cause” for the law); *Gillette Dairy, Inc. v. Neb. Dairy Prods. Bd.*, 219 N.W.2d 214, 221 (Neb. 1974) (concluding that a dairy regulation imposing maximum costs on products “is an unnecessary and unwarranted interference with individual liberty”); *Jones v. Bontempo*, 32 N.E.2d 17, 18 (Ohio 1941) (holding that a ban on the advertising of barbering prices interferes with property rights); *Whittle v. State Bd. of Exam’rs of Psychologists*, 483 P.2d 328, 329-30 (Okla. 1971) (concluding that licensing procedures for psychologists were unduly restrictive).

41. *See supra* notes 28-29 (discussing historical understandings of Lockean rights and their role in the development of constitutional law).

42. *See infra* notes 44-50 and accompanying text (noting that some states have managed to protect economic liberties by recognizing analogous protections under other clauses of their respective state constitutions).

43. The only three states that have not protected economic liberty through economic substantive due process under state constitutional law since 1940 are Alaska, Hawaii, and Rhode Island. *See infra* Appendix B. The constitutions of all three states have a due process clause. ALASKA CONST. art. I, § 7; HAW. CONST. art. I, § 5; R.I. CONST. art. I, § 2.

The states lacking a “due process” clause usually have a “law of the land” clause that its highest court has interpreted as possessing an identical meaning to “due process.”<sup>44</sup> In addition, some states have used other, sometimes unique, clauses to protect economic liberties. Since 1940 state supreme courts have found economic regulations unconstitutional because they violate clauses in their states’s constitution, such as the individual liberty<sup>45</sup> and anti-monopoly<sup>46</sup> clauses of the Arkansas Constitution, the absolute and arbitrary power clause of the Kentucky Constitution,<sup>47</sup> the life’s basic necessities clause of the Montana Constitution,<sup>48</sup> and the declaration of rights of the Pennsylvania Constitution.<sup>49</sup> Many cases interpreting these clauses do essentially the same thing: conclude that a regulation impermissibly violates an individual’s economic liberties.<sup>50</sup>

For the sake of convenience, the rest of this Article refers to “economic substantive due process” in referring to economic substantive due process itself and the similar bases outlined above, including other constitutional clauses interpreted to protect economic liberties, “police power” cases, and “arbitrary and unreasonable” cases.

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44. See, e.g., *Commonwealth v. Lyons*, 492 N.E.2d 1142, 1144 (Mass. 1986) (“The phrase ‘law of the land’ does not refer to the statutory law of the Commonwealth, as it exists from time to time. Rather, it refers, in language found in Magna Carta, to the concept of due process of law.”); *Commonwealth v. Devlin*, 333 A.2d 888, 891 (Pa. 1975) (“It has been a long-standing tenet of Pennsylvania jurisprudence that ‘the law of the land’ in Article I, Section 9 is synonymous with ‘due process of law.’”).

45. ARK. CONST. art. II, § 2. In *McCastlain v. R. & B. Tobacco Co.*, 411 S.W.2d 882, 885 (Ark. 1967), the Arkansas Supreme Court determined that a regulation requiring a cigarette wholesaler to obtain letters of credit from cigarette manufacturers as a condition of obtaining a cigarette wholesaler’s permit violated the state constitution’s individual liberty clause.

46. ARK. CONST. art. II, § 19. See *N. Little Rock Transp. Co. v. City of N. Little Rock*, 184 S.W.2d 52, 53-54 (Ark. 1944) (striking down taxi licensing scheme as a violation of state constitution’s anti-monopoly clause).

47. KY. CONST. § 2. See *Remote Servs., Inc. v. FDR Corp.*, 764 S.W.2d 80, 81-83 (Ky. 1989) (striking down minimum mark-up law as facially unconstitutional under “Absolute and Arbitrary Power” Clause).

48. MONT. CONST. art. II, § 3. See *Wadsworth v. State*, 911 P.2d 1165, 1174 (Mont. 1996) (applying a strict scrutiny analysis to invalidate a rule forbidding a state employed property appraiser from working as an independent realtor because it violated the right to “pursue life’s basic necessities”).

49. PA. CONST. art. I, § 1. See *Commonwealth v. Zasloff*, 13 A.2d 67, 72 (Pa. 1940) (declaring the Fair Sale Act unconstitutional under the Declaration of Rights of the State Constitution).

50. An early article concerning economic substantive due process in state courts since the demise of the *Lochner* era also lumped together “due process” cases proper, and those protecting economic liberties through similar constitutional clauses. See Paulsen, *supra* note 15, at 93 n.10 (noting that the author of the article used the phrase “due process” to “refer to clauses in state constitutions which are phrased differently from the Fourteenth Amendment as well as those which are identical to it” and stating that “[w]hatever the wording, these clauses . . . have placed unspecified general limitations on legislative power”).

*B. What is not Included in This Study*

Although this study includes cases where state supreme courts have protected economic liberties under due process clauses, it purposely does not include many other cases where state supreme courts have accomplished similar results under other clauses. A court may strike down an economic regulation on, of course, a variety of constitutional grounds. For instance, federal courts may employ the Due Process Clauses of the Fifth<sup>51</sup> and Fourteenth Amendments,<sup>52</sup> but they also have at their disposal the Equal Protection Clause,<sup>53</sup> the Takings Clause,<sup>54</sup> and the Contracts Clause.<sup>55</sup> State courts have utilized equivalents of all of these examples in striking down economic regulations.<sup>56</sup> However, just as they are under the U.S. Constitution, state court interpretations of these various constitutional provisions are historically distinct from the doctrine of economic substantive due process. To include such clauses in this study would turn the Article into a demonstration of how state courts protect economic liberties at large, and not the more focused question of how the underpinnings of the *Lochner* court have survived to this day under state constitutional law.

This study also does not include some instances of state supreme courts striking down economic regulations under what might be labeled substantive applications of a due process clause. One example is state court decisions striking down statutory caps on tort damages.<sup>57</sup> Such decisions are not examples of courts protecting Lockean rights but, of courts protecting governmental procedural guarantees. Therefore, these

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51. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

52. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”).

53. *Id.*

54. U.S. CONST. amend. V (stating that “private property [shall not] be taken for public use, without just compensation.”).

55. U.S. CONST. art. I, § 10 (“No state shall . . . pass any . . . Law impairing the Obligation of Contracts.”).

56. See, e.g., *Hasegawa v. Maui Pineapple Co.*, 475 P.2d 679, 680-83 (Haw. 1970) (utilizing state equal protection clause to strike down a statute requiring certain employers to partially compensate employees for time served on a jury or a public board); *Clem v. Christole, Inc.*, 582 N.E.2d 780, 781-85 (Ind. 1991) (applying state contracts clause to invalidate a statute barring covenants and other restrictions in residential conveyances specifically prohibiting use of the property as a residential facility for the developmentally disabled or the mentally ill); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 769-70, 779, 784 (Mich. 2004) (employing state takings clause, to strike down the use of eminent domain to stimulate the local economy by condemning private property to construct a business and industrial park).

57. See generally Patricia J. Chupkovich, Comment, *Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Health Care?*, 9 J. CONTEMP. HEALTH L. & POL’Y 337, 352-54 (1993) (identifying state court decisions holding that statutory caps on non-economic damages in tort cases violate substantive due process).

decisions fall outside the scope of this study.

Additionally, this study largely excludes review of local governmental land use zoning decisions. The reason for the exclusion is that courts often treat due process challenges to local land use zoning decisions quite differently from review of other economic regulations. Instead of a deferential rational basis test, where the regulation at issue is heavily presumed to be constitutional, courts often apply a mere “clear and convincing evidence” presumption when deciding land use zoning cases.<sup>58</sup> This is much less demanding than the traditional “rational-basis test.”<sup>59</sup> The affinity for applying economic substantive due process to land use zoning even extends to the federal courts. Although the U.S. Supreme Court has not done so, many federal district and circuit courts, even in recent years, have overturned land use zoning decisions on Fourteenth Amendment economic substantive due process grounds.<sup>60</sup> These decisions do apply the federal rational basis test, but nonetheless often result in the invalidation of the questioned regulation.<sup>61</sup> Regarding this strange quirk in constitutional law, one commentator has noted that “federal courts have allowed economic substantive due process—an endangered species of constitutional doctrine—to escape extinction (and in some instances even to flourish) within the ecosystem that is land development law.”<sup>62</sup> Including land use zoning decisions in this study would therefore mix different doctrines together, similarly to including equal protection or takings cases. It would not yield a representative account of recent trends

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58. See, e.g., *La Salle Nat. Bank of Chi. v. County of Cook*, 145 N.E.2d 65, 69 (Ill. 1957) (“A zoning ordinance is presumptively valid . . . this presumption may be overcome only by clear and convincing evidence.”) (citation omitted).

59. See, e.g., *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 527 S.E.2d 763, 765 (S.C. 2000) (adopting the deferential standard of “[w]hether [the statute being challenged] bears a reasonable relationship to any legitimate interest of government” in all challenges to state statutes on substantive due process grounds).

60. See, e.g., *Bateson v. Geisse*, 857 F.2d 1300, 1302, 1306 (9th Cir. 1987) (affirming district court holding that town council’s refusal to issue a building permit for a condominium project was in violation of the property owner’s substantive due process rights); *KDK Constr., Inc. v. E. Coventry Township Bd. of Supervisors*, Civ. A. No. 95-925, 1996 U.S. Dist. LEXIS 2516, at \*12-\*13 (E.D. Pa. Mar. 1, 1996) (holding that board of supervisors’ denial of a subdivision plan, which followed requirement that construction company post a cash escrow instead of a letter of credit, was arbitrary and in violation of substantive due process); see also Robert Ashbrook, Comment, *Land Development, the Graham Doctrine, & the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1257 (2002) (explaining that property owners have continued to make claims based on substantive due process rather than regulatory takings in land use cases because the prohibitively “strict ripeness requirements of regulatory takings claims” are not present in claims based on substantive due process).

61. See Ashbrook, *supra* note 60, at 1257-58 (noting that under the “Graham doctrine,” which is borrowed from constitutional criminal law, district courts have invalidated the substantive due process claims of land developers that challenge zoning and other regulations).

62. *Id.* at 1257.

in the doctrine of economic substantive due process.

This is not to say that all “zoning” cases were excluded from this study. Just because a court or city council labels a regulation as “land use” or “zoning” does not mean it is a regulation that courts treat differently in economic substantive due process challenges. For instance, included is the Pennsylvania case *Exton Quarries, Inc. v. Zoning Board of Adjustment*.<sup>63</sup> There, the local government sought to ban the operation of all quarries in a township.<sup>64</sup> Such a total exclusion is more akin to a ban on the practice of a business<sup>65</sup> than, for example, a decision to zone a plot of land as residential rather than commercial.<sup>66</sup> Because these “zoning” decisions are more akin to economic substantive due process cases in the non-zoning arena, this study includes them.<sup>67</sup>

## II. BACKGROUND: THE RISE AND FALL OF *LOCHNER* AND HOW THE DOCTRINE SURVIVED IN STATE COURTS

The roots of the story of economic substantive due process under state constitutional law trail back to the founding of the Republic and beyond. Rather than belabor a history already voluminously treated elsewhere in the literature, this Part notes only the essential highlights.<sup>68</sup> It then provides an overview of economic substantive due process under state constitutional law since the New Deal, focusing on some aspects of economic life where state courts have been particularly active in applying the doctrine.

### A. *Early Protections of Economic Liberty and the Lochner Era*

American courts have long recognized the principle of judicial review in interpreting the economic policies of legislatures.<sup>69</sup> In the years preceding

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63. 228 A.2d 169 (Pa. 1967).

64. *Id.* at 172.

65. *See, e.g.*, *Delight Wholesale Co. v. City of Overland Park*, 453 P.2d 82, 87 (Kan. 1969) (holding that the absolute prohibition of “huckstering and peddling” is “arbitrary and unreasonable” and therefore invalid).

66. *See, e.g.*, *County of Lake v. MacNeal*, 181 N.E.2d 85, 92, (Ill. 1962) (determining that zoning of lakeside property to be residential is not reasonably related to “the public health, safety, welfare or morals . . .”).

67. *See, e.g.*, *U.S. Mining & Exploration Natural Res. Co. v. City of Beattyville*, 548 S.W.2d 833, 835 (Ky. 1977) (holding that a coal tippie may not be completely prohibited); *State v. Brown*, 108 S.E.2d 74, 78 (N.C. 1959) (striking down restrictions on the operation of junk yards on the grounds that the law was only justified on aesthetic grounds, and such grounds are not enough to invoke the police power), *overruled by State v. Jones*, 290 S.E.2d 675, 681 (N.C. 1982). Also included in this study are cases involving *state* government (as opposed to local government) land use zoning regulations. *See, e.g.*, *State v. Johnson*, 265 A.2d 711, 716 (Me. 1970) (holding that the denial of a permit under the state Wetlands Act violated substantive due process).

68. For general discussions of the *Lochner* era jurisprudence, *see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 560-86 (2d ed. 1988); GILLMAN, *supra* note 29, *passim*.

69. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (stating that it would offend “all justice and reason” to allow a legislature to take from A and give to

the Civil War, federal and state courts frequently used the Due Process Clauses, Takings Clause, Contracts Clause, or other provisions of the U.S. Constitution and the Constitutions of the several states to strike down economic regulations that infringed upon the People’s economic liberties.<sup>70</sup> In the post-War era, the ratification of the Fourteenth Amendment and its Privileges or Immunities,<sup>71</sup> Due Process,<sup>72</sup> and Equal Protection<sup>73</sup> Clauses greatly expanded the opportunity to protect these economic liberties.<sup>74</sup> Although the narrow reading of the Privileges or Immunities Clause in *The Slaughterhouse Cases*<sup>75</sup> in 1872 at first appeared to suggest that courts would not read the Fourteenth Amendment expansively to protect the American citizenry’s economic liberties,<sup>76</sup> in 1887, the Supreme Court signaled a shift to an expansive reading of the Due Process Clause.<sup>77</sup> The Court clarified its position in an 1897 case, *Allgeyer v. Louisiana*,<sup>78</sup> opening a forty-year period of regularly protecting economic liberties through a substantive reading of that Clause.<sup>79</sup> The most famous of these opinions, *Lochner v. New York*,<sup>80</sup> gave the period its name: the *Lochner* era.

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B).

70. See Paulsen, *supra* note 15, at 93 (“The doctrine of substantive due process was not invented in 1890 by the federal courts. Clear traces of the concept can be found in state court opinions applying state constitutional provisions before the Civil War.”).

71. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

72. U.S. CONST. amend. XIV, § 1 (forbidding a State from depriving “any person of life, liberty, or property, without due process of law . . .”).

73. U.S. CONST. amend. XIV, § 1 (prohibiting a State from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”).

74. See Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 2-3 (1998) (discussing the ratification of the Fourteenth Amendment and the resulting increased protection of many interests including speech, privacy, and religious freedom, as well as economic liberty).

75. 83 U.S. 36 (1872).

76. *Id.* at 79-80 (finding that the “Privileges or Immunities” of American citizens are limited to rights such as the right to travel to the nation’s seat of government and the right to use navigable waters (*citing* *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867))).

77. See *Mugler v. Kansas*, 123 U.S. 623, 661-62 (1887) (upholding the constitutionality of a Kansas liquor regulation, yet commenting at length in dicta that courts must independently determine whether economic legislation is a proper exercise of a state’s police power).

78. 165 U.S. 578 (1897). The *Allgeyer* Court’s expansive definition of due process liberty stretched beyond mere protection from physical restraint. Specifically, the Court included within its definition of liberty the freedom to live and work in any lawful vocation, and the right “to enter into all contracts which may be proper, necessary, and essential” to accomplishing these purposes. *Id.* at 589.

79. See Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 919-20 (1999) (discussing the Court’s use of economic substantive due process from the 1890s through the 1930s).

80. 198 U.S. 45, 56 (1905) (recognizing the individual economic and contractual liberty interests within the Due Process Clause and striking a New York law that limited the working hours of bakery employees as a violation of those interests).

The U.S. Supreme Court was not alone in this enterprise. Various state supreme courts led the way in this post-Civil War endeavor, striking down economic regulations when the courts judged that they violated the economic liberties retained by the people and protected by state constitutions.<sup>81</sup> Once the *Lochner* era was underway, the two levels of the judiciary worked hand-in-hand, with state courts protecting economic liberties through both the U.S. Constitution and their respective state constitutions.<sup>82</sup>

Then, at least as abruptly as it began, the *Lochner* era came to an end. In 1934, while upholding a milk price-support law, the Court in *Nebbia v. New York*<sup>83</sup> articulated that as long as a rational basis existed for an economic regulation, it was not its business to determine it unconstitutional.<sup>84</sup> Then, in 1937, the Court signaled the end of its economic substantive due process review in *West Coast Hotel v. Parrish*<sup>85</sup> by concluding that it was within the state's police power to enact minimum wage legislation.<sup>86</sup> *West Coast Hotel* explicitly overruled the holding of *Adkins v. Children's Hospital*,<sup>87</sup> which had struck-down a minimum wage law for women,<sup>88</sup> despite the Court's reliance on *Adkins* only a year earlier.<sup>89</sup> The Court has not struck down an economic regulation on

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81. See, e.g., *Millett v. People*, 7 N.E. 631, 635-36 (Ill. 1886) (striking an Illinois requirement that coal-mining contracts be regulated by weight); *In re Jacobs*, 98 N.Y. 98, 112-15 (1885) (invalidating restrictions on cigar making).

82. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 277-79 (1932) (invalidating a state-imposed ice vendor monopoly on federal Due Process grounds because the local ice market was not an industry of public use, and regulation of such a non-public enterprise violated individual contract rights); *Liggett Co. v. Baldridge*, 278 U.S. 105, 113 (1928) (striking down a pharmacy ownership restriction because financial control was not directly related to regulating public health); *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 553-56 (1923) (employing the Fifth Amendment's Due Process Clause to invalidate a minimum wage law for women because it was not closely related to regulating the public interest, health, or morals); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (using the Fourteenth Amendment's Due Process Clause to invalidate a law barring employers from forbidding their employees to join unions); *State v. Goldstein*, 93 So. 308, 314 (Ala. Ct. App. 1922) (holding a price-control measure in violation of the Alabama bill of rights and federal due process); *State v. Legendre*, 70 So. 70, 71 (La. 1915) (invalidating a limitation on fireman's working hours under the Louisiana Constitution and the U.S. Constitution).

83. 291 U.S. 502 (1934).

84. *Id.* at 510-11. In adopting a rational basis test to review economic legislation, the *Nebbia* Court emphasized the fundamental importance of the state's power to protect the public common interest. *Id.* at 523-24. According to the Court, the state's interest in protecting the public from the harms of individual contract abuse was "[e]qually fundamental with the private right [of economic liberty] . . ." *Id.* at 523. Given the weight of this state interest, *Nebbia* held that the Fifth and Fourteenth Amendment Due Process Clauses demand only that laws be reasonable—not arbitrary or capricious—and have a "real and substantial relation" to legislative goals. *Id.* at 525.

85. 300 U.S. 379 (1937).

86. *Id.* at 399-400.

87. 261 U.S. 525 (1923).

88. *Id.* at 553-56.

89. One year before the *West Coast Hotel* decision, the Court invoked *Adkins* to strike down a minimum wage law for women and, for the last time, protected individual economic

substantive due process grounds since *West Coast Hotel*.<sup>90</sup>

It was perhaps not immediately apparent after 1937 that this new deference would allow no practical opportunity to strike down economic regulations under a substantive reading of the Due Process Clause.<sup>91</sup> After all, even if the new “rational basis” review made it harder to protect economic liberties, it was by no means an outlandish proposition to argue that such a possibility still existed.<sup>92</sup> Soon, however, that view grew much harder to maintain. In 1941, while upholding a Nebraska regulation limiting the price employment agencies may charge their customers, Justice Douglas announced for the Court: “There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field.”<sup>93</sup> The only constitutional limits on the legislation were notions of policy, and “[s]ince [the policy notions did] not find expression in the Constitution, [the Court could not] give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states [could] be determined.”<sup>94</sup> Following this black-and-white language,<sup>95</sup> in the next two decades, and up through the present day, the Court has resisted any urge to revive the life of

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liberty through substantive due process. See *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587, 617-18 (1936) (noting that an amicus curiae brief argued that *Adkins* was unconstitutional and ought to be overruled, but ultimately confirming that *Adkins*’ holding—that the “prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work”—was a sound interpretation of the Due Process Clause of the Fourteenth Amendment).

90. See Tussusov, *supra* note 18, at 536 (noting that the Supreme Court invalidated only one state economic regulation after 1937 and subsequently overruled that decision, and suggesting that the Court’s current position is a conclusive presumption that economic policy decisions of state legislatures are rational).

91. See Note, *supra* note 15, at 315 (arguing that some courts interpreted the rational basis analysis offered in *Nebbia* and *West Coast Hotel* as merely a more deferential level of scrutiny, rather than abandonment of economic substantive due process altogether); see also *Ex parte Kazas*, 70 P.2d 962, 964, 967-70 (Cal. Dist. Ct. App. 1937) (drawing upon the reasoning of the U.S. Supreme Court’s economic substantive due process decisions to strike down an ordinance that attempted to set minimum prices for local barbers and finding that the ordinance violated both the Federal and State Constitutions).

92. The Court has left open the possibility, however minimal, that it could invalidate an economic regulation if it truly were irrational. See *Williamson v. Lee Optical*, 348 U.S. 483, 487-91 (1955) (considering at length the possible motivations of the legislature in passing an eyeglass sales regulation, suggesting that the Court would invalidate the legislation if it found that none of the motivations were rational). *But see* *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) (refusing to examine the motivation of the Kansas legislature in passing business regulations). The Court has continued to leave open the possibility of invalidating an economic regulation under rational basis review, and has elected to follow the method of *Lee Optical*, not the hands-off method of *Ferguson*. Sanders, *supra* note 22, at 672-73.

93. *Olsen v. Nebraska ex rel. W. Reference & Bond Ass’n*, 313 U.S. 236, 246 (1941).

94. *Id.* at 246-47.

95. According to one commentator, after such a statement, “[s]tate courts could no longer legitimately claim that any form of trade regulation violated fourteenth amendment [sic] due process . . . .” Note, *supra* note 15, at 316.

*Lochner*.<sup>96</sup> Instead, it has emphatically concluded that the Court will not sit as a “superlegislature” in judging the wisdom of economic regulations.<sup>97</sup>

*B. Persistence in the State Courts after the Lochner Era*

For whatever reason, the state courts did not get the memo. From 1937 to the present, state courts have continued to protect economic liberty by applying substantive due process to economic regulations. In addition to utilizing the various constitutional methods discussed earlier,<sup>98</sup> state courts have often concluded that a regulation violates the U.S. Constitution as well.<sup>99</sup> They have done so *even after* the Supreme Court made it crystal clear that this would constitute an incorrect application of the Due Process Clause of the Fourteenth Amendment.<sup>100</sup>

*1. The inability of state courts to let go*

Although this Article concerns state constitutional law, it is worth briefly reviewing state court use of the Fourteenth Amendment in protecting economic liberty since 1940.<sup>101</sup> Quite commonly, constitutional litigation in state court considers whether a statute violates one or both of the state and U.S. Constitutions.<sup>102</sup> If a state court concludes that a law violates both constitutions, as they often have in the decades following 1937, there exists a presumption that the case may not be appealed to the U.S. Supreme Court.<sup>103</sup> As long as invalidation under an economic substantive due

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96. See Tussusov, *supra* note 18, at 536 (stating that “modern due process challenges to state regulation of labor, price fixing, and business practices” have enjoyed almost no success before the Supreme Court) (footnotes omitted).

97. *Ferguson*, 372 U.S. at 731-32 (noting that challengers’ arguments about the social utility of economic regulation should be addressed to the legislature, rather than the courts).

98. See *supra* Part I.A (discussing the use of state constitutional due process, takings, and contract clauses to evaluate the validity of economic regulations).

99. See *supra* note 82 and accompanying text (providing examples of state court decisions finding that economic regulations violate the federal Due Process Clause).

100. See *infra* Part II.B.2.a (describing state court invalidation of fair trade acts after the United States Supreme Court concluded that such acts did not violate economic substantive due process).

101. A review of state court interpretation of the Federal Constitution is especially informative because state courts have often based interpretations of state constitutional provisions on analogous federal precedent. See Kirby, *supra* note 9, at 243-44 (pointing to state courts’ heavy reliance on federal substantive due process precedent, rather than independent interpretation of state constitutions). The relevant language of the Federal Fourteenth Amendment prohibits the states from depriving “any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

102. State courts more frequently review state *and* federal constitutional provisions because parties often raise both types of constitutional arguments or defenses. See Kirby, *supra* note 9, at 242-43 (“[C]onstitutional challenges to economic regulations can be, and usually are, made on both state and federal constitutional grounds.”).

103. See *id.* at 243-44 (noting that state courts often decide a case based on both federal and state constitutional grounds, because the state court can insulate its decision from review by the U.S. Supreme Court as long as the decision has an adequate and independent basis in the state constitution); see also *supra* note 82 and accompanying text (citing

process theory is supported by “adequate and independent” state constitutional grounds, the Supreme Court may not review such a state court decision.<sup>104</sup> Therefore, state courts are generally insulated in concluding that an economic regulation violates the Fourteenth Amendment Due Process Clause as long as the court makes a similar conclusion under the state constitution’s due process provision.<sup>105</sup>

These insulated holdings give us a glimpse into the mindset of state judges in the years following the close of the *Lochner* era. Many of these cases relied upon the most “infamous” *Lochner* era opinions, including *Liggett Co. v. Baldridge*,<sup>106</sup> *New State Ice Co. v. Liebmann*,<sup>107</sup> and even

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numerous examples of state cases striking economic regulations on federal, as well as state, constitutional grounds). Even where state courts have improperly applied federal due process standards, chances of reversal by the Supreme Court are low because state supreme courts have final and ultimate authority to interpret their respective state constitutions. See Kirby, *supra* note 9, at 244 (describing federal appellate review of state decisions as “merely advisory because state courts remain the ultimate arbiters of state law”); Tussasov, *supra* note 18, at 529-30 & n.6 (discussing the “presumption of independence” given to states when interpreting their own constitutions, even when such provisions mimic federal constitutional provisions).

104. See *Jankovich v. Ind. Toll Rd. Comm’n*, 379 U.S. 487, 491-92 (reaffirming that when a state court decision relies on analogous provisions in both the state and Federal Constitutions, the court’s interpretation of the state constitution provides “an independent and adequate ground of decision” that deprives the Supreme Court of the authority to review the judgment); cf. *Mich. v. Long*, 463 U.S. 1032, 1042 (1983) (recognizing the possibility of Supreme Court review where a state court strikes a law under its own constitution but “it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law”); Tussasov, *supra* note 18, at 530 & n.6 (discussing briefly the history of the “adequate and independent” doctrine, and the implication of the *Long* decision on the application and efficacy of that doctrine).

105. See Tussasov, *supra* note 18, at 529-30 (claiming that state courts are “well aware that their decisions can be shielded from federal review” by asserting that the decision is based on adequate and independent state constitutional grounds); Kirby, *supra* note 9, at 243-44 (describing the common state court practice of avoiding federal court review by “summarily indicating that invalidation . . . is also required under the state constitution.”).

106. 278 U.S. 105, 113-14 (1928) (invalidating a state statute requiring all pharmacies to be owned by licensed pharmacists because the regulation created an “unreasonable and unnecessary restriction upon private business”). Post-1940 cases relying on *Liggett* include *City of Denver v. Thrailkill*, 244 P.2d 1074, 1080-81 (Colo. 1952) (citing *Liggett* as recognizing owners’ property interest in their businesses, and invalidating an ordinance regulating taxi ownership and licensing under due process) and *Dep’t of Fin. Insts. v. Holt*, 108 N.E.2d 629, 635 (Ind. 1952) (striking a statute fixing the resale price for automobile financing contracts because, under *Liggett*, there was no substantial relation to public welfare where the public interest was adequately protected by other provisions of the law).

107. 285 U.S. 262, 271, 277 (1932) (invalidating a statute requiring individuals who manufactured, sold, or distributed ice within the state to obtain a license because the regulation unreasonably interfered with lawful, private business activities). Post-1940 cases relying on *New State Ice* include *In re Certificate of Need for Aston Park Hosp., Inc.*, 193 S.E.2d 729, 735 (N.C. 1973) (distinguishing hospital operations, constitutionally regulated under the public use doctrine, from the hospital’s business administration, the regulation of which had no substantial relation to protecting the public interest as required by due process) and *General Electric Co. v. Wahle*, 296 P.2d 635, 647 (Or. 1956) (striking the non-signer clause of a fair trade act as interfering with individual contract rights protected by due process).

*Lochner* itself.<sup>108</sup> State judges knew, of course, about the renunciation of the reasoning in these cases in opinions such as *West Coast Hotel v. Parrish*,<sup>109</sup> *Olsen v. Nebraska*,<sup>110</sup> *Williamson v. Lee Optical*,<sup>111</sup> and *Ferguson v. Skrupa*.<sup>112</sup> It appears, however, that they just did not care. They relied on these *Lochner* era precedents not just as persuasive authority in interpreting their own state constitutions, but in interpreting the Fourteenth Amendment.<sup>113</sup> In case after case, state courts played the part of an ostrich, burying their heads in the pages of pre-1937 case reporters and proceeding as though these *Lochner*-era precedents were still “good law” in interpreting the U.S. Constitution.<sup>114</sup>

But under state constitutions, good law they often were. As discussed in more detail below, in the 1940s, 1950s, and 1960s the highest courts of appeal in almost every state struck down state statutes and local ordinances on economic substantive due process grounds.<sup>115</sup> The number of cases in which a state supreme court protected economic liberty through substantive due process in the 1950s actually exceeded—far and away exceeded—the number of similar cases in the 1940s.<sup>116</sup> Although the volume of these cases declined in the 1960s, state courts in that decade employed the doctrine in roughly the same number of cases as courts had in the 1940s.<sup>117</sup> Thus, thirty years after the U.S. Supreme Court had emphatically stated

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108. 198 U.S. 45, 56 (1905). Post-1940 cases relying on *Lochner* include *Edwards v. State Bd. of Barber Examiners*, 231 P.2d 450, 453 (Ariz. 1951) and *State Bd. of Barber Examiners v. Cloud*, 44 N.E.2d 972, 980 (Ind. 1942).

109. 300 U.S. 379 (1937). For further discussion of *West Coast Hotel*, see *supra* notes 85-90 and accompanying text.

110. *Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236, 247 (1941) (finding that economic substantive due process “does not find expression in the Constitution” and stating that it should not be used to evaluate economic and social judgments made by the states).

111. *Williamson v. Lee Optical*, 348 U.S. 483 (1955). For further discussion of *Williamson*, see *supra* note 92 and accompanying text.

112. 372 U.S. 726 (1963). For further discussion of *Ferguson*, see *supra* note 92 and accompanying text.

113. See *supra* note 82 and accompanying text (citing state court cases in which state courts relied on state and Federal Constitutions to strike down economic legislation).

114. See *infra* Part II.B.2 (noting that state courts in the post-*Lochner* era have been particularly active in applying substantive due process in cases involving “fair trade acts, advertising restrictions, price controls, occupational licensing, and Sunday closing.”).

115. See *infra* Part II.B.2; see also *infra* Appendix A (listing economic substantive due process cases since 1940 by state).

116. See *infra* Appendix B (indicating that state supreme courts handed down ninety-six decisions based on economic substantive due process in the 1950s, compared with sixty-eight decisions in the 1940s).

117. See *infra* Appendix B (indicating that sixty-seven state supreme court decisions based on economic substantive due process were handed down in the 1960s). In 1963 a commentator could confidently (and, at that time, correctly) assert that, “[t]he increasing frequency of [economic substantive due process] decisions indicates that economic due process is neither dead nor dying and that it is the United States Supreme Court, rather than the state courts, which is resisting the current drift in constitutional interpretation.” Note, *supra* note 15, at 321.

that it was not in the business of protecting economic liberties through economic substantive due process,<sup>118</sup> the supreme courts of many states either ignored or openly thumbed their nose at the new jurisprudence of the highest court in the land.<sup>119</sup>

This level of defiance did not last forever, although it continues today at a much-diminished frequency. The number of cases where state supreme courts protected economic liberties through applying economic substantive due process in the 1970s fell considerably when compared to the 1960s, and by the 1980s only a handful of states invalidated economic regulations on substantive due process grounds, and then, only on occasion.<sup>120</sup> Some states repudiated their earlier adherence to *Lochner*-era protections of economic liberties,<sup>121</sup> while in others a heightened degree of protection still stands as good law, but is rarely called upon.<sup>122</sup> For reasons that are a bit unclear, the adherence to *Lochner*-era protection of economic liberties could not sustain itself at such a strong level for more than three decades after *West Coast Hotel*.<sup>123</sup>

Although the level of protection afforded by state courts since 1937 has greatly exceeded that of the modern U.S. Supreme Court, there are few examples of state supreme courts striking down economic regulations with the frequency and regularity of the *Lochner* era Supreme Court. Although scholars have greatly inflated the “activism” of the pre-1937 Court over the years,<sup>124</sup> the Court regularly struck down economic regulations on substantive due process grounds at the rate of just over one per year.<sup>125</sup>

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118. See *supra* notes 83-97 and accompanying text (tracing the decline of the *Lochner* era in the Supreme Court).

119. See *infra* Part III (providing a detailed, state-by-state discussion of economic substantive due process by the supreme courts of Florida, Georgia, Illinois, Indiana, Massachusetts, and South Carolina).

120. See *infra* Appendix B (indicating that state supreme courts decided sixty-seven cases involving economic substantive due process during the 1960s, forty-eight during the 1970s, and eleven during the 1980s).

121. For a discussion of state supreme courts that have refused to apply economic substantive due process since 1980, see *infra* Part III.B (highlighting examples from Indiana, Massachusetts, and South Carolina). For a more detailed study of the curtailment of *Lochner*-style economic substantive due process in one state, see David Smith, *Economic Substantive Due Process in Arizona: A Survey*, 20 ARIZ. ST. L.J. 327, 341 (1988) (highlighting the Arizona Supreme Court’s adoption of a rational basis test in examining economic substantive due process claims, and arguing that this change constituted a “marked divergence” from the court’s traditional approach in such cases).

122. See *infra* Part III.A (examining the status of economic substantive due process in several states that actively applied the doctrine until the 1980s and used the doctrine less frequently after that time).

123. 300 U.S. 379 (1937).

124. See Michael J. Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1080 (1997) (finding that the number of regulations invalidated by the Supreme Court under “true” economic substantive due process during the *Lochner* era was a total of fifty-five, not 200, as had been claimed elsewhere).

125. The rate of approximately one case per year is based on Phillips’ conclusion that the

Since 1940, only the 1950s Florida Supreme Court has approached that level of activity.<sup>126</sup>

2. *Areas of protection extended under state economic substantive due process*

Since 1940,<sup>127</sup> state supreme courts have used economic substantive due process to protect economic liberty in all manner of areas of economic life. The examples range from bans on frog gigging<sup>128</sup> to price controls on cigarettes.<sup>129</sup> The reach of the cases is so wide-ranging that it is difficult to categorize all of them into discrete subject areas. Nevertheless, a few subjects stand out. To gain a full appreciation for the breadth and impact of the material underlying the trends discussed in Part III, the remainder of this Section outlines a few areas where state courts have been particularly active in applying the doctrine of economic substantive due process. These areas are state fair trade acts, advertising restrictions, price controls, occupational licensing, and Sunday closing laws.

a. *Fair trade acts*

More than any other area, the state court treatment of fair trade acts stands out as an example of the “New Judicial Federalism” in the economic substantive due process arena. Legislation generally known as “fair trade acts” allowed suppliers of goods “sold under a trademark, trade name, or brand name to regulate by contract the price at which their products were sold at retail.”<sup>130</sup> What often undermined the acts’ constitutionality was the inclusion of a “non-signer clause,” which allowed suppliers to sue a seller

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Court decided fifty-five “true” economic substantive due process cases during the forty-year *Lochner* period, which lasted from 1897 until 1937. *Id.*

126. See *infra* Part III.A.1 (discussing the Florida Supreme Court’s active use of economic substantive due process as compared to other state supreme courts during the same time period).

127. This article explores state court use of economic substantive due process beginning in 1940, and does not attempt to comment on use of the doctrine in state courts before this time.

128. See *City of Shreveport v. Curry*, 357 So. 2d 1078, 1083 (La. 1978) (declaring that an eleven-month ban on frog gigging had no rational relationship to protecting the public interest, and thus violated economic substantive due process). The *Curry* court described frog gigging as “a method of taking frogs with a mechanical device . . . while in a boat close to the shore line . . . [which . . . essentially] grabs or “gigs” the frog but does not puncture the frog’s skin or reddens its meat.” *Id.* at 1079 n.1.

129. See *Serrer v. Cigarette Serv. Co.*, 76 N.E.2d 91, 91-93 (Ohio 1947) (striking down an Ohio statute that attempted to set minimum cigarette prices because the statute’s failure to account for different operating costs amongst cigarette wholesalers effectively discriminated against one wholesaler in favor of another and therefore violated substantive due process).

130. Robert H. Jerry, II & Reginald L. Robinson, *Statutory Prohibitions on the Negotiation of Insurance Agent Commissions: Substantive Due Process Review Under State Constitutions*, 51 OHIO ST. L.J. 773, 802-03 (1990).

for trading at less than contract price, *even if* the seller was not a party to the contract.<sup>131</sup> In 1936, in the twilight of the *Lochner* era, the U.S. Supreme Court upheld Illinois’ fair trade act as constitutional under the Fourteenth Amendment.<sup>132</sup> However, between 1940 and 1975, after Congress amended the Sherman Act to once again prohibit fair trade acts,<sup>133</sup> at least twenty-one state supreme courts struck down such acts on state economic substantive due process grounds.<sup>134</sup> Interestingly, the history of judicial invalidation of fair trade acts is evidence of the acceleration of economic substantive due process under state constitutional law even as the country moved away from the New Deal. By 1956, only four states had declared such legislation unconstitutional under economic substantive due process;<sup>135</sup> by 1975, that number had grown

131. *See id.* at 803 (describing non-signer clauses and noting that many state courts invalidated fair trade laws on the ground that the clause violated due process under the state constitution). Even though not a signer, the reseller would have to have knowledge of the contract to be liable under a fair trade law. *See* Howard, *supra* note 15, at 883 n.46.

132. *See* Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 191-92 (1936) (acknowledging that established economic substantive due process doctrine prohibited “legislative price fixing” covering an entire industry but concluding that the fair trade act did not violate that doctrine because it simply enabled parties to fix prices of identified goods in a contract).

133. Originally, the Supreme Court concluded that contracts between wholesalers and retailers fixing the price of goods sold to consumers were a “restraint of trade” and violated the Sherman Act. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 400, 407-09 (1911). Much later, Congress amended the law to allow states to provide for such contracts. Miller-Tydings Fair Trade Act, ch. 690, 50 Stat. 693 (1937) (repealed 1975). In 1975, Congress changed its mind, and re-enacted the prohibition against retail price-fixing contracts. Consumer Goods Pricing Act, 89 Stat. 801 (1975) (codified as amended at 15 U.S.C. §§ 1, 45 (2004)). *See generally* Jerry & Robinson, *supra* note 130, at 802-03 (discussing historical treatment of anti-trust laws in Congress).

134. Prior studies contend that a full majority of state supreme courts have invalidated fair trade laws since 1936. Howard, *supra* note 15, at 883 & n.48 (citing 2 TRADE REG. REP. (CCH) ¶ 6041 (Mar. 15, 1976)). The following cases support such an assessment of state court action. For more individualized information regarding each case, *see infra* Appendix A. *See, e.g.*, *Bulova Watch Co. v. Zale Jewelry Co.*, 147 So. 2d 797, 799 (Ala. 1962); *Union Carbide & Carbon Corp. v. White River Distribs.*, 275 S.W.2d 455, 461 (Ark. 1955); *Olin Mathieson Chem. Corp. v. Francis*, 301 P.2d 139, 152 (Colo. 1956); *Miles Labs., Inc. v. Eckerd*, 73 So. 2d 680, 682 (Fla. 1954); *Cox v. Gen. Elec. Co.*, 85 S.E.2d 514, 519 (Ga. 1955); *Gen. Elec. Co. v. Am. Buyers Coop.*, 316 S.W.2d 354, 361 (Ky. 1958); *Opinion of the Justices*, 132 A.2d 47, 49 (Me. 1957); *Loughran Co. v. Lord Baltimore Candy & Tobacco Co.*, 12 A.2d 201, 207 (Md. 1940); *Shakespeare Co. v. Lippman’s Tool Shop Sporting Goods Co.*, 54 N.W.2d 268, 269-70 (Mich. 1952); *Union Carbide & Carbon Corp. v. Skaggs Drug Ctr., Inc.*, 359 P.2d 644, 654 (Mont. 1961); *McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 68 N.W.2d 608, 618 (Neb. 1955); *Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 396 P.2d 683, 693 (Nev. 1964); *Skaggs Drug Ctr. v. Gen. Elec. Co.*, 315 P.2d 967, 974 (N.M. 1957); *Bulova Watch Co. v. Brand Distrib. of N. Wilkesboro, Inc.*, 206 S.E.2d 141, 151 (N.C. 1974); *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 147 N.E.2d 481, 484 (Ohio 1958); *Am. Home Prods. Corp. v. Homsey*, 361 P.2d 297, 303 (Okla. 1961); *Gen. Elec. Co. v. Wahle*, 296 P.2d 635, 647 (Or. 1956); *Commonwealth v. Zasloff*, 13 A.2d 67, 72 (Pa. 1940); *Rogers-Kent, Inc. v. Gen. Elec. Co.*, 99 S.E.2d 665, 672 (S.C. 1957); *Remington Arms Co. v. Skaggs*, 345 P.2d 1085, 1090-91 (Wa. 1959); *Gen. Elec. Co. v. A. Dandy Appliance Co.*, 103 S.E.2d 310, 313 (W.Va. 1958); *Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 371 P.2d 409, 420-21 (Wyo. 1962).

135. *See* Howard, *supra* note 15, at 883 (noting that seventeen states had upheld fair

exponentially.<sup>136</sup>

*b. Advertising restrictions*

Almost as many state supreme courts have used economic substantive due process to invalidate state restrictions on advertising, particularly the advertising of prices. State courts decided most of the relevant cases before the U.S. Supreme Court recognized that the First Amendment protects commercial speech.<sup>137</sup> Today, state courts would find many of the regulations at issue in these cases unconstitutional under the First Amendment and can avoid the “*Lochner* label” by instead applying the commercial speech doctrine.<sup>138</sup> The pre-commercial speech cases themselves usually involved very little discussion, if any, of free speech; instead, they emphasized property rights and the arbitrariness of governmental power.<sup>139</sup> At least fifteen state supreme courts have struck down advertising regulations since 1940 on state economic substantive due process grounds.<sup>140</sup> Many involve whether gas stations may advertise

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trade acts under their state constitutions during the same time period).

136. *See id.* (observing that “far more states have struck down fair trade laws than have upheld them” since 1956); *see also supra* note 134 (listing twenty-two state high court decisions that struck down fair trade laws on substantive due process grounds by 1975, representing more than a five-fold increase in approximately thirty-five years).

137. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (recognizing the importance of commercial speech and advertising and finding that speech does not lose First Amendment protection because money is spent to promote it or because it is “carried in a form that is ‘sold’ for profit”).

138. *Compare* Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm’n of N.Y., 447 U.S. 557, 566 (1980) (applying the commercial speech doctrine, which demands a “substantial” governmental interest to justify a regulation of advertising), *with* Stadnik v. Shell’s City, Inc., 140 So. 2d 871, 875 (Fla. 1962) (striking down a regulation banning the advertising of prescription drugs because it had no “reasonable justification” and lacked any basis in protecting public health). Had *Central Hudson* been available to the *Stadnik* court, it would not have had to justify the invalidation of the regulation by using the substantive due process rational basis test, which gives more deference to the state’s interest.

139. *See, e.g.,* City of Lafayette v. Justus, 161 So. 2d 747, 749 (La. 1964) (striking a law limiting the size of gasoline price advertising signs by stressing the arbitrary and unrelated connection between the restriction and the state’s asserted interest in fraud prevention); Levy v. Pontiac, 49 N.W.2d 80, 82-83 (Mich. 1951) (striking a similar restriction on the size of gasoline price signs, stating that “[t]he ordinance bears no reasonable relation *whatsoever* to public peace, health, morals, welfare or safety.”) (emphasis added).

140. *See, e.g.,* Ala. Indep. Serv. Station Ass’n v. McDowell, 6 So. 2d 502, 507 (Ala. 1942); Mott’s Super Markets, Inc. v. Frassinelli, 172 A.2d 381, 386 (Conn. 1961); State v. Hobson, 83 A.2d 846, 858-59 (Del. 1951); State *ex rel.* Walters v. Blackburn, 104 So. 2d 19, 20-21 (Fla. 1958); Needham v. Proffitt, 41 N.E.2d 606, 607 (Ind. 1942); Sears, Roebuck & Co. v. City of New Orleans, 117 So. 2d 64, 66 (La. 1960); United Interchange, Inc. of Mass. v. Harding, 145 A.2d 94, 97 (Me. 1958); Md. Bd. of Pharmacy v. Sav-A-Lot, Inc., 311 A.2d 242, 252 (Md. 1973); Levy, 49 N.W.2d at 82-83; State v. Redman Petroleum Corp., 360 P.2d 842, 845, 846 (Nev. 1961); State v. Boston Juvenile Shoes, 288 A.2d 7, 11 (N.J. 1972); Jones v. Bontempo, 32 N.E.2d 17, 18 (Ohio 1941); Little Pep Delmonico Rest., Inc. v. City of Charlotte, 113 S.E.2d 422, 423 (N.C. 1960), *overruled by* State v. Jones, 290 S.E.2d 675, 679-82 (N.C. 1982); Pa. State Bd. of Pharmacy v. Pastor, 272 A.2d 487, 490, 495 (Pa. 1971); Pride Oil Co. v. Salt Lake County, 370 P.2d 355, 356-57 (Utah 1962). For more information regarding the facts and holdings of these cases, *see infra* Appendix A.

prices,<sup>141</sup> and several others concern advertising by specific occupations.<sup>142</sup>

*c. Price controls*

Invalidating regulations on prices, whether in striking down minimum wage laws<sup>143</sup> or in nullifying price supports for commodities,<sup>144</sup> was a bread-and-butter practice of the *Lochner*-era Court. Unsurprisingly, such behavior has also characterized state constitutional protection of economic liberties since 1940. At least nineteen state supreme courts have concluded that certain controls on prices violate economic substantive due process under their respective state constitutions.<sup>145</sup> The U.S. Supreme Court concluded in *Nebbia v. New York*<sup>146</sup> that price supports are constitutional under the Fourteenth Amendment’s Due Process Clause as long as they are rationally related to a legitimate governmental interest.<sup>147</sup> In concluding otherwise under their own constitutions, state courts have often ignored

141. *See, e.g.*, *State v. Miller*, 12 A.2d 192, 194 (Conn.1940) (concluding that a prohibition on gas station price signs has no “appreciable effect” of protecting the public from fraud and is therefore unconstitutional); *Walters*, 104 So. 2d at 20-21 (reaching the same conclusion); *Pride Oil Co.*, 370 P.2d at 356-57 (concluding that a restriction on placement of gas price signs violates the right to own and enjoy property).

142. *See, e.g.*, *Amsel v. Brooks*, 106 A.2d 152, 158 (Conn. 1954) (striking down restrictions on dental advertising as bearing no reasonable relation to the public welfare); *Needham*, 41 N.E.2d at 607 (concluding that limiting the ability of funeral directors and embalmers to advertise is unconstitutional); *Bontempo*, 32 N.E.2d at 18 (holding that a ban on advertising barber service prices interferes with property rights).

143. *See, e.g.*, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 609-11 (1936) (upholding a state statute prescribing a minimum wage for women workers and noting that the Court had found that “statutes fixing rates and charges to be exacted by businesses impressed with a public interest, relating to contracts for the performance of public work, prescribing the character, methods and time of payment of wages, [and] fixing hours of labor” did not violate the Due Process Clause).

144. *See, e.g.*, *Williams v. Standard Oil Co.*, 278 U.S. 235, 239 (1929) (striking a gasoline price-control measure by applying the general rule that states may not regulate commodity prices, except where such commodities are “affected with a public interest”).

145. *See* *Ports Petroleum Co. of Ohio v. Tucker*, 916 S.W.2d 749, 751 (Ark. 1996); *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450, 453-54 (Ariz. 1951); *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29, 36 (Cal. 1953); *Frassinelli*, 172 A.2d at 386; *Batton-Jackson Oil Co. v. Reeves*, 340 S.E.2d 16, 18-19 (Ga. 1986); *Dep’t of Fin. Insts. v. Holt*, 108 N.E.2d 629, 637 (Ind. 1952); *State ex rel. Anderson v. Fleming Co.*, 339 P.2d 12, 18 (Kan. 1959); *Remote Servs., Inc. v. FDR Corp.*, 764 S.W.2d 80, 83 (Ky. 1989); *City of Lafayette v. Justus*, 161 So. 2d 747, 749 (La. 1964); *Wiley v. Sampson-Ripley Co.*, 120 A.2d 289, 291 (Me. 1956); *Traveler’s Indem. Co. v. Comm’r of Ins.*, 265 N.E.2d 90, 92 (Mass. 1970); *Gillette Dairy, Inc. v. Neb. Dairy Prods. Bd.*, 219 N.W.2d 214, 221 (Neb. 1974); *Serrer v. Cigarette Serv. Co.*, 76 N.E.2d 91, 91 (Ohio 1947); *Englebrecht v. Day*, 208 P.2d 538, 544 (Okla. 1949); *Richbourg’s Shoppers Fair, Inc. v. Stone*, 153 S.E.2d 895, 899 (S.C. 1967), *overruled by* *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 527 S.E.2d 763, 765 (S.C. 2000); *San Antonio Retail Grocers, Inc. v. Lafferty*, 297 S.W.2d 813 (Tex. 1957); *State v. Wender*, 141 S.E.2d 359, 363 (W.Va. 1965), *overruled by* *Hartsock-Fletcher Candy Co. v. Wheeling Wholesale Grocery Co.*, 328 S.E.2d 144, 150 (W.Va. 1984). For more information about the facts and holdings of these cases, *see infra* Appendix A.

146. 291 U.S. 502 (1934).

147. *Id.* at 525.

*Nebbia*, sometimes explicitly adopting the reasoning of Justice McReynolds' dissenting opinion in that decision.<sup>148</sup> This is not to say that state courts have brazenly invalidated price controls across the board. For example, in many of the cases involving prohibitions on sales below cost—the sale of an item for less than its original purchase price—courts have carefully held that sales below cost may be made illegal, but only when the seller has the “predatory intent” to undermine a competitor.<sup>149</sup>

*d. Occupational licensing*

More than in any other field, except perhaps for review of local land use regulation,<sup>150</sup> state courts in the post-*Lochner* era have utilized economic substantive due process to protect the right to make a living. State supreme courts have invalidated licensing laws outright (including those extending exclusive monopolies or completely banning certain professions),<sup>151</sup> or have determined them to be too restrictive because they require unreasonable prerequisites in order to gain a license.<sup>152</sup> Overall, thirty state supreme courts, three-fifths of the several states, have protected the right to make a living through nullifying licensing or pseudo-licensing laws.<sup>153</sup>

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148. See, e.g., *Gwynette v. Myers*, 115 S.E.2d 673, 678 (S.C. 1960) (agreeing with and adopting the reasoning of the *Nebbia* dissent that prices may only be regulated if the industry is affected with the public interest (citing *Nebbia*, 291 U.S. at 539-59 (McReynolds, J., dissenting) (advocating a return to a strict application of the “affected with the public interest” standard when judging the constitutionality of price-fixing regulations))), *overruled by R.L. Jordan Co.*, 527 S.E.2d at 765.

149. See, e.g., *Ports Petroleum Co.*, 916 S.W.2d at 755-56 (striking down an Arkansas anti-predatory pricing law that failed to require a showing of predatory intent); *Anderson*, 339 P.2d at 18 (declaring unconstitutional a Kansas milk sales law criminalizing sales below cost even when the seller lacked intent to sell below cost); *Englebrecht*, 208 P.2d at 544 (striking down an Oklahoma law banning below-cost sales because the law included sales made without intent to harm competitors).

150. As explained above, the invalidation of local land use decisions are not included in this study. See *supra* Part I.B (stating that local land use cases are not used in the study because courts often employ a different standard of review in these cases than in traditional economic substantive due process cases).

151. See, e.g., *N. Little Rock Transp. Co. v. City of N. Little Rock*, 184 S.W.2d 52, 54-55 (Ark. 1944) (striking down a taxi licensing scheme as a violation of state constitution's anti-monopoly clause and briefly mentioning that the licensing scheme constitutes a blatant abuse of the state's police power).

152. See, e.g., *Cleere v. Bullock*, 361 P.2d 616, 621 (Colo. 1961) (concluding that a licensing scheme requiring funeral directors to be qualified embalmers, which requires additional education, is beyond the police power because it is an arbitrary, unrelated, and unnecessary requirement).

153. See, e.g., *Lisenba v. Griffin*, 8 So. 2d 175, 177 (Ala. 1942) (finding a barbering licensing ordinance unconstitutional because it attempted to regulate a legitimate, private business); *Buehman v. Bechtel*, 114 P.2d 227, 232 (Ariz. 1941) (finding a photographer licensing regulation unconstitutional because it prevented “competent” individuals from pursuing a legitimate occupation); *N. Little Rock Transp. Co.*, 184 S.W.2d at 53-54 (applying the anti-monopoly clause in the state constitution to strike down provisions in a taxi licensing statute); *Abdoo v. City & County of Denver*, 397 P.2d 222, 223 (Colo. 1964) (striking down a photographer licensing scheme as an improper invasion of constitutional freedoms); *Hart v. Bd. of Exam'rs of Embalmers*, 26 A.2d 780, 782 (Conn. 1942) (ruling

Many courts did so in the 1940s, perhaps believing that the *Lochner* era had not drawn to a close, but examples present themselves through the present day.<sup>154</sup>

that a licensing scheme for funeral directors was unconstitutional because it granted an “exclusive privilege” to one class of applicants); *Sullivan v. DeCerb*, 23 So. 2d 571, 572 (Fla. 1945) (declaring that a photographer licensing scheme violated the state constitution); *Berry v. Summers*, 283 P.2d 1093, 1096 (Idaho 1955) (deciding that a requiring dental technicians to be licensed as dentists was unreasonable); *Church v. State*, 646 N.E.2d 572, 580 (Ill. 1995) (concluding that a licensing scheme for private alarm contractors violated the state constitution); *City of Osceola v. Blair*, 2 N.W.2d 83, 85 (Iowa 1942) (ruling that an ordinance prohibiting door-to-door sales unreasonably regulated salesmen); *Delight Wholesale Co. v. City of Overland Park*, 453 P.2d 82, 87 (Kan. 1969) (invalidating an absolute prohibition on “huckstering and peddling” as arbitrary and unreasonable); *City of Mt. Sterling v. Donaldson Baking Co.*, 155 S.W.2d 237, 239 (Ky. 1941) (ruling that an ordinance restricting the activities of door-to-door salesmen was arbitrary and unreasonable); *City of Shreveport v. Restivo*, 491 So. 2d 377, 380 (La. 1986) (striking down an ordinance that limited the type of work journeyman plumbers could perform as an inappropriate exercise of police power); *Opinion of the Justices*, 79 N.E.2d 883, 888 (Mass. 1948) (stating that a proposed bill preventing cemetery owners from selling cemetery monuments would be an unreasonable exercise of the police power); *Moore v. Grillis*, 39 So. 2d 505, 512 (Miss. 1949) (ruling that a law preventing unlicensed public accountants from preparing tax returns was not reasonably related to goals of protecting public welfare); *State v. Gleason*, 277 P.2d 530, 533-34 (Mont. 1954) (finding that a photography licensing board that has sole and arbitrary power to choose qualified photographers violates due process); *Jewel Tea Co. v. City of Geneva*, 291 N.W. 664, 670 (Neb. 1940) (asserting that an ordinance preventing door-to-door sales encroached on an individual’s right to engage in lawful business); *State v. Moore*, 13 A.2d 143, 148 (N.H. 1940) (determining that a truck licensing scheme was an arbitrary restriction on a lawful business); *N.J. Good Humor, Inc. v. Bd. of Comm’rs of Bradley Beach*, 11 A.2d 113, 117 (N.J. 1940) (ruling that an ordinance that prevents peddling for the benefit of local merchants is an abuse of the police power); *Good Humor Corp. v. City of New York*, 49 N.E.2d 153, 157 (N.Y. 1943) (striking down an anti-peddling ordinance that had no reasonable relation to the public welfare); *Roller v. Allen*, 96 S.E.2d 851, 859 (N.C. 1957) (overturning a statute authorizing a board to have the exclusive right to license tile contractors as arbitrarily interfering with private business); *State v. Cromwell*, 9 N.W.2d 914, 922 (N.D. 1943) (determining that a photographer licensing law unreasonably interfered with the right to engage in business); *Frecker v. Dayton*, 90 N.E.2d 851, 854 (Ohio 1950) (determining that an ordinance preventing the sale of certain foods on the street is void absent a real relationship to public welfare); *Whittle v. State Bd. of Exam’rs of Psychologists*, 483 P.2d 328, 329-30 (Okla. 1971) (ruling that psychologist licensing procedures were unreasonably restrictive); *Hertz Corp. v. Heltzel*, 341 P.2d 1063, 1069 (Or. 1959) (invalidating a statute regulating the rental of delivery vehicles as furthering a monopoly in violation of the constitution); *Olan Mills, Inc. v. Sharon*, 92 A.2d 222, 224 (Pa. 1952) (striking down an ordinance imposing a tax on transient retail photographic businesses as an improper use of police power); *City of Rapid City v. Schmitt*, 71 N.W.2d 297, 298 (S.D. 1955) (holding that an ordinance that restricted plumbing permits only to plumbing contractors violated due process); *Livesay v. Tenn. Bd. of Exam’rs in Watchmaking*, 322 S.W.2d 209, 213 (Tenn. 1959) (declaring that a statute regulating the occupation of watchmakers encroached on the right to pursue an occupation in a valid field); *Vermont Salvage Corp. v. Vill. of St. Johnsbury*, 34 A.2d 188, 196-97 (Vt. 1943) (ruling that an ordinance licensing junk businesses was an abuse of the police power); *Moore v. Sutton*, 39 S.E.2d 348, 350-51 (Va. 1946) (deciding that a photographic licensing statute infringed on the right to earn a living); *Thorne v. Roush*, 261 S.E.2d 72, 75 (W.Va. 1979) (determining that a statute regulating junior barbers curtailed individual liberty and violated substantive due process).

154. See, e.g., *Church*, 646 N.E.2d at 580 (determining that a private alarm contractor licensing scheme was unconstitutional as an invalid use of the police power); *Nixon v. Dep’t of Pub. Welfare*, 839 A.2d 277, 290 (Pa. 2003) (concluding that a law restricting recently released criminals from working in nursing homes “unconstitutionally infringes on

*e. Sunday closing laws*

Whereas the invalidation of many advertising restrictions by state courts under economic substantive due process review presaged the U.S. Supreme Court invalidating many such restrictions under the First Amendment's Free Speech Clause,<sup>155</sup> the invalidation of Sunday closing laws by many state courts has occurred in spite of the Supreme Court's refusal to strike down such laws as *per se* violations of the First Amendment's Establishment Clause.<sup>156</sup> The Supreme Court has held that a legislature may mandate a uniform day of rest as long as it is for a secular purpose and does not substantially burden religion.<sup>157</sup> Ten state supreme courts, however, often not looking at whether the law possesses a religious purpose, have struck down Sunday closing laws as unreasonable and anticompetitive.<sup>158</sup> This is an area of economic substantive due process that has weathered the passage of time much better than others, as several cases were decided in recent decades.<sup>159</sup>

### III. WHICH STATES HAVE ENFORCED ECONOMIC SUBSTANTIVE DUE PROCESS PROTECTIONS AND WHEN

As stated above, and set forth in detail in the Appendices, the persistence

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the Employees' right to pursue an occupation").

155. *See supra* Part II.B.2.b (discussing cases in which state supreme courts have invalidated advertising restrictions).

156. *See Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion) (ruling that a Sunday closing law does not violate the Establishment Clause because it advances secular goals by providing a day of rest for all citizens and only incidentally burdening religion).

157. *Id.*

158. *See Handy Dan Imp. Ctr., Inc. v. Adams*, 633 S.W.2d 699, 702-03 (Ark. 1982) (ruling that a Sunday closing law that lists general categories of prohibited items is too vague for men of common intelligence to follow and violates due process); *Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey*, 640 A.2d 101, 107-08 (Conn. 1994) (striking down a statute that prevented car sales on Sunday as arbitrary and only affecting one class of employment); *Rogers v. State*, 199 A.2d 895, 897 (Del. 1964) (invalidating a statute prohibiting barbering on Sundays as an unreasonable restriction on private business); *Moore v. Thompson*, 126 So. 2d 543, 551 (Fla. 1961) (ruling against a statute prohibiting used car sales on Sundays because there was no "valid and substantial reason" for regulating this particular business); *West v. Town of Winnsboro*, 211 So. 2d 665, 672 (La. 1967) (overturning an ordinance preventing some grocery stores from operating on Sundays but not other grocery stores); *Terry Carpenter, Inc. v. Wood*, 129 N.W.2d 475, 481 (Neb. 1964) (rejecting a Sunday closing law that exempted businesses employing not more than two people and trade shows); *State v. Smith*, 143 S.E.2d 293, 299 (N.C. 1965) (striking down a Sunday closing law for clubs within 300 yards of schools as unreasonable because schools are not in session during the time specified in the law); *Spartan's Indus., Inc. v. Oklahoma City*, 498 P.2d 399, 402 (Okla. 1972) (ruling that a Sunday closing law affecting some discount stores is an unreasonable exercise of the state's police power); *Dodge Town v. Romney*, 480 P.2d 461, 462 (Utah 1971) (reasoning that there is no legitimate reason related to public welfare for banning car sales on Sundays); *Nation v. Giant Drug Co.*, 396 P.2d 431, 437 (Wyo. 1964) (ruling that an ordinance that allowed the sale of some items on Sundays provided they were separate from the prohibited items as capricious and arbitrary).

159. *See, e.g., Handy Dan*, 633 S.W.2d at 703 (invalidating a Sunday closing law in 1982); *Fair Cadillac*, 640 A.2d at 107-08 (overturning a Sunday closing law in 1994).

of economic substantive due process review under state constitutional law in state supreme courts during the 1940s, 1950s, and 1960s is quite astonishing considering such review was all but nominally abandoned by the U.S. Supreme Court. As Appendix B illustrates, in the 1940s state courts of highest review invalidated economic regulations sixty-eight times under economic substantive due process. In the 1950s this number *grew* to ninety-six instances.<sup>160</sup> This was in the face of the continued, and relentless, insistence of the U.S. Supreme Court that it was no longer in the business of economic substantive due process.<sup>161</sup> In the 1960s the numbers fell, but only back to the level of the 1940s, with sixty-seven such instances according to the research underlying this study.<sup>162</sup> What is more, the court of highest review of every state except Alaska, Hawaii, and Rhode Island utilized economic substantive due process to protect economic liberties during the period from 1940 to 1969.<sup>163</sup> Even these three omissions are misleading because Alaska and Hawaii only gained statehood in 1959, and 1960, respectively.<sup>164</sup> Rhode Island, although it has refused to interpret its due process clause to provide substantive protections to non-criminal defendants,<sup>165</sup> invalidated a state statute on at least one occasion through the Fourteenth Amendment’s Due Process Clause.<sup>166</sup>

Although no study before this one attempted a comprehensive review of all state supreme court economic substantive due process cases during the 1940s, 1950s, and 1960s,<sup>167</sup> prior studies provide extensive analysis of this period and of why the state courts hung onto economic substantive due process for such a long time.<sup>168</sup> The excellence of those studies

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160. See *infra* Appendix B.

161. See *supra* Part II.A-B (tracing the rise and fall of the *Lochner* era in the Supreme Court and discussing specific cases in which state supreme courts continued to apply substantive due process despite the Court’s abandonment of the doctrine).

162. See *infra* Appendix B.

163. See *infra* Appendix B.

164. Alaska Statehood Act, Pub. L. No. 85-508, § 1, 72 Stat. 339, 339 (1958); Hawaii Admission Act, Pub. L. No. 86-3, § 1, 73 Stat. 4, 4 (1959).

165. See *Sepe v. Daneker*, 68 A.2d 101, 105-06 (R.I. 1949) (refusing to invalidate restrictions on the sale of liquor as the due process clause in the Rhode Island Constitution is construed narrowly and only applies to criminal defendants).

166. See *Haigh v. State Bd. of Hairdressing*, 72 A.2d 674, 677-78 (R.I. 1952) (using the Fourteenth Amendment to strike down an arbitrary statute prohibiting hairdressers from advertising fees).

167. One study alludes to research of how many times a state court of highest review struck down economic regulations through economic substantive due process, but the article does not include the specific cases from each state, and includes a different time-period from the period analyzed here. See Gary M. Anderson et al., *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J.L. & ECON. 215, 222-23 (1989) (analyzing the use of substantive due process evaluations by state courts as a marker of judicial independence from the political branches of government).

168. See, e.g., articles cited *supra* note 18 (referring to a study that focused on economic substantive due process in cases involving healthcare regulations and a study that focused on the application of economic substantive due process by New York courts).

notwithstanding, no study that has come to the Author's attention analyzes in any detail the decades after 1970 as a distinct time period. More specifically, no study reveals the immense drop in state supreme courts actively using economic substantive due process review after 1970.

And drop the numbers did. Whether the judicial history of the 1940s, 1950s, and 1960s is labeled "judicial activism" or "protecting the rights of the individual," it was not to last.<sup>169</sup> During the 1970s state supreme courts applied economic substantive due process in protecting economic liberties on forty-eight occasions.<sup>170</sup> Admittedly, this is not a drastic departure from past practices, but was a significant drop from the sixty-seven of the 1960s.<sup>171</sup> The bottom fell out of the market in the 1980s, with a mere eleven instances.<sup>172</sup> In the 1990s the numbers fell even further, to eight.<sup>173</sup> So far during the 2000s, this research has uncovered a paltry three occasions where state supreme courts have protected economic liberties through applying economic substantive due process.<sup>174</sup> In addition, fewer and fewer states have continued their past application of the doctrine.<sup>175</sup> Since 1980 only thirteen state supreme courts have added to this study's case law.<sup>176</sup>

This Article now turns to a state-by-state assessment of trends in economic substantive due process, and similar doctrines, since 1940. It begins with those states that were active in their protection of economic liberties through economic substantive due process in the decades following the New Deal, and have continued to be at least somewhat active since 1980. For the sake of convenience and brevity, this Part does not analyze each and every state that has done so, but only highlights the three particularly interesting examples of Florida, Illinois, and Georgia. This Article then turns to states that were active in the years immediately following the *Lochner* era but who have since refused to apply the doctrine.

#### A. States That Were Active in Applying Economic Substantive Due Process

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169. See *infra* Appendix B (indicating that 231 state supreme court cases involving economic substantive due process rights were decided between 1940 and 1970, while only seventy were decided since).

170. See *infra* Appendix B.

171. See *infra* Appendix B.

172. See *infra* Appendix B.

173. See *infra* Appendix B.

174. Please remember that this does not include the use of economic substantive due process in land use zoning cases. See *supra* Part I.B (explaining that land use cases were excluded from this study because courts have not analyzed economic substantive due process claims consistently in this area).

175. See *infra* Appendix B (noting that thirty-four states used economic substantive due process before 1980 but not since 1980).

176. These states are Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Montana, North Carolina, Ohio, Pennsylvania, and Wisconsin. See *infra* Appendix B.

*After 1940, and Have Continued to Since 1980**1. Florida! Florida! Florida!*<sup>177</sup>

Head and shoulders above the rest, the Florida Supreme Court has continuously protected economic liberty through the application of economic substantive due process.<sup>178</sup> Since 1940 it has done so twenty-nine times.<sup>179</sup> The nearest to this is Illinois, at sixteen.<sup>180</sup> Most of the court’s economic substantive due process holdings were in the 1950s and 1960s, but even the 1980s saw three instances, the most of any state supreme court in the nation.<sup>181</sup> The most recent, *Chicago Title Insurance Co. v. Butler*,<sup>182</sup> was a classic economic substantive due process opinion, where the court invalidated a statute limiting the rebates that insurance agents may receive.<sup>183</sup> The court’s history includes many of the “usual suspects” discussed earlier in this Article, including price controls,<sup>184</sup> advertising restrictions,<sup>185</sup> Sunday closing laws,<sup>186</sup> different incarnations of the state’s Fair Trade Act,<sup>187</sup> and occupational licensing laws.<sup>188</sup>

177. “Florida, Florida, Florida. I honestly believe, Matt, as goes Florida, will go the nation.” *Today Show* (NBC television broadcast, Nov. 6, 2000) (Tim Russert to Matt Lauer on the eve of the 2000 presidential election).

178. See *infra* Appendix B (comparing the number of cases decided in Florida involving economic substantive due process with the number of cases in other states).

179. See *infra* Appendix B.

180. See *infra* Appendix B. This number does not include a large number of Illinois land use zoning cases that are excluded for reasons stated in Part I.B. See, e.g., *City of Loves Park v. Woodward Governor Co.*, 153 N.E.2d 560, 563 (Ill. 1958) (concluding that zoning of lot for residential purposes, adjacent to automobile plant, is beyond the legitimate use of the police power); *Mack v. County of Cook*, 142 N.E.2d 785, 788-89 (Ill. 1957) (holding that classification of property as non-commercial is not a proper use of the police power); *Hannifin Corp. v. City of Berwyn*, 115 N.E.2d 315, 319 (Ill. 1953) (zoning of land in mostly industrial area as “residential” is “manifestly unreasonable, arbitrary and capricious”).

181. See *infra* Appendix B.

182. 770 So. 2d 1210 (Fla. 2000).

183. *Id.* at 1220 (“[T]he anti-rebate statutes . . . unconstitutionally restrict a citizen’s rights to freely bargain for services.”).

184. See, e.g., *United Gas Pipe Line Co. v. Bevis*, 336 So. 2d 560, 563-64 (Fla. 1976) (concluding that energy price restrictions are unconstitutional because, *inter alia*, they exceed the state’s police power).

185. See, e.g., *Eskind v. City of Vero Beach*, 159 So. 2d 209, 212-13 (Fla. 1963) (invalidating an ordinance banning outdoor advertising of lodging accommodations as an infringement on the right to advertise business); *Town of Miami Springs v. Scoville*, 81 So. 2d 188, 192-93 (Fla. 1955) (determining that an ordinance regulating the size of gas station signs is not rationally related to the public safety or health).

186. See, e.g., *Moore v. Thompson*, 126 So. 2d 543, 551 (Fla. 1961) (determining that a Sunday closing law for used automobile dealers exceeded the state’s police power).

187. See, e.g., *Miles Labs., Inc. v. Eckerd*, 73 So. 2d 680, 682 (Fla. 1954) (invalidating a non-signer clause of a state fair trade act because the clause caused anticompetitive pricing and was an unacceptable use of the police power); *Liquor Store v. Cont’l Distilling Corp.*, 40 So. 2d 371, 385 (Fla. 1949) (invalidating a provision of the Fair Trade Act that prevented selling products below the fixed price as arbitrary and unreasonable).

188. See, e.g., *Snedeker v. Vermmar, Ltd.*, 151 So. 2d 439, 442 (Fla. 1963) (concluding that an education requirement for masseurs constituted an invalid use of the police power); *Sullivan v. DeCerb*, 23 So. 2d 571, 572 (Fla. 1945) (holding that a

Furthermore, the court innovated in other areas of substantive due process to some extent, including two race track related tax cases<sup>189</sup> and a decision striking down a ban on the possession of embossing machines.<sup>190</sup>

The reasons for the Florida Supreme Court's extraordinary use of economic substantive due process, including the motivations behind the state's individual justices, local history outside of that Court's case law, or unusual machinations in the state's legislature,<sup>191</sup> are beyond the scope of this study. Although this Article briefly explores what has led to the recent nationwide decline in the use of economic substantive due process under state constitutional law,<sup>192</sup> speculations on individual states, even in the case of mighty Florida, rely on too few data points to be of much value. What may briefly be said is that the Florida Supreme Court has interpreted a "due process clause" nearly identical to that of the U.S. Supreme Court in striking down economic regulations.<sup>193</sup> In short, the Florida opinions listed in Appendix A by and large textually rest on nothing more than a "generic" due process clause and the extra-textual bases of exceeding the police power or lacking a rational basis.<sup>194</sup> Nevertheless, with as much a textual commitment to economic liberty as the Fourteenth Amendment, the Florida Supreme Court has interpreted the Florida Constitution to protect economic

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photography licensing scheme exceeded the proper exercise of the police power because it had no reasonable relation to the general welfare).

189. See, e.g., *Horsemen's Benevolent & Protective Ass'n v. Div. of Pari-Mutuel Wagering Dep't of Bus. Regulation*, 397 So. 2d 692, 695 (Fla. 1981) (holding that a permit scheme deducting one percent of race winnings and transferring funds to private associations constituted an invalid exercise of the state's police power); *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 245 So. 2d 625, 628-29 (Fla. 1971) (striking down as violating substantive due process a statute regulating race track operating days according to the amount of tax revenue the track produced in the preceding year).

190. *State v. Saiez*, 489 So. 2d 1125, 1129 (Fla. 1986) (striking down a statute criminalizing the possession of embossing machines on substantive due process grounds because the blanket prohibition impermissibly interfered with the rights of people who used the machines for their business).

191. All of these reasons are purely hypothetical and could be applied to any state government. They are the type of reasons, however, that may account for a state's stepped-up enforcement of economic substantive due process. For a discussion of how the use of economic substantive due process at the state level may be superior to that under the Federal Constitution, precisely because local variations in state economies may countenance different results under economic substantive due process review, see Hetherington, *supra* note 15, at 250.

192. See *infra* Part IV (advocating a theory that conservative judges declined to use economic substantive due process in their decisions after the controversial outcome of *Roe v. Wade*).

193. Compare FLA. CONST. art. I, § 9 ("No person shall be deprived of life, liberty or property without due process of law . . ."), with U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law . . ."). The Florida Constitution does include language that directly protects economic liberties, but the state supreme court has not been active in relying upon it. See FLA. CONST. art. I, § 2 ("All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property . . .").

194. See *infra* Appendix A.

liberty through economic substantive due process more than any other state court of highest review since 1940.<sup>195</sup> Perhaps the lesson to be taken from this is that it is not the text of the constitution that matters in whether a court protects an economic liberty. Instead, the reasons may be non-textual, or even non-legal.

## 2. Illinois

A very distant second to Florida, the Illinois Supreme Court has struck down economic regulations under economic substantive due process on sixteen occasions.<sup>196</sup> This has run the gamut of different areas of economic regulation, from keeping auto records<sup>197</sup> to mandating that employers pay their employees while they leave to vote.<sup>198</sup> Occupational licensing has taken many hits from the court, with it striking down four plumbing licensing schemes alone.<sup>199</sup> Other anti-licensing opinions include the invalidation of the requirement that a funeral director obtain an embalmer's license,<sup>200</sup> and a case from as recently as 1995 invalidating a scheme licensing private alarm contractors.<sup>201</sup>

Illinois stands as an interesting exception when viewing its Supreme Court's performance against the nationwide trend of economic substantive

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195. See *infra* Appendix B (indicating that the Florida Supreme Court has decided twenty-nine economic substantive due process cases since the 1940s, while the next most active state was Illinois, with sixteen cases).

196. See *infra* Appendix B.

197. See *People v. Wright*, 740 N.E.2d 755, 768-69 (Ill. 2000) (invalidating a statute that penalized auto parts recycling businesses for failing to keep accurate records regardless of the record-keeper's intent as an unreasonable means to achieve the state's goal of preventing the trafficking of stolen vehicles and parts).

198. See *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 128 N.E.2d 691, 697-98 (Ill. 1955) (determining that a “pay-while-voting” statute directed at only one class of employees “has no real or substantial relation to the object of public welfare” and therefore is an unconstitutional use of the police power). The Kentucky Court of Appeals struck down a similar statute. See *Illinois Cent. R. Co. v. Commonwealth*, 204 S.W.2d 973, 975 (Ky. 1947) (determining that the “pay-for-voting” scheme is an arbitrary and unfair use of legislative power and prohibited by the Kentucky Constitution).

199. See *People v. Johnson*, 369 N.E.2d 898, 903 (Ill. 1977) (holding that a plumbing licensing scheme, as implemented, created an unconstitutional monopoly power in the hands of already licensed plumbers); *People v. Masters*, 274 N.E.2d 12, 14 (Ill. 1971) (striking down a plumbing licensing law requiring plumbers to pay an annual fee in order to become certified as arbitrary and unreasonable); *Schroeder v. Binks*, 113 N.E.2d 169, 171-73 (Ill. 1953) (striking down a plumbing licensing law as an improper exercise of the police power); *People v. Brown*, 95 N.E.2d 888, 899 (Ill. 1950) (striking down various arduous plumbing licensing restrictions as violating substantive due process because the restrictions impermissibly interfered with the basic right to work in a legitimate business).

200. *Gholson v. Engle*, 138 N.E.2d 508, 512 (Ill. 1956) (striking down a regulation on substantive due process grounds, and concluding “[t]he record does not, in our opinion, establish that public health considerations justify the requirement that a funeral director be a licensed embalmer”).

201. *Church v. State*, 646 N.E.2d 572, 580-81 (Ill. 1995) (finding a licensing scheme applicable to private alarm contractors unconstitutional as an invalid use of the police power because it places considerable barriers on a person who wishes to work in a legitimate business).

due process cases.<sup>202</sup> With the exception of the roaring 1950s, when the Illinois Supreme Court utilized the doctrine in non-land use zoning cases seven times,<sup>203</sup> in no decade since 1940 has the court issued more than three opinions striking down an economic regulation on substantive due process grounds.<sup>204</sup> Yet, the court has issued at least one such opinion in every decade except for the 1980s, including the 2000s.<sup>205</sup> This long, but measured, tail stretching out from the *Lochner* era illustrates how a court can create a tempered, yet alive, jurisprudence of economic liberty.<sup>206</sup>

### 3. Georgia

This Section closes with a relatively recent opinion from the Georgia Supreme Court. It is one of the most recent examples of a state supreme court explicitly rejecting the federal courts' non-use of economic substantive due process.<sup>207</sup> In 1987, while striking down a ban on sales below cost, the court had the following to say about its constitutional jurisprudence:

This court has repeatedly declared that the right to contract, and for the seller and purchaser to agree upon a price, is a property right protected by the due-process clause of our Constitution, and unless it is a business *affected with a public interest*, the General Assembly is without authority to abridge that right . . . no matter what other states or the Supreme Court of the United States may or may not have decided.<sup>208</sup>

The Georgia Supreme Court's insistence on continuing to apply the "affected with a public interest" test<sup>209</sup> is a throw-back to the pre-*Nebbia* period of the *Lochner* era.<sup>210</sup> In *Strickland* the court affirmed an earlier determination<sup>211</sup> that the petroleum industry is not affected with a public

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202. See *infra* Appendix B (comparing the total of substantive economic due process decisions state-by-state for seven decades).

203. See *infra* Appendix B.

204. See *infra* Appendix B.

205. See *infra* Appendix B.

206. For an argument that the United States Supreme Court should strike a similar balance by applying a level of rational-basis scrutiny to economic regulations, yet a stricter level of rational-basis than that currently applied, see the comments of President Clinton's former Acting Solicitor General Walter Dellinger, *The Indivisibility of Economic Rights & Personal Liberty*, 2004 CATO SUP. CT. REV. 9, 13-16 (2004), available at <http://www.cato.org/pubs/scr/docs/2004/indivisibility.pdf>.

207. *Strickland v. Ports Petroleum Co.* 353 S.E.2d 17 (Ga. 1987).

208. *Strickland*, 353 S.E.2d at 18 (citations and internal quotation marks omitted).

209. *Id.*

210. See *supra* Part II.A (describing a time period where both state supreme courts and the United States Supreme Court regularly struck down economic regulations).

211. See *Batton-Jackson Oil Co., Inc. v. Reeves*, 340 S.E.2d 16, 19 (Ga. 1986) ("As it cannot be said that the gasoline industry is devoted to the citizens of this state and its use granted to the public, we conclude that the gasoline industry is not affected with a public interest . . .").

interest.<sup>212</sup> Because it was not, the legislature therefore lacked the power to regulate its prices.<sup>213</sup>

The Court's statement that the Georgia General Assembly has no authority to abridge the right to contract "no matter what other states or the Supreme Court of the United States may or may not have decided"<sup>214</sup> may at first sound like a bit of libertarian bravado, but it is actually little different from statements state courts routinely make regarding the U.S. Supreme Court in matters of criminal law and privacy.<sup>215</sup> The statement's spirit is consonant with Justice Brennan's battle cry to the states discussed in the Introduction.<sup>216</sup> The Georgia Supreme Court's refusal to accept the conventional wisdom on the right to contract<sup>217</sup> illustrates that in the State of Georgia, at least as of 1987, the "New Judicial Federalism" is alive and well in its attempt to preserve the legacy of the *Lochner* era.<sup>218</sup>

*B. States That Were Active After 1940, but Have not Utilized Economic Substantive Due Process Since 1980*

As with the previous section, the following does not review every state supreme court that fits in this category, but investigates a few examples illustrating how a state judiciary may actively enforce the principles of economic substantive due process review for a time before letting the doctrine die away. The states considered are Indiana, Massachusetts, and

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212. See *Strickland*, 353 S.E.2d at 18 (determining that a gasoline price fixing scheme was unconstitutional because the gasoline industry is not affected with a public interest).

213. See *id.* (relying on Georgia case law in striking down legislation regulating and fixing prices with respect to industries that are not affected with a public interest).

214. *Id.* (internal quotation marks omitted).

215. See, e.g., *People v. Dunn*, 564 N.E.2d 1054, 1057 (N.Y. 1990) (extending rights to citizens under the state constitution that the U.S. Supreme Court has not extended under the U.S. Constitution); see also *supra* note 2 (noting that state courts often interpret their constitutions differently than the U.S. Supreme Court has interpreted analogous provisions of the Federal Constitution).

216. See *supra* notes 1-8 and accompanying text (discussing Justice Brennan's seminal law review article, in which he encouraged the states to interpret their constitutions liberally in the face of the Supreme Court's growing conservatism).

217. See *Strickland*, 353 S.E.2d at 18 (explicitly rejecting the U.S. Supreme Court's refusal to protect the right to contract).

218. The Georgia Supreme Court has a long history of pining for the *Lochner* era. In 1951 the court complained at length regarding the plight of economic liberties in the face of cases such as *Nebbia v. New York*, 291 U.S. 502 (1934). See *Harris v. Duncan*, 67 S.E.2d 692, 694 (Ga. 1951) (implicitly agreeing with the dissenting opinion in *Nebbia* in finding that the state legislature had no legitimate reason to fix the price of milk). Chief Justice Duckworth of the Georgia Supreme Court, in condemning *Nebbia*, even argued that, in the face of a world-wide war against communism, it would not be right to turn over to the legislature all decisions regarding economic regulation, and that "[b]y such conduct the legislature, aided and abetted by the judiciary of this state, could ultimately convert Georgia into a socialistic State despite the plain provisions of the Constitution which forbid such." *Id.* at 698 (Duckworth, C.J., concurring). Regarding such an attitude, one commentator mildly noted, "[t]he Georgia Supreme Court . . . found the self restraint philosophy distasteful." Note, *supra* note 15, at 317.

South Carolina.

1. *Indiana*

After four holdings enforcing economic substantive due process in the 1940s,<sup>219</sup> in 1952 the Indiana Supreme Court drew the following line in the sand between itself and the contemporary trend of constitutional law: “This court has in the past consistently refused to follow the ‘pattern’ or ‘drift’ apparent in the decisions of other courts which approve mere legislative price fixing.”<sup>220</sup> The court struck down several restrictions on automobile dealers because they were not reasonably related to the legislative purpose of preventing fraud.<sup>221</sup> In doing so it proudly cited a *Lochner*-era case, *Liggett Co. v. Baldrige*,<sup>222</sup> which struck down a Pennsylvania statute restricting ownership of pharmacies to licensed pharmacists.<sup>223</sup> However, twenty years after *Holt*, the U.S. Supreme Court overruled *Liggett*, labeling it “a derelict in the stream of the law.”<sup>224</sup>

Four years after *Holt*, the Indiana Supreme Court utilized the doctrine again, striking down a restriction on automobile dealers.<sup>225</sup> After that, however, the court left the field. Since 1956 the court has refused to invalidate an economic regulation on economic substantive due process grounds.<sup>226</sup> Such a “switch in time” is not, of course, unusual,<sup>227</sup> but it is quite a contrast to the practice of other states that continued to fight the

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219. See *infra* Appendix B.

220. Dep’t of Fin. Insts. v. Holt, 108 N.E.2d 629, 635 (Ind. 1952).

221. See *id.* at 635-36 (finding no link between making the retail seller of automobiles fully liable under recourse liability and the state objective to prevent fraud).

222. 278 U.S. 105 (1928).

223. *Id.* at 113-14. See *Holt*, 108 N.E.2d at 635 (citing with approval *Liggett*’s reasons for overturning the Pennsylvania statute including the unreasonableness of the regulation and the lack of a substantial relationship to the public welfare).

224. See *N.D. State Bd. of Pharmacy v. Snyder’s Drug Stores, Inc.*, 414 U.S. 156, 166-67 (1973) (agreeing with Justice Holmes’s dissent in *Liggett* which found an adequate relationship between the public health and the statutory requirement that licensed pharmacists own drugstores and sell drugs).

225. See Dep’t of Ins. v. Motors Ins. Corp., 138 N.E.2d 157, 165 (Ind. 1956) (striking down a bar on automobile dealers also selling auto insurance on grounds that there was no reasonable cause for the law).

226. See *infra* Appendix B. The court has, however, invalidated land use zoning restrictions on economic substantive due process grounds since *Motor Insurance Corp. v. Metro. Bd. of Zoning Appeals of Marion County v. Gateway Corp.*, 268 N.E.2d 736, 742 (Ind. 1971) (upholding a trial court ruling refusing to enforce a zoning ordinance when application of the ordinance would preclude the property owner from using his property “for any purpose to which it is reasonably adapted”); *Bd. of Zoning Appeals of New Albany v. Koehler*, 194 N.E.2d 49, 54-55 (Ind. 1963) (deciding that when a zoning ordinance does not promote or protect the public welfare and invades property rights, the ordinance is unconstitutional).

227. This refers to the switch in voting practices by Chief Justice Hughes between 1936 and 1937. See Michael Comiskey, *Can a President Pack—or Draft—the Supreme Court? FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043, 1046 (1994) (discussing generally the switch in Chief Justice Hughes’s voting pattern).

trend in constitutional law for decades more.<sup>228</sup>

## 2. *Massachusetts*

The now “liberal” Supreme Judicial Court of Massachusetts<sup>229</sup> extended its respect for liberty into the economic sphere in the 1940s, 1950s, 1960s, and even 1970s.<sup>230</sup> This included two cases striking down compulsory auto insurance mandates,<sup>231</sup> as well as occupational licensing rulings.<sup>232</sup> The original opening to the state’s constitution reflected a deep commitment to economic liberty, proclaiming, “[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be

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228. See *supra* Part II.B. However, some states have followed Indiana’s trend. The Oregon Supreme Court made a similar defiant comment to that in *Holt* in 1952:

In by-gone days when government was deemed to be a responsibility of the people, rather than the people being a responsibility of government, as is unfortunately too much the case today, all legislation of the character now under consideration was deemed an unreasonable interference with the right of the individual to contract and to own and enjoy private property. Laws attempting to fix minimum wages or prices were uniformly held invalid as being in violation of the due process clause of the Fourteenth Amendment.

*Christian v. La Forge*, 242 P.2d 797, 805 (Or. 1952). Admittedly, the court went on to admit that the law had changed “and, in most respects, justly so.” *Id.* Nevertheless, the court went on to strike-down the barber-pricing regulation as an unreasonable interference with the right to carry-on a business. *Id.* at 809. This sentiment had little long term effect. The court has not enforced economic substantive due process, broadly understood, since the 1960s. See *infra* Appendix B (indicating that the Oregon Supreme Court has not decided a case on economic substantive due process grounds since the 1960s). “Broadly understood” is worth emphasizing because the Oregon Constitution lacks either a “due process clause” or a “law of the land” clause.

229. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (declaring that denying same-sex marriage violates equal protection under the state’s constitution and defining civil marriage as the union of two persons, rather than the union of a man and a woman); Robert P. George, *Judicial Usurpation and the Constitution: Historical and Contemporary Issues*, HERITAGE LECTURES, Apr. 11, 2005, at 1, 6, available at <http://www.heritage.org/Research/LegalIssues/hl871.cfm> (calling the decision in *Goodridge* the work of “four liberal Massachusetts Supreme Judicial Court justices” and arguing that decisions such as this force culturally leftist views about marriage on society).

230. See *infra* Appendix B (demonstrating that throughout this time period the Supreme Judicial Court of Massachusetts decided seven cases involving economic substantive due process rights).

231. See *Traveler’s Indem. Co. v. Comm’r of Ins.*, 265 N.E.2d 90, 92 (Mass. 1970) (holding that maximum rates set for compulsory auto insurance were unconstitutionally low as they were confiscatory); *Aetna Cas. & Sur. Co. v. Comm’r of Ins.*, 263 N.E.2d 698, 703 (Mass. 1970) (finding that legislatively-fixed maximum rates that insurers could charge for automobile insurance were confiscatory and that it is within the power of the judicial branch to review such rates for constitutional sufficiency).

232. See *In re Opinion of the Justices*, 151 N.E.2d 631, 632-33 (Mass. 1958) (stating that a proposed regulation on the hours barbers may keep that had no connection to public health or safety would violate economic liberties); *Mansfield Beauty Acad., Inc. v. Bd. of Registration of Hairdressers*, 96 N.E.2d 145, 147 (Mass. 1951) (striking down a statute barring beauty schools from accepting payment for hairdressing students rendering services because it had no legitimate connection to public health or safety); *Opinion of the Justices*, 79 N.E.2d 883, 887-88 (Mass. 1948) (stating that a proposed bill seeking to bar cemetery owners and operators from selling cemetery monuments would be an invalid exercise of the police power because such a prohibition was unrelated to the public welfare).

reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”<sup>233</sup> This commitment to economic liberty contributed to the court’s opinion in *Coffee-Rich, Inc. v. Commissioner of Public Health* in 1965.<sup>234</sup>

*Coffee-Rich* involved a challenge to a law prohibiting the sale of a dairy substitute product.<sup>235</sup> The court reasoned that the consumer-protection regulation at issue was unconstitutional because it failed to consider the actual likelihood that a consumer would mistake the product for real cream.<sup>236</sup> Assessing the argument that the bar was necessary to prevent fraud, the court bluntly, and repeatedly, stated that members of the public must be given some credit in determining for themselves what a product actually is:

We think that average consumers are aware that milk and cream are not “vegetable product[s].” Similarly, advertising matter displayed on the frozen food counters from which Coffee-Rich is purveyed clearly and conspicuously states that Coffee-Rich is a ‘frozen non-dairy’ product. Again, we think that average consumers are aware that milk and cream are dairy products. . . . We do not believe that an average consumer would buy this product under the mistaken impression that it is milk or cream.<sup>237</sup>

Because it could be assumed that the public read the labels of Coffee-Rich products, the court concluded that the consumer-protection justification for the law was illusory.<sup>238</sup> Such an inquiry, however, was not

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233. MASS. CONST. pt. 1, art. 1, *amended by* MASS. CONST. art. CVI.

234. 204 N.E.2d 281 (Mass. 1965).

235. *Id.* at 283. Other state supreme courts have struck down restrictions on the sale of alternative dairy products. *See, e.g.,* *People ex rel. Orcutt v. Instantwhip Denver, Inc.*, 490 P.2d 940, 945 ( Colo. 1971) (ruling that the Filled Dairy Products Act, outlawing the use of a vegetable substitute for sour cream, exceeded state police powers and violated substantive due process); *Sun Ray Drive-In Dairy, Inc. v. Trenhaile*, 486 P.2d 1021, 1024 (Idaho 1971) (striking down statute banning “filled milk” under substantive due process because there was no reasonable relation between the statute and the state’s exercise of police powers); *Brackman v. Kruse*, 199 P.2d 971, 978 (Mont. 1948) (declaring prohibitive oleomargarine licensing fees unconstitutional as “excessive, confiscatory and prohibitive”); *Flynn v. Horst*, 51 A.2d 54, 60 (Pa. 1947) (determining that an act licensing the sale of oleomargarine bore no rational relation to the state’s police power and therefore violated substantive due process).

236. *Coffee Rich*, 204 N.E.2d at 284-88. *But see* *Aeration Processes, Inc. v. Comm’r of Pub. Health*, 194 N.E.2d 838, 843 (Mass. 1963) (upholding a ban on the sale of imitation cream because the likelihood that the average consumer would confuse Instantblend with actual cream was too great).

237. *Coffee-Rich*, 204 N.E.2d at 287-88. The court also noted, “It seems to us that the defendants’ reasons for attempting to prohibit the sale of Coffee-Rich are more fanciful than real.” *Id.* at 288 (citing Opinion of the Justices, 79 N.E.2d 883, 888 (Mass. 1948)).

238. *See id.* at 288 (finding that there was no evidence before the court upon which it could conclude that the manufacturing or labeling of Coffee-Rich confused or misled the public).

to stay in the state’s jurisprudence for long. Eight years later the court stated that it employed the equivalent of the federal rational-basis test in reviewing economic regulation, asserting that “any rational basis of fact that reasonably can be conceived to sustain [the act of legislation]” will prevent a challenge to economic regulation.<sup>239</sup> Since then the court has not employed economic substantive due process to strike down a restriction on economic liberty.<sup>240</sup>

### 3. *South Carolina*

In the decades after the close of the *Lochner* era, South Carolina used economic substantive due process to protect economic liberty; however, beginning in the 1970s, it did not enforce the doctrine for many years and then whole-heartedly repudiated its use.<sup>241</sup> In the 1960s the South Carolina Supreme Court repeatedly struck down the regulation of milk prices.<sup>242</sup> In *Gwynette v. Myers*,<sup>243</sup> the court examined the various opinions in *Nebbia v. New York*<sup>244</sup> and explicitly adopted the reasoning from Justice McReynolds’s dissent.<sup>245</sup> McReynolds had stated that “fixation of the price at which A, engaged in an ordinary business, may sell, in order to enable B, a producer, to improve his condition, has not been regarded as within

239. *Corning Glass Works v. Ann & Hope, Inc.*, 294 N.E.2d 354, 358 (Mass. 1973). The court further stated that “[i]t is not within [its] province to pass upon the wisdom of an enactment.” If there was any room for debate, the court conceded that it “cannot substitute [its] judgment for that of the Legislature.” *Id.* at 360 (citing *Gen. Elec. Co. v. Kimball Jewelers, Inc.*, 132 N.E.2d 652, 658 (Mass. 1956)); see also Howard, *supra* note 15, at 882-83 (stating that Massachusetts’s highest court, and those of some other states, “defer to legislative judgments in terms similar to those used by the United States Supreme Court”).

240. See *infra* Appendix B (revealing that no substantive economic due process case was decided in Massachusetts during the 1980s, 1990s, or 2000s). But see *Zuckerman v. Town of Hadley*, 813 N.E.2d 843, 845 (Mass. 2004) (finding in a zoning case that, absent special circumstances, “restrictions of unlimited duration on a municipality’s rate of development are in derogation of the general welfare and thus are unconstitutional”).

241. See *infra* Appendix B (indicating that the South Carolina Supreme Court did not decide any economic substantive due process cases in the 1970s, 1980s, 1990s, and 2000s).

242. See, e.g., *Richbourg’s Shoppers Fair, Inc. v. Stone*, 153 S.E.2d 895, 899 (S.C. 1967) (finding a milk price-control law unconstitutional); *Stone v. Salley*, 137 S.E.2d 788, 792-93 (S.C. 1964) (noting that in spite of the United States Supreme Court’s decision upholding the right of states to fix milk prices, the South Carolina court’s interpretation of its Constitution supports a finding that the State’s milk price-control law violates substantive due process); *Gwynette v. Myers*, 115 S.E.2d 673, 680 (S.C. 1960) (declaring that a milk price-control law was an illegitimate exercise of the police power).

243. 115 S.E.2d 673 (S.C. 1960).

244. 291 U.S. 502, 537 (1934) (upholding a New York law fixing the price of milk and noting that when a law is reasonably related to its proper legislative function and is not arbitrary, due process is satisfied).

245. See *Gwynette*, 115 S.E.2d at 679 (recognizing that legislative economic control over private industries is acceptable only when such industry is devoted to public use and the legislation directly concerns the public welfare (citing *Nebbia*, 291 U.S. at 539, (McReynolds, J., dissenting))). The *Gwynette* court further stated, “[t]he majority opinion in [*Nebbia*], however conclusive as to applicable provisions of the Federal Constitution, does not control us in the interpretation of the Constitution of this state, under which the issue here arises.” *Id.*

legislative power.”<sup>246</sup> He reasoned that if the courts deferred to the legislature in their determination of when a price regulation was necessary for the public interest, then the legislature could always evade judicial review of such enactments and that “such a view, of course, would put an end to liberty under the Constitution.”<sup>247</sup> Relying on this, the South Carolina Court struck down the price control as an illegitimate exercise of the police power.<sup>248</sup>

Years passed by, and then in 2000 the Court overruled all of these milk price control cases.<sup>249</sup> Asserting that only it and the Georgia Supreme Court still engaged in the “affected with a public interest” inquiry, it handed the legislature much broader powers in its ability to regulate economic and social policy.<sup>250</sup> As seen throughout this Article, such a statement regarding South Carolina and Georgia is misleading when taking into account the existence of recent cases in other states utilizing economic substantive due process.<sup>251</sup> Furthermore, although courts might refuse to enforce some of them, almost all of the cases listed in Appendix A have not been explicitly overruled. South Carolina, in that way, stands as an exception.<sup>252</sup>

#### IV. WHY SUCH A PRECIPITOUS DECLINE? WAS *ROE V. WADE* THE FLY IN THE CONSERVATIVE OINTMENT?

Although economic substantive due process still functions in the state

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246. *Nebbia*, 291 U.S. at 554 (McReynolds, J., dissenting) (internal quotation marks omitted).

247. *Id.* at 555.

248. *See Gwynette*, 115 S.E.2d at 679 (recognizing that although the milk industry is vital to the public, this alone does not grant the legislature power to fix milk prices in retail stores).

249. *See R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 527 S.E.2d 763, 765 (S.C. 2000) (adopting a “reasonable relationship” standard to determine the constitutionality of economic and social welfare legislation and overruling the “Dairy Commission cases” to the extent that they are contrary to the new rule).

250. *Id.*

251. *See infra* Appendix A (collecting cases involving economic substantive due process issues from the fifty states and showing that in recent years Arkansas, Connecticut, Florida, Illinois, Montana, Ohio, and Pennsylvania have used substantive due process to strike down economic legislation). It may have been true that, strictly speaking, only South Carolina and Georgia used the “affected with a public interest” test, but, as has been previously mentioned, other states invalidated economic regulations through other manifestations of economic substantive due process.

252. In addition to South Carolina, the West Virginia Supreme Court has overruled some of its post-1940 economic substantive due process opinions. *See State v. Wender*, 141 S.E.2d 359, 363 (W.Va. 1965) (striking down cigarette minimum price law as violating substantive due process), *overruled by Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 328 S.E.2d 144, 150 (W.Va. 1984); *State v. Mem'l Gardens Dev. Corp.*, 101 S.E.2d 425, 432 (W.Va. 1957) (deciding that regulation of pre-need sales of funeral items violates substantive due process), *overruled by Whitener v. W.Va. Bd. of Embalmers & Funeral Dirs.*, 288 S.E.2d 543, 545 (W.Va. 1982).

courts, it is nothing like what it was only thirty years ago.<sup>253</sup> What explains this drop, especially after the relatively prolific use of the doctrine by state courts in the 1940s, 1950s, and 1960s? Commentators have proposed various ideas for why state courts hung onto the doctrine in those decades immediately following the close of the *Lochner* era, but because this Article is the first to recognize the more recent drop in the use of the doctrine, no studies have so far suggested a reason for it. This Part will introduce some possible answers. One is that state judges who were legally trained during the *Lochner* era had a hard time coming to grips with the revolution of the New Deal, and clung onto the doctrine until they began retiring en masse in the 1970s. Another is that state justices experimented for a time with economic substantive due process under a “New Judicial Federalism” approach, and then, for whatever reason, backed away from the experiment in the 1970s and 1980s. A more controversial hypothesis, and that advocated here, is that conservatives’ abhorrence of the result in *Roe v. Wade*,<sup>254</sup> and of the case’s substantive due process analysis, turned many traditional advocates of economic substantive due process into critics of substantive due process review generally. In the process, economic substantive due process under state constitutional law was not eviscerated, but injured severely.

*A. The Old Judges Die Hard, and Judicial Experimentation, Hypotheses*

In 1976 Professor A.E. Dick Howard, a leading authority on state constitutional law, had this to say concerning the continued use of economic substantive due process in state courts:

Old habits die hard, and it is not surprising that state court judges in the 1950’s were still thinking in substantive due process terms. That generation of judges had completed their legal education well before even the Supreme Court had begun to reject the premises of the cases decided early in the twentieth century. One might expect, however, that by the 1970’s, with the Supreme Court’s renunciation of substantive due process in economic cases so clear and so widely known, state courts would have fallen in line, and limited their own review of legislative judgments touching social and economic questions. A look at state court decisions since the 1960’s and 1970’s shows that this has not happened.<sup>255</sup>

As this Article has illustrated, it did happen. Was Professor Howard

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253. See *infra* Appendix B (collecting data that shows only seven out of fifty states decided economic substantive due process cases in the 1980s, only seven out of fifty in the 1990s, and only three out of fifty in the 2000s).

254. 410 U.S. 113, 154 (1973). For a discussion of *Roe*’s holding, see *infra* notes 274-278 and accompanying text.

255. Howard, *supra* note 15, at 882.

merely wrong about the data and not about the judges? As more and more law students graduated after studying *West Coast Hotel v. Parrish*<sup>256</sup> instead of *Lochner*,<sup>257</sup> perhaps the tipping point finally came in the 1970s, and by the 1980s and 1990s these new judges were firmly in command of the nation's state supreme courts, ready to avoid the ghosts of *Lochner* that had haunted their chambers since the 1930s.

This proposal could possibly be the correct explanation. However, it does not satisfactorily explain the *rise* in economic substantive due process opinions from the 1940s to the 1950s. The rise was considerable—from sixty-eight to ninety-six.<sup>258</sup> Was this a “last gasp” of the old guard of “*Lochnerians*” striking back against the forces of the New Deal?<sup>259</sup> Perhaps. Yet, at the same time, this explanation sounds a bit too conspiratorial for fifty sets of jurists. Perhaps instead, the judges of the 1950s collectively tried to experiment with economic substantive due process under their own constitutions, and later assessed the experiment a failure.<sup>260</sup>

As has been argued elsewhere (in normative evaluations of state economic substantive due process), there are valid reasons for rejecting such review at the federal level while keeping it in state courts.<sup>261</sup> For one thing, state judges are often elected, so if the voters feel that a judge is interjecting too many personal socioeconomic views into opinions the voters can remove her.<sup>262</sup> Furthermore, state constitutions are generally much easier to amend than the U.S. Constitution.<sup>263</sup> If the people or the legislature disagree with a state supreme court's decision to protect economic liberty through the state constitution's due process clause, they can amend the constitution to preclude such an interpretation.<sup>264</sup> In

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256. 300 U.S. 379 (1937).

257. 198 U.S. 45 (1905).

258. See *infra* Appendix B.

259. See, e.g., *supra* notes 220-224 and accompanying text (discussing the Indiana Supreme Court's opinion in *Department of Financial Institutions v. Holt*, 108 N.E.2d 629, 635 (Ind. 1952), and analyzing the court's refusal to blindly follow legislative price fixing, contrary to other courts' tendency to do so, and its willingness to follow *Lochner*-era cases).

260. This experimentation often extended to the Fourteenth Amendment as well. See *supra* notes 101-114 and accompanying text (discussing the tactic often used by state courts of highest review in striking down an economic regulation on both state and federal grounds, thus insulating it from review by the United States Supreme Court).

261. See, e.g., Kirby, *supra* note 9, at 248 (recognizing that there is no plausible national interest to support federal judicial meddling in local state economic matters).

262. See Newberg, *supra* note 18, at 267 (stating that “in all but three states the judges of the highest state courts are subject to various forms of majoritarian review . . .”).

263. See *id.* (pointing out that many states allow for amending the constitution through a referendum or initiative and noting that in a nine year period, between 1970 and 1979, the states collectively adopted over 900 constitutional amendments).

264. The United States Constitution, in fact, possesses several amendments that sought to rectify a past Supreme Court interpretation. For instance, the Eleventh Amendment was a direct response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See also Tribe, *supra*

addition, state courts “may better adapt their decisions to local economic conditions and needs” because their decisions concern the economy of only one state.<sup>265</sup> It may be that a regulation that is unreasonable in one market is a legitimate exercise of the police power in another.<sup>266</sup> Another suggestion is that state legislatures, not to mention town councils, are much more susceptible to direct and one-sided special interest lobbying than is Congress.<sup>267</sup> State justices are perhaps better attuned to local political forces and motivations, and can use review of new regulations to ferret out local protectionist legislation.<sup>268</sup>

Therefore, with these and similar justifications on the minds of state judges, perhaps the 1950s were a time for experimentation, followed by, for whatever reason, a pull-back in the 1960s that only grew in the 1970s and beyond.

### B. *The Convergence Hypothesis*

A different view is that something other than attrition or judicial experimentation, and something specific, caused the heavy drop in cases from the 1960s to the 1970s, and especially from the 1970s to the 1980s. The 1970s, in fact, saw less of a drop, percentage-wise, from the previous decade (forty-eight following sixty-seven), than the 1960s did from its predecessor (sixty-seven following ninety-six).<sup>269</sup> However, the drop from the 1970s to the 1980s was over four-fold (eleven following forty-eight).<sup>270</sup> Such a substantial drop after the much more gradual decline of the previous two decades does not square all that well with either the aging of old fashioned jurists or the abandonment of an experimental “new” state

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note 68, at 64-65 & n.10 (noting “four (or perhaps five)” occasions and listing the Amendments in addition to the Eleventh Amendment, that sought to remedy unpopular Supreme Court decisions: the Fourteenth Amendment, section 1 (nullifying *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)); the Sixteenth Amendment (nullifying *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895)); the Twenty-Sixth Amendment (nullifying *Oregon v. Mitchell*, 400 U.S. 112 (1970)); the Nineteenth Amendment (reversing *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874))).

265. Hetherington, *supra* note 15, at 250.

266. *See id.* (comparing hypothetical review of theater anti-scalping laws in Indiana and New York, taking into account the different theater markets, and concluding that legislative regulation may be appropriate in New York but inappropriate in Indiana where there is no booming theater industry).

267. This applies in other fields of legislation as well. *See* W. David Slawson, *The Right to Protection From Air Pollution*, 59 S. CAL. L. REV. 667, 767-68 (1986) (stating that “[s]pecial interest legislation is of special concern to states because state legislatures are more susceptible to pressures from special interests than is Congress”).

268. *See, e.g.*, Newberg, *supra* note 18, at 265 (arguing that state court economic substantive due process review is beneficial when the legislative process fails the public interest by catering to minority special interest groups).

269. *See infra* Appendix B.

270. *See infra* Appendix B.

approach to economic substantive due process.<sup>271</sup> It would explain the change of one court, such as what happened to the U.S. Supreme Court in the 1930s,<sup>272</sup> but a wave of retirements, or a wave of experiments, taking less than ten years does not satisfactorily account for such a sudden change when those retirements and experiments are spread across fifty different jurisdictions. This is not to say that these trends could not have caused the four-fold drop in cases, it is just to say that a specific event, or events, peculiar to the time better fits the data.

If anything “big” happened to cause the four-fold drop it very likely took place in the 1970s.<sup>273</sup> What in the field of economic substantive due process took place in the 1970s? Other than what has been mentioned in this Article, not very much. Leave off the word “economic,” however, and something seismic occurred.

In 1973 the U.S. Supreme Court decided that a woman has the constitutional right to terminate her pregnancy.<sup>274</sup> Presaged by *Griswold v. Connecticut* in 1965,<sup>275</sup> *Roe* partly relied upon the substantive component of the Fourteenth Amendment’s Due Process Clause in recognizing that a woman’s right to privacy encompassed the right to choose to have an abortion.<sup>276</sup> Although it drew largely on the recent precedent establishing the “right to privacy,” *Roe* was familiar to students of the *Lochner* court.<sup>277</sup> The Court identified an unenumerated right and then weighed that right against the state’s interest to act through the police power in protecting public health and safety.<sup>278</sup> The most pertinent difference, of course, was

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271. See *supra* Part IV.A (discussing these theories).

272. See generally Comiskey, *supra* note 227 (describing changes on the Supreme Court during President Roosevelt’s presidency which ultimately resulted in seven Roosevelt appointees sitting on the Court).

273. Of course the event, or events, could have taken place earlier, but this would be more akin to a long-term cause, such as the attrition of judges.

274. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (concluding that the “right of personal privacy includes the abortion decision,” but finding that the right is qualified and may be regulated by the state under certain circumstances).

275. 381 U.S. 479, 484-85 (1965). *Griswold* did not rely on the Due Process Clause, but the opinion of Justice Douglas famously discovered a right to privacy in the “penumbras, formed by emanations” of the Bill of Rights. *Id.* at 484.

276. *Roe*, 410 U.S. at 153-54.

277. The underpinnings of the “right to privacy” originated, to some degree, in the *Lochner* era. Says Professor David Bernstein:

*Roe* was especially difficult to distinguish from *Lochner* because its foundation is a series of Warren Court privacy decisions beginning with *Griswold v. Connecticut*. *Griswold*, in turn, not only asserted a nontextual right of privacy, but also relied on *Lochner* era civil liberties precedents. Like *Lochner* itself, the *Lochner* era precedents relied upon in *Griswold* had invalidated state laws based on an expansive, substantive interpretation of the Fourteenth Amendment’s Due Process Clause.

David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1, 7 (2003).

278. The opinion stated, “[t]he Court’s decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in

that in this case the right was non-economic.

As students of recent American politics know, many conservatives’ reaction to *Roe* was vicious, ongoing, and relentless.<sup>279</sup> Much of this reaction pertained to the Court “making up rights” and “finding rights in the Constitution that are not there.”<sup>280</sup> Critics have repeatedly tied *Roe* to cases of the *Lochner* era. Comparisons with *Lochner* were inevitable because each case did essentially the same thing—protect unenumerated and (at least arguably) Lockean rights through a substantive interpretation of the Due Process Clause.<sup>281</sup> Conservative jurist Robert Bork has compared both of these cases to the infamous *Dred Scott* decision.<sup>282</sup> Although he admits that, in terms of economic policy, he is predisposed to agree with the *result* in a case protecting economic liberties,<sup>283</sup> he adamantly contends that it is not the judiciary’s place to protect rights that are not explicitly provided for in the Constitution.<sup>284</sup>

After arguing that *Dred Scott* was perhaps “the first application of substantive due process in the Supreme Court,”<sup>285</sup> Bork states, “*Lochner* employed substantive due process to strike down a state law limiting the hours of work by bakery employees. *Roe* used substantive due process to create a constitutional right to abortion. *Lochner* and *Roe* have, therefore, a very ugly common ancestor.”<sup>286</sup> Bork employs the tactic of repeatedly referring to “*Dred Scott*, *Lochner*, and *Roe*” collectively, as though they form an unbroken line of cases.<sup>287</sup> Perhaps Bork himself would have denounced *Lochner*-era decisions whether or not *Roe* and its fellow privacy

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maintaining medical standards, and in protecting potential life.” *Roe*, 410 U.S. at 153-54.

279. See, e.g., Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1096 (2005) (contending that the Supreme Court’s decision in *Roe* “infuriated” certain conservative sectors of the country and touched off a culture war that has continued to the present time).

280. See, e.g., Michael S. Greve, *A Conservative View of the Court: Getting Beyond “Activism” and “Restraint”*, NAT’L REV., June 16, 2003, at 35, 36 (arguing that “Brennan-era precedents” involved “the assertion of invented constitutional rights”).

281. A strong case can be made that *Lochner* was founded on a traditional understanding of the “substantive” component of due process, while *Roe* was a more flimsy attempt at finding a “right to privacy” in the Due Process Clause and other provisions of the Constitution. What is important for the current thesis, however, is that both protected what might be characterized as Lockean rights through unenumerated constitutional protections.

282. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 32 (1990) (arguing that *Dred Scott v. Sandford*, *Lochner*, and *Roe* are legitimate interpretations of the Constitution if one accepts that the Due Process Clause contains substantive content (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856))).

283. See *id.* at 225 (stating that “I too . . . accept the correctness of laissez-faire, as so defined.”).

284. See *id.* at 351-52 (arguing that judges must always abide by the original understanding of the Constitution to prevent “preposterous” outcomes).

285. *Id.* at 32 (citing DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888* 271 (1985)).

286. *Id.*

287. *Id.* at 32, 131, 193, 209.

cases had come to fruition. Even so, Bork's strict constructivism is highly attractive to a jurist who admires the free market, yet is adamantly opposed to the liberalization of abortion laws through judicial action. In similar abhorrence of judicial power, conservative legal scholar Lino A. Graglia has compared the methods of *Roe* and *Lochner* and argued that both are wrong because each turns a procedural limitation on government into a substantive one: "The due process clause . . . has absolutely nothing to do with, for example, the power of New York State to limit the working hours of bakers or of Texas to restrict the availability of abortion."<sup>288</sup>

These sentiments illustrate a recognition of the similarity between *Roe* and cases invoking economic substantive due process. Once *Roe* was decided, those who vigorously disagreed with the legalization of abortion had to find fault with the case in order to have any hope of overturning it. The easiest way to do so was to discredit substantive due process itself. This would assist in overturning *Roe*, but would also discredit the use of "due process" clauses in protecting economic liberty.<sup>289</sup>

The conservative criticism of the right to privacy was not the first time substantive due process had been denounced as a form of legislating from the bench.<sup>290</sup> That began at least as long ago as the dawn of the *Lochner* era, with Professor Thayer's seminal article, *The Origin and Scope of the American Doctrine of Constitutional Law* in 1893.<sup>291</sup> Thayer argued for a deferential form of judicial review where a court should uphold a statute as constitutional as long as there exists some reasonable interpretation that would allow it to do so.<sup>292</sup> His thesis was repeated in various forums, from Justice Holmes' dissent in *Lochner* itself,<sup>293</sup> to the arguments by progressive-era intellectuals that the individual's economic liberties must make way for the government's power to alleviate the suffering of

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288. Lino A. Graglia, "Constitutional Theory": *The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789, 795 (1987).

289. This is not to say Bork and Graglia changed their views in order to find fault with *Roe*. It is to say that a jurist who valued economic substantive due process, yet was aghast at the result of *Roe*, might think about the former differently once faced with the existence of the later.

290. Indeed, it was not by any means the first time that a court had been tarred with the name "*Lochner*." See, e.g., Hetherington, *supra* note 15, at 249 (noting that "[f]requently dissents in cases [in state courts] holding regulations invalid on substantive due process grounds accuse the majority of resurrecting the concepts of *Lochner v. New York*").

291. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130 (1893) (remarking that neither the United States Constitution nor the oath judges take upon being sworn in gives them the right of "reversing, displacing, or disregarding" acts of the legislature).

292. *Id.* at 144.

293. *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (arguing that legislative judgments should be respected by the courts "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law").

capitalist society.<sup>294</sup> As seen above,<sup>295</sup> the U.S. Supreme Court finally made way for this new progressive jurisprudence with *Nebbia v. New York*<sup>296</sup> and *West Coast Hotel v. Parrish*.<sup>297</sup>

Why did this distaste not reach the state courts until relatively recently? An easy explanation, and a corollary to Professor Howard’s hypothesis regarding judicial attrition,<sup>298</sup> is that the Justices of the U.S. Supreme Court in the years immediately following *West Coast Hotel* were progressive scholars and politicians nominated by President Franklin Delano Roosevelt.<sup>299</sup> Mathematically speaking, it is easy to effectuate a change in the views of a body of nine by making a few personnel substitutions, especially where the concurrence of a mere five members will suffice. However, it is much harder to change the minds of the justices of the several state courts of highest review, supreme in their interpretation of their own constitutions. Therefore, it is not surprising that state justices stuck, to some degree, to the methodology of the *Lochner* era and ignored the vicissitudes of a small body consisting of favorites of a Democratic president.

What *is* surprising, but only from today’s post-*Roe* perspective, is that state justices who embraced “substantive due process” in the face of the Supreme Court’s hostility were “conservative.”<sup>300</sup> In 1950 Professor Monrad G. Paulsen stated that, regarding the *Lochner* court, “It has been

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294. See, e.g., Edward S. Corwin, *The Supreme Court & the Fourteenth Amendment*, 7 MICH. L. REV. 643, 670 (1909) (arguing that the Supreme Court’s interpretation of due process under the Fourteenth Amendment leads it beyond the traditional scope of judicial power and into the legislative realm); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 487 (1909) (declaring that legislatures attempting to enact legislation involving economic policy must learn how to work around the legacy of wrongly decided Supreme Court decisions on the issue).

295. See *supra* Part II.A (outlining the fall of economic substantive due process under federal constitutional law).

296. 291 U.S. 502 (1934).

297. 300 U.S. 379 (1937); see also *supra* notes 84-90 and accompanying text (discussing the Supreme Court’s adoption of a “rational basis” test to uphold legislative economic regulation and the Court’s abandonment of economic substantive due process).

298. See *supra* Part IV.A (arguing that the majority of state court judges had received their legal education during the *Lochner* era and were therefore reluctant to abandon a legal theory in which they were trained).

299. Ultimately, seven of the sitting justices were Roosevelt picks. See Comiskey, *supra* note 227, at 1045 (stating that in selecting his Supreme Court nominees, Roosevelt sought specific qualifications for his justices, such as “an unwavering belief in the constitutionality of economic regulatory and social welfare legislation; an adherence to a generally libertarian and egalitarian constitutional philosophy; and a willingness to support broad executive authority to lead the nation in war.”).

300. Of course, just because a judge is labeled as a “conservative” does not mean that one actually is. The term is, however, safe to use in this context, being that the Supreme Court that gave President Roosevelt so many problems was repeatedly labeled a “conservative” court. See Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should not be Just for the Rich*, 6 CHAP. L. REV. 31, 41 (2003) (noting that “[t]he *Lochner* era featured conservative Justices who were deeply committed to a laissez-faire economy, protecting business from legislative regulation.”).

charged that the doctrine of substantive due process has been the means whereby *conservative* judges have read classical economic theory into the Constitution.<sup>301</sup> In 1957 an article commented on the persistence of economic substantive due process under state constitutional law by stating that “in . . . states where more *conservative* social and economic theories still hold sway, the courts have refused to follow the federal due process doctrine and have clung to the older concept of substantive due process.”<sup>302</sup>

Yet today, “conservative” jurists often assail substantive due process, whether of the economic or non-economic flavor, as alien to their jurisprudence. While he sat on the bench of the Alabama Supreme Court, Chief Justice Roy Moore was indisputably one of the most conservative jurists in the country.<sup>303</sup> When concurring in a parental-notification case, Moore reflected on numerous scholars’ criticism of the doctrine’s use in *Roe*, asking, “Substantive due process? The very phrase teeters on the edge of textual self-contradiction.”<sup>304</sup> Chief Justice Moore did not mention *Lochner* and its ilk, but with such a denunciation of “substantive due process” as a whole, one would expect a similar rebuke of its economic subset. Furthermore, Justice Scalia, no friend of progressive intellectuals, has proclaimed his contempt for substantive due process as expressed in *Lochner*. In a punitive damages case where the question of substantive limitations on damages awards arose, he opined, “I do not accept the proposition that [the Due Process Clause of the Fourteenth Amendment] is the secret repository of all sorts of . . . unenumerated, substantive rights—however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*-era cases . . . .”<sup>305</sup>

Other examples are found across the post-1973 jurisprudence, in majority opinions, dissents, and concurrences. In *Schochet v. State*, the Maryland Court of Special Appeals went to great lengths to argue that the State had not violated the privacy rights of an unmarried heterosexual couple for a fellatio prosecution.<sup>306</sup> The court cabined the U.S. Supreme

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301. Paulsen, *supra* note 15, at 92 (emphasis added).

302. Hoskins & Katz, *supra* note 15, at 400 (emphasis added). It is very interesting that Hoskins and Katz referred to states that were not only more economically conservative, but also more *socially* conservative. Today, to say that socially conservative judges better respect substantive due process than their liberal counterparts is to utter an absurdity.

303. Chief Justice Moore became famous for refusing to remove a replica of the Ten Commandments from the Alabama Supreme Court grounds in the face of a court order to do so. See Manuel Roig-Franzia, *Alabama Court Ousts “Ten Commandments Judge”*, WASH. POST, Nov. 16, 2003, at A3.

304. *Ex parte* Anonymous, 803 So. 2d 542, 550 (2001) (Moore, C.J., concurring) (citing Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 773-74 (1999)).

305. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring).

306. 541 A.2d 183 (Md. Ct. App. 1988).

Court’s “right to privacy” cases as only applying to marital interests.<sup>307</sup> In doing so, it went out of its way to state that *Griswold v. Connecticut* relied on “two decisions from the heyday of the *Lochner v. New York* era.”<sup>308</sup> The Maryland court also quoted Justice Holmes’ opinion in *Tyson & Bro. United Theatre Ticket Offices v. Banton*, where he dissented from the Court’s striking-down of a control on ticket prices.<sup>309</sup> Thus, the court used the specter of the *Lochner* era, and the words of Holmes (the era’s greatest contemporary critic), to minimize contemporary privacy rights jurisprudence.<sup>310</sup>

In *Commonwealth v. O’Neal*,<sup>311</sup> the Supreme Judicial Court of Massachusetts ruled that a law automatically imposing the death penalty for rape violated the state’s due process clause. In dissent, Justice Reardon criticized the substantive due process approach the majority used, citing *Roe* and comparing the majority’s reasoning to “the theory of judicial intervention employed in the *Lochner* line of cases . . . .”<sup>312</sup> In expressing his disagreement with the “right to privacy” cases he derogatorily quipped “it appears that the right of privacy is considered a fundamental interest protected by the due process clause.”<sup>313</sup>

In *Coldwell Banker Residential Real Estate Services, Inc. v. Missouri Real Estate Commission*,<sup>314</sup> the Supreme Court of Missouri rejected an appeal to economic substantive due process in attacking the use of gifts in selling real estate. In concurring in the opinion, Justice Donnelly lampooned not only substantive due process but the commercial speech doctrine as well.<sup>315</sup> He asserted that the commercial speech doctrine, which the real estate company had also invoked, “may have been ‘an attempt to buttress’ the decision in *Roe v. Wade*, where the Court created a constitutional right to obtain an abortion.”<sup>316</sup> He then concluded that the commercial speech doctrine was an attempt to return to the law the values of *Lochner*.<sup>317</sup> Donnelly’s “conservative” credentials are not in doubt, at least in the *Coldwell* opinion, as he lamented the judicial supremacy of

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307. *Id.* at 188-190.

308. *Id.* at 188.

309. *Id.* at 189 (quoting *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 60 (1973) (quoting *Tyson & Bro. United Theater Ticket Offices v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting))).

310. The Maryland Supreme Court later reversed the case on statutory grounds. *Schochet v. State*, 580 A.2d 176, (Md. 1990).

311. 339 N.E.2d 676 (Mass. 1975).

312. *Id.* at 702 (Reardon, J., dissenting).

313. *Id.* (Reardon, J., dissenting) (citing *Roe v. Wade* 410 U.S. 113, 152-53 (1973)) (emphasis added).

314. 712 S.W.2d 666 (Mo. 1986).

315. *Id.* at 671-72 (Donnelly, J., dissenting).

316. *Id.* at 672 (Donnelly, J., dissenting) (emphasis in original).

317. *Id.* (Donnelly, J., dissenting).

*Cooper v. Aaron*,<sup>318</sup> and hopefully predicted that “[w]ith the possibility of Reagan appointments to the Court now looming on the horizon, the elites are beginning to take another look at the *Cooper* assertion.”<sup>319</sup> Justice Donnelly earlier wrote a similar opinion, where he explicitly connected *Lochner* and *Roe* as examples of judges imposing their views on the rest of society.<sup>320</sup> Regarding the jurisprudence of *Roe*, Donnelly heralded, “I think it must be conceded, *on the record*, that some time ago we entered another *Lochner Era*.”<sup>321</sup>

Meanwhile, in *People v. Onofre*,<sup>322</sup> where the New York Court of Appeals struck down an anti-sodomy law, dissenting Judge Gabrielli noted the similarity between *Griswold*, *Roe*, and *Lochner*, stating, “The assertion that the theories espoused in *Griswold*, *Roe* and their progeny may be likened to the discredited doctrine of ‘substantive due process’ . . . would not come as a surprise to any serious constitutional scholar.”<sup>323</sup> Later, in *Lambert v. State*,<sup>324</sup> Judge Lumpkin, of the Oklahoma Court of Criminal Appeals, expressed a similar sentiment when concurring in upholding a death sentence for a mentally retarded defendant.<sup>325</sup> Citing *Dred Scott*, *Lochner*, and *Roe*, the Judge stated, “Historically, each time appellate courts have ventured into the public policy forum and disregarded the rule of law, it has resulted in not only turmoil, but a denigration of the respect of the judicial system and the rule of law.”<sup>326</sup>

These many examples illustrate that many conservative jurists have come to the same conclusion that their liberal counterparts reached decades before: economic substantive due process cannot be trusted. This convergence, of course, occurred for very different reasons on each side of the aisle. Liberals did not like economic substantive due process for the obvious policy outcomes while conservatives moved away because its use provided possible legitimacy for the parallel method used in *Roe v. Wade*. When faced with the choice of (1) distinguishing “economic substantive due process” from substantive due process and the “right to privacy,” and (2) discrediting the use of substantive due process altogether, enough conservative state justices appear to have chosen the latter approach so that the number of economic substantive due process cases has had nowhere to go but down.

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318. See 358 U.S. 1 (1958) (stating that the word of the United States Supreme Court is final in the interpretation of the United States Constitution).

319. *Coldwell*, 712 S.W.2d at 671 n.1.

320. *Baker v. State*, 584 S.W.2d 65, 70-71 (Mo. 1979) (Donnelly, J., dissenting).

321. *Id.* at 71 (Donnelly, J., dissenting) (emphasis added).

322. 415 N.E.2d 936 (N.Y. Ct. App. 1980).

323. *Id.* at 948 (Gabrielli, J., dissenting) (citations omitted).

324. 984 P.2d 221 (Ok. Ct. Crim. App. 1999).

325. *Id.* at 244 (Lumpkin, J., concurring).

326. *Id.* at 247 (Lumpkin, J., concurring).

This about-face in “conservative” views on substantive due process under state constitutional law was merely part of the broader, and well-recognized, conservative retreat from the doctrine in the wake of *Roe v. Wade* discussed earlier.<sup>327</sup> It is also a gross oversimplification of current attitudes to judicial review amongst those often labeled “conservative.” Legal scholars and jurists who are *politically* conservative often fall into two separate categories when it comes to judicial review: *judicial* conservatives on one side and a more counter-majoritarian school of thought, sometimes called “liberal originalist,”<sup>328</sup> on the other. Therefore, “conservative” legal scholars may be conservative on abortion, but still advocate heightened judicial review when it comes to economic regulation and economic substantive due process.<sup>329</sup> This is to say nothing of libertarian legal scholars, such as Randy Barnett, who would like to see heightened judicial review across the board.<sup>330</sup>

The above disclaimer aside, however, nuances among legal scholars are not what is at issue when explaining a long-term trend spread across fifty different jurisdictions. The overall effect of *Roe v. Wade* among conservative jurists and scholars has undeniably increased distaste for “*Lochnerism*.” The effect of *Roe*, if it did cause the drop in economic substantive due process cases in the 1970s and 1980s, did not occur immediately. It is not as though all of the forty-eight cases of the 1970s were issued before the date of *Roe*’s publication.<sup>331</sup> However, doctrines do not suffer such drops overnight when spread across fifty courts with total discretion in the interpretation of their own constitutions. However, the drop, whatever its cause, was huge, and the accompanying conservative rejection of heightened judicial review under the Fourteenth Amendment’s Due Process Clause cannot be discounted as a meme that may have spread across the “conservative” state justices of the land.

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327. See *supra* notes 277-278 and accompanying text (comparing the *Roe* Court’s identification of an unenumerated right and weighing it against public welfare interests to the similar method used in *Lochner*-era economic substantive due process cases).

328. See Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL’Y 489, 490 (2004) (contrasting “conservative originalism” with “liberal originalism,” and explaining that liberal originalism incorporates the Declaration of Independence, and its underlying political philosophy, into interpreting the Constitution).

329. See, e.g., Douglas W. Kmiec, *America’s “Culture War”—The Sinister Denial of Virtue and the Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183, 191-92 (1993) (distinguishing rights derived from natural law from “new” rights, such as the right to an abortion).

330. See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 35-36 (2003), available at <http://www.cato.org/pubs/scr/docs/2003/revolution.pdf> (praising the Supreme Court for applying a “presumption of liberty” analysis in its opinion in *Lawrence v. Texas*).

331. See *infra* Appendix A (listing approximately as many cases from 1970-1973 as from 1974-1979).

## CONCLUSION

This study has attempted to catalog every economic substantive due process opinion under state constitutional law since 1940 in state courts of highest review. More importantly, it has analyzed the trends that the cataloging reveals. It has defined “economic substantive due process” broadly to include all cases that substantively protect Lockean rights of an economic nature, excluding cases decided under equal protection clauses, contracts clauses, takings clauses, and cases involving land use zoning. This is the first study that has comprehensively gathered these cases, and its findings both confirm and discount past articles on the same subject. As previously recognized, state supreme courts protected economic liberties through economic substantive due process under state constitutional law after the close of the *Lochner* era. State supreme courts continued use of the doctrine through the 1940s, expanded it in the 1950s, and carried it on to a great degree in the 1960s. However, what has not been recognized until this Article is that the doctrine declined further in the 1970s and nearly collapsed in the 1980s. Although the doctrine still exists in some states, no state supreme court is aggressive in its use, and many states have not employed it in protecting economic liberty for decades.<sup>332</sup>

The reason for the rapid decline of the doctrine’s use in the 1970s and 1980s is difficult to determine without further analysis across the fifty relevant jurisdictions. This Article has suggested a cause of the decline. Preliminarily, the suggestion best explains the near collapse of the doctrine in the 1980s. The suggestion is that the emergence of the “right to privacy” cases in the 1960s and 1970s, especially the U.S. Supreme Court’s protection of abortion rights in *Roe v. Wade*, reversed the lingering respect of conservative state jurists for substantive due process. Within a few years of the decision’s issuance, as is evident in the drop in the number of cases alone, many conservative state justices joined with their liberal counterparts in condemning the use of economic substantive due process. The doctrine, although it had robustly persisted for over thirty years since the fall of “*Lochnerism*,” fell into near disuse because there was almost no one left to defend it.

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332. See *infra* Appendix B.

## APPENDIX A

Cases in which state courts of highest review have protected economic liberty through applying economic substantive due process, as that doctrine is defined in this Article, under state constitutional law since 1940.

*Alabama*

*City of Russellville v. Vulcan Materials Co.*, 382 So. 2d 525, 528 (Ala. 1980) (concluding that a blasting ordinance was unconstitutional).

*White v. Associated Indus. of Ala., Inc.*, 373 So. 2d 616, 620 (Ala. 1979) (concluding that a law requiring employers to pay National Guard employees double pay during service violates state due process and contracts clauses).

*Estell v. City of Birmingham*, 286 So. 2d 872, 876 (Ala. 1973) (finding an anti-scalping law to be not affected with a public interest, and thus unconstitutional in the limitations it places on ticket resellers).

*Bulova Watch Co. v. Zale Jewelry Co.*, 147 So. 2d 797, 799 (Ala. 1962) (determining fair trade regulation unconstitutional).

*Ala. Indep. Serv. Stations Ass’n v. Hunter*, 31 So. 2d 571, 574 (Ala. 1947) (holding the selling of gasoline is not an industry affected with the “public interest”).

*Lisenba v. Griffin*, 8 So. 2d 175, 177 (Ala. 1942) (ruling that a barbering licensing board is unconstitutional because barbering is not a business “affected with the public interest”).

*Ala. Indep. Serv. Station Ass’n v. McDowell*, 6 So. 2d 502, 507 (Ala. 1942) (holding the banning of advertising of sales-below-cost unconstitutional).

*Alaska*

None.

*Arizona*

*Visco v. State ex rel. Pickrell*, 388 P.2d 155, 165 (Ariz. 1963) (nullifying a grant of monopoly in a garbage collection business).

*Killingsworth v. W. Way Motors, Inc.*, 347 P.2d 1098, 1101 (Ariz. 1959) (finding “no reasonable relationship between the requirement that a [car] dealer must have a building on the premises containing a display room for at least two new cars of the type he is selling and the alleged purpose of the legislation . . .”).

*State v. A. J. Bayless Mkts., Inc.*, 342 P.2d 1088, 1092 (Ariz. 1959) (declaring that a ban on selling of imitation ice cream was

unconstitutional).

*Findley v. Bd. of Supervisors of Mohave County*, 230 P.2d 526, 531 (Ariz. 1951) (concluding that a rule that restricts a doctor's use of a county hospital if the doctor fails to give assistance at the request of another doctor to be unconstitutional).

*Edwards v. State Bd. of Barber Exam'rs*, 231 P.2d 450, 453-54 (Ariz. 1951) (determining the regulation of prices barbers may charge offends due process).

*Buehman v. Bechtel*, 114 P.2d 227, 232 (Ariz. 1941) (labeling favoritism in a photographer licensing regulation as "arbitrary" and therefore unconstitutional).

#### *Arkansas*

*Ports Petroleum Co., Inc. of Ohio v. Tucker*, 916 S.W.2d 749, 751 (Ark. 1996) (striking down, as a violation of substantive due process, an anti-predatory pricing law that failed to require a showing of predatory intent).

*Handy Dan Imp. Ctr., Inc. v. Adams*, 633 S.W.2d 699, 703 (Ark. 1982) (determining that a Sunday closing law violates substantive due process).

*Hand v. H & R Block, Inc.*, 528 S.W.2d 916, 923 (Ark. 1975) (concluding that a franchise regulation was effectively a minimum price requirement and beyond the state's police power).

*City of Blytheville v. Thompson*, 491 S.W.2d 769, 773 (Ark. 1973) (affirming the trial court's holding that a decision was arbitrary and outside of the police power).

*McCastlain v. R. & B. Tobacco Co.*, 411 S.W.2d 882, 885 (Ark. 1967) (determining that a regulation requiring a cigarette wholesaler to obtain a letter of credit offends the state constitution's individual liberty clause).

*Bachman v. State*, 359 S.W.2d 815, 818 (Ark. 1962) (finding a regulation arbitrary and unreasonable, because it forbids a landowner from maintaining "more than 5 non-usable cars in open view within 500 feet of the highway").

*Union Carbide & Carbon Corp. v. White River Distribs.*, 275 S.W.2d 455, 461 (Ark. 1955) (striking down a non-signer clause of the Fair Trade Act).

*Wilkins v. City of Harrison*, 236 S.W.2d 82, 84 (Ark. 1951) (ruling an anti-soliciting ordinance unconstitutional, because it had no reasonable relationship to a proper exercise of the police power).

*N. Little Rock Transp. Co. v. City of N. Little Rock*, 184 S.W.2d 52, 54 (Ark. 1944) (striking down a taxi licensing scheme as a violation of the state constitution's anti-monopoly clause).

*Noble v. Davis*, 161 S.W.2d 189, 191 (Ark. 1942) (ruling barbering regulations unconstitutional for violating substantive due process).

*California*

Hale v. Morgan, 584 P.2d 512, 521 (Cal. 1978) (determining that a cumulative fining scheme penalizing a landlord violates substantive due process).

Walsh v. Kirby, 529 P.2d 33, 42 (Cal. 1974) (concluding the penalty for selling alcohol under a minimum price was so large that it violated due process).

State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 254 P.2d 29, 36 (Cal. 1953) (ruling dry cleaning minimum price scheme violates due process).

*Colorado*

City of Denver v. Nielson, 572 P.2d 484, 486 (Colo. 1977) (determining that a mixed-sex massage ban violates substantive due process, because it makes a conclusive presumption).

People ex rel. Orcutt v. Instantwhip Denver, Inc., 490 P.2d 940, 945 (Colo. 1971) (concluding that the Filled Dairy Products Act, which outlawed vegetable substitute for sour cream, violated substantive due process).

City of Colo. Springs v. Grueskin, 422 P.2d 384, 387-88 (Colo. 1966) (ruling that a gasoline delivery ordinance violates substantive due process).

Abdo v. City & County of Denver, 397 P.2d 222, 223 (Colo. 1964) (striking down a photographer licensing ordinance).

Cleere v. Bullock, 361 P.2d 616, 621 (Colo. 1961) (concluding a licensing scheme requiring funeral directors to be qualified embalmers to be beyond the police power).

Olin Mathieson Chem. Corp. v. Francis, 301 P.2d 139, 152 (Colo. 1956) (determining that a “non-signer” clause in the Colorado Fair Trade Act violated substantive due process).

Battaglia v. Moore, 261 P.2d 1017, 1020 (Colo. 1953) (ruling that denial of a barber license violates the right to follow a lawful calling).

City of Denver v. Thrailkill, 244 P.2d 1074, 1080 (Colo. 1952) (striking down an ordinance requiring taxicab drivers to either own their vehicle or be employed by the owner of the vehicle).

*Connecticut*

Fair Cadillac-Oldsmobile Isuzu P’ship v. Bailey, 640 A.2d 101, 107-08 (Conn. 1994) (invalidating, on substantive due process grounds, a mandatory Sunday closing law for motor vehicle dealerships).

Caldor’s, Inc. v. Bedding Barn, Inc., 417 A.2d 343, 354 (Conn. 1979) (invalidating a mandatory Sunday closing law for retail establishments,

because it violates substantive due process).

*Mott's Super Mkts., Inc. v. Frassinelli*, 172 A.2d 381, 386 (Conn. 1961) (striking down a statute forbidding advertising of items sold below cost).

*United Interchange, Inc. v. Spellacy*, 136 A.2d 801, 806 (Conn. 1957) (invalidating a real estate broker licensing scheme on substantive due process grounds).

*Amsel v. Brooks*, 106 A.2d 152, 158 (Conn. 1954) (concluding a restriction on dental advertising has no reasonable relation to the public welfare).

*Gibson v. Board of Exam'rs of Embalmers*, 26 A.2d 783, 784 (Conn. 1942) (mandating a grant of license to a funeral director, following *Hart v. Board of Examiners of Embalmers*, 26 A.2d 780, 782 (Conn. 1942)).

*Hart v. Bd. of Exam'rs of Embalmers*, 26 A.2d 780, 782 (Conn. 1942) (striking down requirement that funeral directors also be licensed embalmers).

*State v. Miller*, 12 A.2d 192, 194 (Conn. 1940) (concluding that a prohibition on gas station price signs is unconstitutional).

#### *Delaware*

*Green v. Mid-Penn Nat'l Mortg. Co.*, 268 A.2d 876, 877 (Del. 1970) (holding that an in-state residency requirement for a majority of stockholders is "not a valid exercise of police power since its residence requirements bear no reasonable relation to the prevention of fraud or other protection of the public").

*Rogers v. State*, 199 A.2d 895, 897 (Del. 1964) (invalidating a Sunday closing law for barbers on substantive due process grounds).

*State v. Hobson*, 83 A.2d 846, 858-59 (Del. 1951) (striking down a statute regulating size of gas station signs).

#### *Florida*

*Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1220 (Fla. 2000) (concluding an anti-rebate statute regarding title insurance agents' commissions violates substantive due process).

*In re Forfeiture of 1969 Piper Navajo*, 592 So. 2d 233, 236 (Fla. 1992) (using heightened scrutiny to determine that a statute allowing the state to confiscate certain airline engines violates substantive due process).

*Dep't of Ins. v. Dade County Consumer Advocate's Office*, 492 So. 2d 1032, 1035 (Fla. 1986) (concluding an anti-rebate statute regarding insurance agents' commissions violates substantive due process).

*State v. Saiez*, 489 So. 2d 1125, 1129 (Fla. 1986) (striking down a statute criminalizing the possession of embossing machines on substantive due process grounds).

Horsemen’s Benevolent & Protective Ass’n v. Div. of Pari-Mutuel Wagering, 397 So. 2d 692, 695 (Fla. 1981) (holding that a permit scheme deducting one percent of race winnings and transferring funds to private associations is an invalid exercise of the state police power).

Bass v. Gen. Dev. Corp., 374 So. 2d 479, 484-85 (Fla. 1979) (determining that a tax statute violates due process, because it creates an irrebuttable presumption that an agricultural landowner who files a subdivision plat no longer has lower-tax agricultural land).

United Gas Pipe Line Co. v. Bevis, 336 So. 2d 560, 563-64 (Fla. 1976) (concluding that energy price restrictions are unconstitutional because, inter alia, they exceed the state’s police power).

Castlewood Int’l Corp. v. Wynne, 294 So. 2d 321, 324 (Fla. 1974) (concluding that a statute that requires alcohol sales only be made in cash was unconstitutional under substantive due process).

Hilaleah Race Course, Inc. v. Gulfstream Park Racing Ass’n, 245 So. 2d 625, 628-29 (Fla. 1971) (striking down a statute regulating race track operating days according to the amount of tax revenue the track produced in the preceding year for violating substantive due process).

Fla. Bd. of Pharmacy v. Webb’s City, Inc., 219 So. 2d 681, 681-82 (Fla. 1969) (relying on *Stadnik v. Shell’s City, Inc.*, 140 So. 2d 871 (Fla. 1962), to strike down a ban on advertising prescription drugs).

Rabin v. Conner, 174 So. 2d 721, 726 (Fla. 1965) (invalidating celery marketing scheme for violating substantive due process).

Eskind v. City of Vero Beach, 159 So. 2d 209, 212-13 (Fla. 1963) (invalidating an ordinance banning outdoor advertising of lodging accommodations).

Delmonico v. State, 155 So. 2d 368, 370 (Fla. 1963) (concluding that a ban on the possession of spearfishing equipment exceeds the police power).

Snedeker v. Vernmar, Ltd., 151 So. 2d 439, 442 (Fla. 1963) (concluding an education requirement for masseurs was an invalid use of the police power).

*Stadnik v. Shell’s City, Inc.*, 140 So. 2d 871, 875 (Fla. 1962) (holding a regulation banning the advertising of prescription drugs to have no rational basis).

Moore v. Thompson, 126 So. 2d 543, 551 (Fla. 1961) (determining that a Sunday closing law for automobile dealers exceeds the police power).

State v. Leone, 118 So. 2d 781, 783 (Fla. 1960) (striking down a requirement that a drug store have a licensed pharmacist on duty while open, even when not preparing and selling “controlled drugs and medicines”).

Larson v. Lesser, 106 So. 2d 188, 192 (Fla. 1958) (concluding that an act that banned solicitation by public adjusters violated the police power).

State *ex rel.* Walters v. Blackburn, 104 So. 2d 19, 20-21 (Fla. 1958) (invalidating a statute barring roadside signs advertising gas prices).

Fla. Accountants Ass'n v. Dandelake, 98 So. 2d 323, 328 (Fla. 1957) (“[T]o prohibit non-certified accountants in this state from doing routine accounting work in their own offices, rather than in that of an ‘employer,’ and to require them to designate themselves as ‘bookkeepers’ rather than as accountants, ‘is in conflict with the spirit and express provision of the Constitution and void . . . .’”).

Miami Springs v. Scoville, 81 So. 2d 188, 192-93 (Fla. 1955) (determining that an ordinance regulating the size of gas station signs exceeds the police power).

Miles Labs., Inc. v. Eckerd, 73 So. 2d 680, 682 (Fla. 1954) (invalidating a non-signer clause of state Fair Trade Act).

Lee v. Shobe, 66 So. 2d 256, 256 (Fla. 1953) (invalidating a regulation banning real estate salesmen from working part-time).

Lee v. Delmar, 66 So. 2d 252, 255 (Fla. 1953) (invalidating a regulation banning real estate salesmen from working part-time).

Bay Harbor Islands v. Schlapik, 57 So. 2d 855, 857 (Fla. 1952) (concluding that an ordinance restricting construction to certain times of the year exceeds the police power).

City of Miami v. Shell’s Super Store, 50 So. 2d 883, 884 (Fla. 1951) (striking down a restriction on barbering hours as beyond the valid exercise of the police power).

Liquor Store v. Cont’l Distilling Corp., 40 So. 2d 371, 385 (Fla. 1949) (invalidating the Fair Trade Act as “arbitrary and unreasonable”).

Sullivan v. DeCerb, 23 So. 2d 571, 572 (Fla. 1945) (holding that a photography licensing scheme is beyond the proper exercise of the police power).

Scarborough v. Webb’s Cut Rate Drug Co., Inc., 8 So. 2d 913, 922 (Fla. 1942) (concluding that the Fair Trade Act regulating wholesale and retail prices violates substantive due process).

#### *Georgia*

Strickland v. Ports Petroleum Co., Inc., 353 S.E.2d 17, 18 (Ga. 1987) (invalidating the Below Sales Cost Act, because the oil industry is not affected with the public interest).

Batton-Jackson Oil Co., Inc. v. Reeves, 340 S.E.2d 16, 18-19 (Ga. 1986) (concluding a gasoline price-fixing statute violates substantive due process, because the gasoline industry is not affected with the public interest).

Strickland v. Rio Stores, Inc., 255 S.E.2d 714, 716 (Ga. 1979) (concluding a prohibition on below-cost tobacco sales violates substantive due process).

2005] THE “NEW JUDICIAL FEDERALISM” BEFORE ITS TIME 515

Georgia Franchise Practices Comm’n v. Massey-Ferguson, Inc., 262 S.E.2d 106, 108 (1979) (“The cited sections violate the due process clause by seeking to regulate an industry not affected with a public interest . . . and by restricting competition.”).

Ward v. Big Apple Super Mkts., 158 S.E.2d 396, 398 (Ga. 1967) (holding a milk price-fixing scheme unconstitutional under substantive due process).

Williams v. Hirsch, 87 S.E.2d 70 (Ga. 1955) (striking down a tobacco price-fixing provision as a violation of substantive due process).

Cox v. Gen. Elec. Co., 85 S.E.2d 514, 519 (Ga. 1955) (finding the state Fair Trade Act unconstitutional under substantive due process).

Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 75 S.E.2d 161, 165 (Ga. 1953) (finding the state Fair Trade Act unconstitutional under substantive due process).

Harris v. Duncan, 67 S.E.2d 692, 694-95 (Ga. 1951) (determining that a milk price-fixing statute was unconstitutional).

#### *Hawaii*

None.

#### *Idaho*

Sun Ray Drive-In Dairy, Inc. v. Trenhaile, 486 P.2d 1021, 1024 (Idaho 1971) (striking down a statute banning “filled milk” under substantive due process).

Winther v. Village of Weippe, 430 P.2d 689, 695 (Idaho 1967) (striking down an ordinance limiting the number of beer-selling licenses as violating substantive due process).

Berry v. Summers, 283 P.2d 1093, 1096 (Idaho 1955) (determining a requirement that “dental mechanics or technicians” be licensed as dentists was unconstitutional).

O’Connor v. City of Moscow, 202 P.2d 401, 404 (Idaho 1949) (invalidating an ordinance, on substantive due process grounds, barring a pool-hall owner from selling the business and allowing it to continue running as a pool-hall).

#### *Illinois*

People v. Wright, 740 N.E.2d 755, 768-69 (Ill. 2000) (invalidating a statute penalizing an auto recycling owner for not keeping accurate records even absent criminal intent).

Church v. State, 646 N.E.2d 572, 580 (Ill. 1995) (determining a private alarm contractor licensing scheme unconstitutional as invalid use of the

police power).

*People v. Hamm*, 595 N.E.2d 540, 547 (Ill. 1992) (concluding that a requirement that commercial fishermen tag their nets and have immediate possession of fishing licenses violates substantive due process).

*People v. Johnson*, 369 N.E.2d 898, 903 (Ill. 1977) (holding that a plumbing licensing scheme, as implemented, created an unconstitutional monopoly power in the hands of already licensed plumbers).

*Cook County v. Priester*, 342 N.E.2d 41, 48 (Ill. 1976) (determining that restrictions on a private airport runway were unconstitutional).

*People v. Masters*, 274 N.E.2d 12, 14 (Ill. 1971) (striking down a plumbing licensing law).

*Shoot v. Ill. Liquor Control Comm'n*, 198 N.E.2d 497, 500 (Ill. 1964) (declaring a requirement that liquor businesses purchase a gaming stamp unconstitutional).

*City Sav. Ass'n v. Int'l Guar. & Ins. Co.*, 162 N.E.2d 345, 347 (Ill. 1959) (determining that a prohibition on certain savings and loans from obtaining insurance has no reasonable basis).

*Gholson v. Engle*, 138 N.E.2d 508, 512 (Ill. 1956) (striking down a regulation on substantive due process grounds, and concluding “[t]he record does not, in our opinion, establish that public health considerations justify the requirement that a funeral director be a licensed embalmer”).

*Wolford v. City of Chicago*, 138 N.E.2d 502, 503 (Ill. 1956) (concluding that an ordinance requiring prospective gas station owners to obtain the consent of neighboring property owners is “arbitrary and unreasonable”).

*Heimgaertner v. Benjamin Elec. Mfg. Co.*, 128 N.E.2d 691, 697 (Ill. 1955) (determining a “pay-while-voting” statute “has no real or substantial relation to the object of public welfare” and therefore is an unconstitutional use of the police power).

*Figura v. Cummins*, 122 N.E.2d 162, 166 (Ill. 1954) (ruling that a ban on the manufacture of metal springs in residences is not in “the proper domain of the police power”).

*Schroeder v. Binks*, 113 N.E.2d 169, 170-73 (Ill. 1953) (striking down a plumbing licensing law as an improper exercise of the police power).

*People v. Brown*, 95 N.E.2d 888, 899 (Ill. 1950) (striking down various arduous plumbing licensing restrictions as violating substantive due process).

*N. Ill. Coal Corp. v. Medill*, 72 N.E.2d 844, 847 (Ill. 1947) (striking down a strip-mining regulation because it was not reasonably related to a legitimate purpose).

*Metro. Trust Co. v. Jones*, 51 N.E.2d 256, 260 (Ill. 1943) (concluding that a provision of the Small Loans Act, which restricts the transferability of a note, violates substantive due process).

*Indiana*

Dep't of Ins. v. Motors Ins. Corp., 138 N.E.2d 157, 165 (Ind. 1956) (striking down a bar on automobile dealers also selling auto insurance on grounds that there was no "good cause" for the law).

Dep't of Fin. Insts. v. Holt, 108 N.E.2d 629, 637 (Ind. 1952) (declaring that price restrictions on automobile dealers are not a valid use of the police power).

Kirtley v. State, 84 N.E.2d 712, 715 (Ind. 1949) (concluding that an anti-scalping law "cannot be justified as a proper exercise of police power").

Dep't of Ins. v. Schoonover, 72 N.E.2d 747, 750 (Ind. 1947) (striking down a requirement that insurance agents be paid by commission because the law has "no substantial relation to the police power").

State Bd. of Barber Exam'rs v. Cloud, 44 N.E.2d 972, 979 (Ind. 1942) (holding barbering restrictions unconstitutional because barbering is "not affected with a public interest").

Needham v. Proffit, 41 N.E.2d 606, 607 (Ind. 1942) (concluding that a ban on print advertisements of funeral directors and embalmers is unconstitutional).

*Iowa*

Pierce v. Inc. Town of La Porte City, 146 N.W.2d 907, 910 (Iowa 1966) (declaring that an ordinance, relating to trailer parks and adopted under general police powers, violates substantive due process).

Cent. States Theatre Corp. v. Sar, 66 N.W.2d 450, 454 (Iowa 1954) (striking down a movie house licensing ordinance for violating due process).

Sperry & Hutchinson Co. v. Hoegh, 65 N.W.2d 410, 419 (Iowa 1954) (invalidating an anti-trading stamp regulation as not a legitimate use of the police power).

City of Osceola v. Blair, 2 N.W.2d 83, 85 (Iowa 1942) (striking down an anti-door-to-door salesman ordinance as an unreasonable exercise of the police power).

*Kansas*

City of Baxter Springs v. Bryant, 598 P.2d 1051, 1061 (Kan. 1979) (declaring that a bar on curtains and screens in saloon windows would not promote the general welfare).

Delight Wholesale Co. v. City of Prairie Village, 491 P.2d 910, 913 (Kan. 1971) (striking down a city ban on selling goods from vehicles between seven o'clock a.m. and nine o'clock p.m. because it has the effect of prohibiting an ice cream truck business).

Delight Wholesale Co. v. City of Overland Park, 453 P.2d 82, 87 (Kan. 1969) (holding that the absolute prohibition of “huckstering and peddling” is beyond the police power).

Sunflower Tip Top Dairies Co. v. City of Russell, 362 P.2d 76, 80 (Kan. 1961) (concluding that a permitting scheme for milk producers violated substantive due process).

Gilbert v. Mathews, 352 P.2d 58, 69 (Kan. 1960) (striking down a public auction law because it was “designed to be so oppressive and unreasonable that it prohibit[ed] the conduct of such lawful business”).

State ex rel. Anderson v. Fleming Co., 339 P.2d 12, 18 (Kan. 1959) (declaring a milk sales law unconstitutional where legislation criminalized selling below cost even when the seller lacked the intent to sell below cost).

#### *Kentucky*

Remote Servs., Inc. v. FDR Corp., 764 S.W.2d 80, 83 (Ky. 1989) (striking down a minimum mark-up law as facially unconstitutional under the Absolute and Arbitrary Power Clause).

Kentucky Milk Marketing and Antimonopoly Comm’n v. Kroger Co., 691 S.W.2d 893, 900-01 (Ky. 1985) (holding that a Milk Marketing Law Commission’s refusal to accept a milk seller’s price per gallon was “arbitrary and capricious”).

U.S. Mining & Exploration Natural Res. Co. v. City of Beattyville, 548 S.W.2d 833, 835 (Ky. 1977) (holding that a coal tipple may not be completely prohibited).

Johnson v. City of Paducah, 512 S.W.2d 514, 516 (Ky. 1974) (striking down an ordinance mandating the destruction of property without giving the owner reasonable time to make repairs).

Adams, Inc. v. Louisville & Jefferson County Bd. of Health, 439 S.W.2d 586, 592 (Ky. 1969) (striking down a requirement that all swimming pools, regardless of type, have a lifeguard on duty at all times as an unreasonable exercise of the police power).

Roe v. Commonwealth, 405 S.W.2d 25, 28 (Ky. 1966) (concluding that regulations on nudist colonies requiring a twenty-foot-high wall and a licensing fee are an unreasonable exercise of the police power).

Bruner v. City of Danville, 394 S.W.2d 939, 943-44 (Ky. 1965) (holding that a denial of a dancing hall permit was arbitrary use of the police power).

Gen. Elec. Co. v. Am. Buyers Corp., 316 S.W.2d 354, 361 (Ky. 1958) (declaring the Fair Trade Act non-signer clause to be “a legislative invasion of the broad constitutional liberty of the people to acquire and protect their property and engage in free trade”).

Marshall v. City of Louisville, Ky., 244 S.W.2d 755, 757 (Ky. 1951) (striking down an ordinance requiring all signs to be electrified and

illuminated until ten o'clock p.m.).

*Int'l Shoe Co. v. Commonwealth*, 204 S.W.2d 976, 976, (Ky. 1947) (permitting employer to deduct employee's wages when voting, following *Illinois Cent. R. Co. v. Com.*, 204 S.W.2d 973 (Ky. 1947)).

*Ill. Cent. Ry. Co. v. Commonwealth*, 204 S.W.2d 973, 975 (Ky. 1947) (striking down a law mandating employers pay workers for time taken off to vote).

*Kenton & Campbell Burial Ass'n v. Goodpaster*, 200 S.W.2d 120, 124 (Ky. 1946) (concluding that a bar on making insurance contracts with undertakers is arbitrary).

*City of Jackson v. Murray-Reed-Slone & Co.*, 178 S.W.2d 847, 848 (Ky. 1944) (determining an ordinance preventing a restaurant from opening between midnight and four o'clock a.m. is arbitrary and unreasonable).

*City of Mount Sterling v. Donaldson Baking Co.*, 155 S.W.2d 237, 239 (Ky. 1941) (holding an anti-door-to-door salesman ordinance to be an unreasonable exercise of the police power).

*City of Louisville v. Kuhn*, 145 S.W.2d 851, 856 (Ky. 1940) (striking down a limitation on hours of that barbershops may keep because it was found to be arbitrary).

#### *Louisiana*

*City of Shreveport v. Restivo*, 491 So. 2d 377, 380 (La. 1986) (striking down a bar on journeyman plumbers engaging in plumbing repairs).

*City of Shreveport v. Curry*, 357 So. 2d 1078, 1083 (La. 1978) (declaring that a ban on frog gigging for eleven months out of the year violates substantive due process).

*City of Crowley Firemen v. City of Crowley*, 280 So. 2d 897, 902 (La. 1973) (declaring that a prohibition on outside employment by city firemen violates substantive due process).

*West v. Town of Winnsboro*, 211 So. 2d 665, 672, (La. 1967) (declaring a Sunday closing law to have no reasonable basis).

*City of Lafayette v. Justus*, 161 So. 2d 747, 749 (La. 1964) (striking down a ban on advertising gasoline prices as a restriction that violates substantive due process).

*Sears, Roebuck & Co. v. City of New Orleans*, 117 So. 2d 64, 66 (La. 1960) (striking down a ban on advertising gasoline prices as a restriction that violates substantive due process).

*City of Lake Charles v. Hasha*, 116 So. 2d 277, 280-81 (La. 1959) (concluding a size restriction on gas station signs is an unreasonable use of the police power).

*Schwegmann Bros. v. La. Bd. of Alcoholic Beverage Control*, 43 So. 2d 248, 260 (La. 1949) (declaring that a statute mandating mark-ups on sales

of certain classes of alcohol violates substantive due process).

#### *Maine*

*State v. Johnson*, 265 A.2d 711, 716 (Me. 1970) (holding that a denial of permit under the state Wetlands Act violates substantive due process).

*United Interchange, Inc. of Mass. v. Harding*, 145 A.2d 94, 97 (Me. 1958) (striking down a bar on real estate advertising in magazines for being beyond the police power).

*Opinion of the Justices*, 132 A.2d 47, 49 (Me. 1957) (declaring that a proposed unfair trade legislation would be unconstitutional, because the legislation would criminalize selling below cost even when the seller lacked the intent to sell below cost).

*State v. Union Oil Co.*, 120 A.2d 708, 713 (Me. 1956) (concluding that a restriction on the size of gas station price signs violates substantive due process).

*Wiley v. Sampson-Ripley Co.*, 120 A.2d 289, 291 (Me. 1956) (declaring that a below-cost sales law violates substantive due process in as much as it makes a sale below cost prima facie evidence).

#### *Maryland*

*Md. Bd. of Pharmacy v. Sav-A-Lot, Inc.*, 311 A.2d 242, 252 (Md. 1973) (declaring a ban on the advertising of drug prices to be an unconstitutional exercise of the police power).

*Md. State Bd. of Barber Exam'rs v. Kuhn*, 312 A.2d 216, 225 (Md. 1973) (striking down a law preventing cosmetologists from cutting male hair in the same manner as they cut female hair).

*Bruce v. Dir., Dep't of Chesapeake Bay Affairs*, 276 A.2d 200, 209 (Md. 1971) (concluding that a regulation mandating that crab fishermen only fish in their own county is not a reasonable exercise of the police power).

*City of Baltimore v. Charles Ctr. Parking, Inc.*, 271 A.2d 144, 147-48 (Md. 1970) (declaring an ordinance banning painted signs but allowing billboards, to be "arbitrary and unreasonable").

*Loughran v. Lord Baltimore Candy & Tobacco Co.*, 12 A.2d 201, 207 (Md. 1940) (striking down a provision of Fair Trade Act banning below cost sales as unconstitutional).

*Middleman v. Davis*, 12 A.2d 208, 208 (Md. 1940) (same holding as *Loughran*).

*Massachusetts*

*Traveler’s Indem. Co. v. Comm’r of Ins.*, 265 N.E.2d 90, 92 (Mass. 1970) (holding that maximum rates set for compulsory auto insurance were confiscatory and thus unconstitutionally low).

*Aetna Cas. & Sur. Co. v. Comm’r of Ins.*, 263 N.E.2d 698, 703 (Mass. 1970) (same holding as *Traveler’s Indem. Co.*).

*Coffee-Rich, Inc. v. Comm’r of Pub. Health*, 204 N.E.2d 281, 289 (Mass. 1965) (“[T]here is no rational basis for prohibiting the sale of Coffee-Rich, an admittedly nutritious product which is distinctively labeled.”).

*In re Opinion of the Justices*, 151 N.E.2d 631, 632 (Mass. 1958) (stating that a proposed regulation on the hours barbers may keep would violate economic liberties).

*Mansfield Beauty Acad., Inc. v. Bd. of Registration of Hairdressers*, 96 N.E.2d 145, 147 (Mass. 1951) (striking down a bar on beauty schools accepting payment for hairdressing students rendering services).

*Opinion of the Justices*, 79 N.E.2d 883, 888 (Mass. 1948) (stating that a proposed bill barring cemetery owners and operators from selling cemetery monuments would be an invalid exercise of the police power).

*Sperry & Hutchinson Co. v. McBride*, 30 N.E.2d 269, 276 (Mass. 1940) (declaring that a bar on exchanging trading stamps for gasoline void as “an arbitrary interference with business and an irrational and unnecessary restriction”).

*Michigan*

*Grocers Dairy Co. v. McIntyre*, 138 N.W.2d 767, 771 (Mich. 1966) (striking down a ban on one gallon milk containers as violating substantive due process).

*Shakespeare Co. v. Lippman’s Tool Shop Sporting Goods Co.*, 54 N.W.2d 268, 269-70 (Mich. 1952) (holding that a non-signer clause of the Fair Trade Act violates substantive due process).

*Levy v. Pontiac*, 49 N.W.2d 80, 82-83 (Mich. 1951) (striking down a restriction on the size of gasoline price signs as violating substantive due process).

*Minnesota*

*Fairmont Foods Co. v. City of Duluth*, 110 N.W.2d 155, 159 (Minn. 1961) (striking down limitations on production of milk with a certain bacterial count as violating substantive due process).

*Mississippi*

Goodin v. City of Philadelphia, 75 So. 2d 279, 280 (Miss. 1954) (holding that a ban on operating a business after ten o'clock p.m. does not further the public interest).

Stone v. Reichman-Crosby Co., 43 So. 2d 184, 190-91 (Miss. 1949) (holding that the application of a use tax for an out-of-state corporation violates substantive due process).

King v. City of Louisville, 42 So. 2d 813, 816 (Miss. 1949) (concluding that effective prohibition of fireworks sales is unreasonable).

Moore v. Grillis, 39 So. 2d 505, 509, 512 (Miss. 1949) (striking down a ban on unlicensed public accountants preparing tax returns as not a "reasonable exercise of the police power").

McCool v. Blaine, 11 So. 2d 801, 802 (Miss. 1943) (holding that an ordinance restricting the opening of businesses past eleven o'clock p.m. violates substantive due process).

Saucier v. Life & Cas. Ins. Co. of Tenn., 198 So. 625, 629 (Miss. 1940) (striking down a statute making insurance company special agents into general agents because it has "[no] imaginable legitimate legislative end").

*Missouri*

Blue Inv. Co. v. City of Raytown, 478 S.W.2d 361 (Mo. 1972) (concluding that a flat charge of \$2.50 per room, whether vacant or not, violated substantive due process).

State on Info. of Taylor v. Currency Servs., Inc., 218 S.W.2d 600, 604 (Mo. 1949) (invalidating law restricting the type of corporation that may send money by electronic means as a law granting special rights and privileges).

Heil v. Kauffman, 189 S.W.2d 276, 278 (Mo. 1945) (striking down a ban on selling gasoline outside of certain business hours as violating substantive due process).

State v. Taylor, 173 S.W.2d 902, 903, 906 (Mo. 1943) (concluding that a regulation limiting women's working hours to 54 hours per week, and only in towns with less than 3,000 residents, violates substantive due process).

*Montana*

Wadsworth v. State, 911 P.2d 1165, 1174 (Mont. 1996) (invalidating, under a strict scrutiny analysis, a rule forbidding state employed property appraiser from working as an independent realtor as violating right "to pursue life's basic necessities").

State *ex rel.* Schultz-Lindsay Const. Co. v. State Bd. of Equalization, 403 P.2d 635, 646 (Mont. 1965) (concluding that a tax on nonresident

contractors violates substantive due process).

Garden Spot Mkt., Inc. v. Byrne, 378 P.2d 220, 231 (Mont. 1963) (striking down a prohibitively restrictive licensing scheme on trading stamps “as an unreasonable exercise of the police power”).

Union Carbide & Carbon Corp. v. Skaggs Drug Ctr., Inc., 359 P.2d 644, 654 (Mont. 1961) (invalidating a state Fair Trade Act as violating the state constitution’s anti-price-fixing provision).

State v. Canfield, 277 P.2d 534, 534 (Mont. 1954) (relying on State v. Gleason, 277 P.2d 530, 533-34 (Mont. 1954), to invalidate a photography licensing scheme).

State v. Gleason, 277 P.2d 530, 533-34 (Mont. 1954) (declaring that a photography licensing scheme violates substantive due process).

Brackman v. Kruse, 199 P.2d 971, 978 (Mont. 1948) (declaring a prohibitive oleomargarine licensing fee unconstitutional as “excessive, confiscatory and prohibitive”).

#### *Nebraska*

Gillette Dairy, Inc. v. Neb. Dairy Prods. Bd., 219 N.W.2d 214, 221 (Neb. 1974) (concluding that a dairy regulation act imposing maximum costs on products “is an unnecessary and unwarranted interference with individual liberty”).

United States Brewers’ Ass’n, Inc. v. State, 220 N.W.2d 544, 549 (Neb. 1974) (declaring a liquor distribution law to be an “unreasonable invasion of the personal and property rights of the plaintiffs”).

Plucknett v. Morrison, 133 N.W.2d 18, 19 (Neb. 1965) (invalidating a Sunday closing law, relying on *Terry Carpenter, Inc. v. Wood*, 129 N.W.2d 475, 481 (Neb. 1964)).

Skag-Way, Inc. v. Douglas, 133 N.W.2d 12, 13 (Neb. 1965) (invalidating a Sunday closing law, relying on *Terry Carpenter, Inc. v. Wood*, 129 N.W.2d 475, 481 (Neb. 1964)).

*Terry Carpenter, Inc. v. Wood*, 129 N.W.2d 475, 481 (Neb. 1964) (striking down a Sunday closing law only applying to establishments of more than two employees as violating substantive due process).

Skag-Way Dep’t Stores, Inc. v. City of Grand Island, 125 N.W.2d 529, 541 (Neb. 1964) (concluding that a Sunday closing law violates substantive due process).

Lincoln Dairy Co. v. Finigan, 104 N.W.2d 227, 234-35 (Neb. 1960) (striking down a milk-regulation law as violating substantive due process).

Gen. Elec. Co. v. J. L. Brandeis & Sons, 68 N.W.2d 620, 621 (Neb. 1955) (relying on *McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 68 N.W.2d 608, 618 (Neb. 1955), in striking down the Fair Trade Act).

*McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 159 Neb. 703, 721-22,

68 N.W.2d 608, 618 (Neb. 1955) (striking down the Fair Trade Act on grounds that it violates substantive due process).

*City of Scottsbluff v. Winters Creek Canal Co.*, 53 N.W.2d 543, 550 (Neb. 1952) (concluding that a regulation on pipes used by a canal company violated substantive due process).

*Boomer v. Olsen*, 10 N.W.2d 507, 511 (Neb. 1943) (“[T]he provision fixing the maximum fee to be charged by a private employment agency, to an amount equivalent to ten per cent. [sic] of the first month’s salary, is unreasonable, prohibitory and confiscatory . . .”).

*Webber v. City of Scottsbluff*, 3 N.W.2d 635, 638-39 (Neb. 1942) (concluding that regulations restricting the timing of auctions “arbitrarily and unreasonably interfere with private business and impose unreasonable and unnecessary restrictions on auction sales”).

*Golden v. Bartholomew*, 299 N.W. 356, 362 (Neb. 1941) (declaring that a requirement that funeral directors carry a certain amount of caskets in stock is arbitrary and an unreasonable and unconstitutional exercise of the police power).

*Jewel Tea Co. v. City of Geneva*, 291 N.W. 664, 670 (Neb. 1940) (holding that an ordinance outlawing peddling as a nuisance is outside of the exercise of the police power).

#### *Nevada*

*In re Martin*, 504 P.2d 14, 16 (Nev. 1972) (striking down an ordinance banning delivery of gasoline to underground storage facilities by vehicles holding over 2,000 gallons as violating substantive due process).

*Zale-Las Vegas, Inc. v. Bulova Watch Co.*, 396 P.2d 683, 693 (Nev. 1964) (concluding that the Fair Trade Act is an unlawful exercise of the police power).

*State v. Redman Petroleum Corp.*, 360 P.2d 842, 845, 846 (Nev. 1961) (holding that restrictions on the size of gasoline station signs violate substantive due process).

#### *New Hampshire*

*State v. Moore*, 13 A.2d 143, 148 (N.H. 1940) (striking down a trucking licensing scheme as arbitrary and unreasonable).

#### *New Jersey*

*State v. Boston Juvenile Shoes*, 288 A.2d 7, 11 (N.J. 1972) (striking down an ordinance licensing fee regulating interior window signs as too burdensome for the stated legislative end of visibility into commercial premises).

Moyant v. Borough of Paramus, 154 A.2d 9, 21 (N.J. 1959) (ruling that a requirement that solicitors submit a “freedom from disease” statement in obtaining a soliciting license is “an arbitrary and unreasonable exercise of the police power”).

Gilbert v. Town of Irvington, 120 A.2d 114, 118 (N.J. 1956) (“[W]e hold the ordinance in question, exacting a license fee of \$100 for each milk vending machine, is unreasonable, discriminatory and confiscatory . . .”).

Lane Distribs. v. Tilton, 81 A.2d 786, 796 (N.J. 1951) (concluding that the Tax Act and Unfair Cigarette Sales Act are arbitrary and discriminatory).

Lakewood Express Serv. v. Bd. of Pub. Utility Comm’rs, 61 A.2d 730, 734 (N.J. 1948) (striking down a bar on sedan hire cars as violating substantive due process).

Hart v. Teaneck Township, 50 A.2d 856, 857-58 (N.J. 1947) (concluding that an ordinance prohibiting the operation of lunch wagons from 1 a.m. until 7 a.m. is unreasonable).

N.J. Good Humor, Inc. v. Bd. of Comm’rs of Borough of Bradley Beach, 11 A.2d 113, 118 (N.J. 1940) (determining that an anti-peddling ordinance is an abuse of the police power).

#### *New Mexico*

Drink, Inc. v. Babcock, 421 P.2d 798, 803 (N.M. 1966) (striking down non-signer and mandatory markup provisions of the Liquor Fair Trade Act as violating substantive due process).

Skaggs Drug Ctr. v. Gen. Elec. Co., 315 P.2d 967, 974 (N.M. 1957) (concluding that a non-signer provision of the Fair Trade Act “is unconstitutional and void as an arbitrary and unreasonable exercise of the police power”).

#### *New York*

People v. Bunis, 172 N.E.2d 273, 274 (N.Y. 1961) (striking down a blanket ban on sale of coverless magazines as outside the exercise of the police power).

Trio Distrib. Corp. v. City of Albany, 143 N.E.2d 329, 331-32 (N.Y. 1957) (concluding an ordinance requiring peddlers selling to children to employ a safety guard to be an invalid exercise of the police power).

Defiance Milk Prods. Co. v. DuMond, 132 N.E.2d 829, 831 (N.Y. 1956) (ruling that a ban on the sale of containers of evaporated filled milk of less than ten pounds violates substantive due process).

Good Humor Corp. v. City of New York, 49 N.E.2d 153, 157 (N.Y. 1943) (striking down an anti-peddling law as violating substantive due process).

*North Carolina*

Treants Enters., Inc. v. Onslow County, 360 S.E.2d 783, 786 (N.C. 1987) (striking down ordinance banning “companionship” businesses because the language is overbroad and therefore is not “rationally related to a substantial government purpose”).

Hartford Acc. & Indem. Co. v. Ingram, 226 S.E.2d 498, 506 (N.C. 1976) (striking down an insurance law mandating that insurers in other fields provide medical insurance for violating the state’s Law of the Land Clause).

Bulva Watch Co. v. Brand Distrib., Inc., 206 S.E.2d 141, 151 (N.C. 1974) (declaring the Fair Trade Act to violate the state’s Law of the Land Clause).

*In re* Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729 (N.C. 1973) (concluding that a property owner may not be denied the right to construct a hospital on its own property, as a restriction that violates the state’s Law of the Land Clause).

State v. Smith, 143 S.E.2d 293, 299 (N.C. 1965) (striking down a Sunday closing law that only applies to nightclubs as violating substantive due process).

State v. Byrd, 130 S.E.2d 55, 59 (N.C. 1963) (holding that an ordinance banning the operation of ice cream vans is an invalid use of the police power).

Little Pep Delmonico Rest., Inc. v. Charlotte, 113 S.E.2d 422, 423 (N.C. 1960) (striking down an ordinance restricting the use of business signs as unreasonable), overruled by State v. Jones, 290 S.E.2d 675, 677 (N.C. 1982).

State *ex rel.* Utilities Com. v. Atl. Greyhound Corp., 113 S.E.2d 57, 61 (N.C. 1960) (holding that a regulation restricting the choices of common carriers over tickets and agents violates the right to earn a living).

State v. Brown, 108 S.E.2d 74, 78 (N.C. 1959) (striking down restrictions on the operation of junk yards on the grounds that the law was only justified on aesthetic grounds, and such grounds are not enough to invoke the police power), overruled by State v. Jones, 290 S.E.2d 675, 677 (N.C. 1982).

Winston-Salem v. S. Ry. Co., 105 S.E.2d 37, 52 (N.C. 1958) (holding that an ordinance forcing a railroad company to pay for rebuilding a trestle violates the state’s Law of the Land Clause).

Roller v. Allen, 96 S.E.2d 851, 859 (N.C. 1957) (concluding that a scheme licensing tile contractors violates the state’s Law of the Land Clause).

State v. Balance, 229 N.C. 764, 51 S.E.2d 731, 736 (N.C. 1949) (striking down a photography licensing scheme as violating the state’s Law of the

Land Clause).

*State v. Harris*, 6 S.E.2d 854, 886 (N.C. 1940) (determining that a dry cleaning licensing scheme is an illegitimate exercise of the police power).

*North Dakota*

*Fairmont Foods v. Burgum*, 81 N.W.2d 639, 647 (N.D. 1957) (striking down dairy industry regulations for violating substantive due process).

*State v. Cromwell*, 9 N.W.2d 914, 922 (N.D. 1943) (concluding that a photography licensing law violates substantive due process).

*Ohio*

*Hausman v. City of Dayton*, 653 N.E.2d 1190, 1196 (Ohio 1995) (holding that an ordinance imposing a duty to prevent a nuisance on non-possessory mortgagee was arbitrary and therefore unconstitutional).

*Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 147 N.E.2d 481, 484 (Ohio 1958) (striking down a non-signer clause of the Fair Trade Act as violating substantive due process).

*Frost Bar v. City of Shaker Heights*, 141 N.E.2d 245, 246 (Ohio 1957) (concluding that an ordinance banning mobile food vendors is an unreasonable exercise of the police power).

*Bellevue v. Hopps*, 132 N.E.2d 204, 205 (Ohio 1956) (determining that an ordinance restricting heavy trucks to driving in the extreme right lane is unreasonable).

*Frecker v. Dayton*, 90 N.E.2d 851, 854 (Ohio 1950) (holding that an ordinance licensing mobile food vendors is unreasonable).

*Serrer v. Cigarette Serv. Co.*, 76 N.E.2d 91, 91 (Ohio 1947) (determining that the Unfair Cigarette Sales Act does not take into account different operating costs amongst wholesalers, and therefore violates substantive due process).

*City of Cincinnati v. Correll*, 49 N.E.2d 412, 416 (Ohio 1943) (striking down an ordinance regulating barber shop hours as an invalid exercise of the police power).

*Direct Plumbing Supply Co. v. City of Dayton*, 38 N.E.2d 70, 74 (Ohio 1941) (concluding that an ordinance imposing reporting requirements on plumbers is “unduly oppressive upon individuals”).

*Jones v. Bontempo*, 32 N.E.2d 17, 18 (Ohio 1941) (holding that a ban on the advertising of barbering prices interferes with property rights).

*Oklahoma*

*Spartan’s Indus., Inc. v. City of Okla. City*, 498 P.2d 399, 402 (Okla. 1972) (declaring a Sunday closing ordinance is not a legitimate exercise of

the police power).

*Whittle v. State Bd. of Exam'rs of Psychologists*, 483 P.2d 328, 329-30 (Okla. 1971) (concluding that licensing procedures for psychologists were unduly restrictive).

*American Home Prods. Corp. v. Homsey*, 361 P.2d 297, 303 (Okla. 1961) (holding that the Fair Trade Act non-signer clause violates substantive due process).

*Okla. City v. Poor*, 298 P.2d 459, 461-62 (Okla. 1956) (concluding that an ordinance restricting the selling of raw milk to those licensed by the city violates substantive due process).

*State ex rel. Whetsel v. Wood*, 248 P.2d 612, 615 (Okla. 1952) (striking down a watchmaking licensing scheme for violating substantive due process).

*City of Guthrie v. Pike & Long*, 206 Okla. 307, 243 P.2d 697, 701 (1952) (concluding that ordinance licensing retail establishments was arbitrary).

*Englebrecht v. Day*, 208 P.2d 538, 544 (Okla. 1949) (striking down a law banning below-cost sales as violating substantive due process, because the law included sales made without intent to harm competitors).

#### *Oregon*

*Leathers v. City of Burns*, 444 P.2d 1010, 1015, 1018 (Or. 1968) (striking down an ordinance banning the use of underground gasoline storage tanks in excess of 3,000 gallons as violating substantive due process).

*Hertz Corp. v. Heltzel*, 341 P.2d 1063, 1069 (Or. 1959) (concluding that a law requiring a permit in order to rent delivery vehicles was unconstitutional because it furthered a monopoly).

*Gen. Elec. Co. v. Wahle*, 296 P.2d 635, 647 (Or. 1956) (holding a non-signer clause of the Fair Trade Act unreasonable).

#### *Pennsylvania*

*Nixon v. Dep't of Pub. Welfare*, 839 A.2d 277, 290 (Pa. 2003) (concluding that a law restricting recently released criminals from working in nursing homes "unconstitutionally infringes on the Employees' right to pursue an occupation").

*Pa. State Bd. of Pharmacy v. Pastor*, 272 A.2d 487, 490, 495 (Pa. 1971) (striking down a ban on the advertisement of "dangerous drugs" for violating substantive due process under the state constitution).

*Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 228 A.2d 169, 182 (Pa. 1967) (declaring that an ordinance completely banning the operation of quarries inside of a town violates substantive due process).

Lutz v. Armour, 151 A.2d 108, 111 (Pa. 1959) (determining that an ordinance banning the importation of garbage into a town is arbitrary and unreasonable).

Warren v. Phila., 127 A.2d 703, 706 (Pa. 1956) (holding that the city’s rent control ordinance was not justified by the police power and was therefore “invalid, arbitrary, and void”).

Commonwealth *ex rel.* Woodside v. Sun Ray Drug Co., 116 A.2d 833, 840 (Pa. 1955) (concluding that the application of state Ice Cream Law to malt products is an unreasonable exercise of the police power).

Cott Beverage Corp. v. Horst, 110 A.2d 405 (Pa. 1955) (striking down a ban on the use of an artificial sweetener in non-alcoholic drinks as violating the state constitution’s protection of property rights).

Gambone v. Commonwealth, 101 A.2d 634, 638 (Pa. 1954) (“We hold that the provision of the statute forbidding price signs in excess of the size therein prescribed violates” state constitution protection of property rights).

Otto Milk Co. v. Rose, 99 A.2d 467, 472-73 (Pa. 1953) (ruling that an ordinance requiring that all of a milk producer’s suppliers be inspected violated state constitution’s protection of property rights).

Olan Mills, Inc. v. Sharon, 92 A.2d 222, 224 (Pa. 1952) (holding that a photography licensing ordinance was an improper use of the police power as it was in effect a revenue measure).

Girard Trust Co. v. Pa. R.R. Co., 73 A.2d 371, 371 (Pa. 1950), *aff’g* Girard Trust Co. v. Pa. R.R. Co., 71 Pa. D. & C. 533, 537 (Pa. C.P. 1950) (invalidating a statute cutting off the right to collect rent payments after fifty years as violating substantive due process).

*In re* Borsch Estate, 67 A.2d 119, 123 (Pa. 1949) (striking down a statute, as it applies retroactively, allowing beneficiaries of spendthrift trusts to renounce such trusts in order to vest the trust’s property in a remainderman as violating substantive due process).

Hertz Drivurself Stations v. Siggins, 58 A.2d 464, 475 (Pa. 1948) (holding that a requirement that automobile rental company obtain a “certificate of public convenience” violates substantive due process).

Wilcox v. Penn Mut. Life Ins. Co., 55 A.2d 521, 528 (Pa. 1947) (determining that a community property law, when retroactively applied to property spouses acquired before the law’s passage, violated substantive due process).

Flynn v. Horst, 51 A.2d 54, 60 (Pa. 1947) (determining the licensing of the sale of oleomargarine violates substantive due process).

Commonwealth v. Zasloff, 13 A.2d 67, 72 (Pa. 1940) (declaring the Fair Sale Act unconstitutional under state Declaration of Rights).

*Rhode Island*

None.

*South Carolina*

Richbourg's Shoppers Fair, Inc. v. Stone, 153 S.E.2d 895, 899 (S.C. 1967) (holding a milk price-control law to be unconstitutional), *overruled* by R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 527 S.E.2d 763, 765 (S.C. 2000) (rejecting the "affected with a public interest" approach in favor of an approach upholding regulations with a rational relationship to the intended legislative purpose).

Stone v. Salley, 137 S.E.2d 788, 793 (S.C. 1964) (holding a milk price-control law to violate substantive due process), *overruled* by R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 527 S.E.2d 763, 765 (S.C. 2000).

Gwynette v. Myers, 115 S.E.2d 673, 680 (S.C. 1960) (declaring that a milk price-control law is an illegitimate exercise of the police power), *overruled* by R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 527 S.E.2d 763, 765 (S.C. 2000).

Rogers-Kent, Inc. v. Gen. Elec. Co., 99 S.E.2d 665, 672 (S.C. 1957) (concluding that a non-signer clause of the Fair Trade Act violates substantive due process).

Painter v. Forest Acres, 97 S.E.2d 71, 73 (S.C. 1957) (determining that an ordinance requiring all businesses to close at midnight is an unlawful exercise of the police power).

State v. Standard Oil Co., 10 S.E.2d 778, 790 (S.C. 1940) (affirming the trial court's conclusion that a restriction on tying the price of a commodity to the quantity sold violates substantive due process).

McCoy v. Town of York, 8 S.E.2d 905, 908 (S.C. 1940) (holding that a restriction on the amount of gasoline that may be transported is unreasonable and arbitrary).

*South Dakota*

State v. Nuss, 114 N.W.2d 633, 637 (S.D. 1962) (striking down a law that limits the amount of advance tuition that may be collected at \$25 as violating substantive due process).

City of Rapid City v. Schmitt, 71 N.W.2d 297, 298 (S.D. 1955) (holding that a requirement that only plumbing contractors may practice plumbing is an invalid exercise of the police power).

City of Sioux Falls v. Kadinger, 50 N.W.2d 797, 800 (S.D. 1951) (concluding that an apprentice requirement in order to obtain a plumbing license is an unreasonable exercise of the police power).

*Tennessee*

Livesay v. Tenn. Bd. of Exam’rs in Watchmaking, 322 S.W.2d 209, 213 (Tenn. 1959) (holding that a watchmaking board’s power to license watchmakers violates substantive due process).

Consumer’s Gasoline Stations v. City of Peelaski, 292 S.W.2d 735, 737 (Tenn. 1956) (striking down a restriction on the size of gasoline tanks used by filling stations as violating the State’s Law of the Land Clause).

State v. White, 288 S.W.2d 428, 429-30 (Tenn. 1956) (concluding that a restriction on the selling of gasoline for other than the posted price is an illegitimate exercise of the police power).

Checker Cab Co. v. City of Johnson City, 216 S.W.2d 335, 337-38 (Tenn. 1948) (determining that a town’s taxi permit scheme violated the State’s anti-monopoly clause).

*Texas*

Texas Power & Light Co. v. City of Garland, 431 S.W.2d 511, 521 (Tex. 1968) (concluding that a regulation requiring a power company to obtain a permit is an invalid use of the police power).

*Ex Parte* Rodgers, 371 S.W.2d 570, 571 (Tex. 1963) (striking down an ordinance banning the storage of gasoline in underground tanks of more than 1,500 gallons as lacking a reasonable basis).

Marney v. State, 330 S.W.2d 623, 625 (Tex. Crim. App. 1960) (holding that a statute banning the possession of mercury without written authorization placed an “unreasonable restriction on the use and enjoyment of a lawful commodity”).

San Antonio Retail Grocers, Inc. v. Lafferty, 297 S.W.2d 813 (Tex. 1957) (striking down a bar on grocery stores selling items below-cost as violating substantive due process).

*Utah*

Leetham v. McGinn, 524 P.2d 323, 325 (Utah 1974) (striking down a statute requiring that cosmetologists only render services to females as violating substantive due process).

Dodge Town v. Romney, 480 P.2d 461, 462 (Utah 1971) (“We are unable to see that the banning of automobile sales on Sunday would so affect the public health, morals, safety or welfare as to justify the interdiction of this statute under the police power.”).

Pride Oil Co. v. Salt Lake County, 370 P.2d 355, 356-57 (Utah 1962) (concluding that a restriction on the placement of gas price signs violates the right to own and enjoy property).

Salt Lake City v. Revene, 124 P.2d 537, 511 (Utah 1942) (determining

that an ordinance regulating barber hours is an invalid exercise of the police power).

*Vermont*

Vermont Salvage Corp. v. St. Johnsbury, 34 A.2d 188, 197 (Vt. 1943) (striking down a licensing ordinance of junkyards as an invalid exercise of the police power).

*Virginia*

Alford v. City of Newport News, 260 S.E.2d 241, 243 (Va. 1979) (holding that ordinance requiring “no smoking” signs in restaurants gives patrons an unfounded belief that their area will not contain smoke, because only their table may be smoke-free, and that the law therefore is unreasonable and violates substantive due process).

Joyner v. Centre Motor Co., 66 S.E.2d 469, 474 (Va. 1951) (striking down restrictions on car dealerships as “not in the interest of the public health, morals, safety or general welfare”).

Moore v. Sutton, 39 S.E.2d 348, 351-52 (Va. 1946) (concluding that a photography licensing scheme violates the right to pursue a calling).

*Washington*

Spokane v. Valu-Mart, Inc., 419 P.2d 993, 999 (Wa. 1966) (holding that an ordinance forbidding certain store departments from opening is an invalid exercise of the police power).

Lenci v. Seattle, 388 P.2d 926, 935-36 (Wa. 1964) (concluding that an ordinance is unreasonable when it allows wrecking yards to have only one access onto a public way).

Remington Arms Co. v. Skaggs, 345 P.2d 1085, 1090-91 (Wa. 1959) (striking down a non-signer clause of the Fair Trade Act as an invalid exercise of the police power).

*West Virginia*

Thorne v. Roush, 261 S.E.2d 72, 75 (W.Va. 1979) (concluding that an apprenticeship requirement for barbers violates substantive due process).

State v. Wender, 141 S.E.2d 359, 363 (W.Va. 1965) (striking down a cigarette minimum price law as violating substantive due process), *overruled by* Hartsock-Fisher Candy Co. v. Wheeling Wholesale Grocery Co., 328 S.E.2d 144, 150 (W.Va. 1984).

Gen. Elec. Co. v. Dandy Appliance Co., 103 S.E.2d 310, 313 (W.Va. 1958) (holding that the Fair Trade Act violates substantive due process).

State v. Mem'l Gardens Dev. Corp., 101 S.E.2d 425, (W.Va. 1957)

(deciding that the regulation of pre-need sales of funeral items violates substantive due process), *overruled by* *Whitener v. West Va. Bd. of Embalmers & Funeral Dirs.*, 288 S.E.2d 543, 545 (W.Va. 1982).

*State ex rel. Schroath v. Condry*, 83 S.E.2d 470, 477 (W.Va. 1954) (concluding that requiring leased automobiles to be classified as common carriers is an improper use of the police power).

#### *Wisconsin*

*Peppies Courtesy Cab Co. v. Kenosha*, 475 N.W.2d 156, 159 (Wis. 1991) (holding that an ordinance imposing dress and grooming requirements upon taxi drivers is unreasonable).

*Chicago & N.W. Ry. v. La Follette*, 169 N.W.2d 441, 451 (Wis. 1969) (striking down a requirement of a three-man crew for single train engines operating outside railroad yards as lacking a rational basis).

*Clark Oil & Ref. Corp. v. City of Tomah*, 141 N.W.2d 299, 304-05 (Wis. 1966) (concluding that an ordinance prohibiting gasoline delivery trucks of more than 1,500 gallons lacks a rational basis).

#### *Wyoming*

*Nation v. Giant Drug Co.*, 396 P.2d 431, 437 (Wyo. 1964) (holding that a Sunday closing law violates state constitution’s prohibition on “absolute, arbitrary power”).

*Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne*, 371 P.2d 409, 420-21 (Wyo. 1962) (concluding that the Fair Trade Act’s non-signer clause violates substantive due process).

## APPENDIX B

State-by-state, decade-by-decade summary of cases enumerated in Appendix A.

<i>State</i>	<i>1940 - 49</i>	<i>1950 - 59</i>	<i>1960 - 69</i>	<i>1970 - 79</i>	<i>1980 - 89</i>	<i>1990 - 99</i>	<i>2000 - presen t</i>	<i>Total</i>
Alabama	3	0	1	2	1	0	0	7
Alaska	N/A	N/A	0	0	0	0	0	0
Arizona	1	4	1	0	0	0	0	6
Arkansas	2	2	2	2	1	1	0	10
California	0	1	0	2	0	0	0	3
Colorado	0	3	3	2	0	0	0	8
Connecticut	3	2	1	1	0	1	0	8
Delaware	0	1	1	1	0	0	0	3
Florida	3	9	8	4	3	1	1	29
Georgia	0	4	1	2	2	0	0	9
Hawaii	N/A	N/A	0	0	0	0	0	0
Idaho	1	1	1	1	0	0	0	4
Illinois	2	7	1	3	0	2	1	16
Indiana	4	2	0	0	0	0	0	6
Iowa	1	2	1	0	0	0	0	4
Kansas	0	1	3	2	0	0	0	6
Kentucky	6	2	3	2	2	0	0	15
Louisiana	1	1	3	2	1	0	0	8
Maine	0	4	0	1	0	0	0	5
Maryland	2	0	0	4	0	0	0	6
Massachusetts	2	2	1	2	0	0	0	7
Michigan	0	2	1	0	0	0	0	3
Minnesota	0	0	1	0	0	0	0	1
Mississippi	5	1	0	0	0	0	0	6
Missouri	3	0	0	1	0	0	0	4
Montana	1	2	3	0	0	1	0	7
Nebraska	4	3	5	2	0	0	0	14
Nevada	0	0	2	1	0	0	0	3
New Hampshire	1	0	0	0	0	0	0	1
New Jersey	3	3	0	1	0	0	0	7
New Mexico	0	1	1	0	0	0	0	2
New York	1	2	1	0	0	0	0	4
North Carolina	2	3	4	3	1	0	0	13
North Dakota	1	1	0	0	0	0	0	2
Ohio	4	4	0	0	0	1	0	9
Oklahoma	1	3	1	2	0	0	0	7
Oregon	0	2	1	0	0	0	0	3
Pennsylvania	5	8	1	1	0	0	1	15
Rhode Island	0	0	0	0	0	0	0	0
South Carolina	2	2	3	0	0	0	0	8

## 2005] THE "NEW JUDICIAL FEDERALISM" BEFORE ITS TIME 535

South Dakota	0	2	1	0	0	0	0	3
Tennessee	1	3	0	0	0	0	0	4
Texas	0	1	3	0	0	0	0	4
Utah	1	0	1	2	0	0	0	4
Vermont	1	0	0	0	0	0	0	1
Virginia	1	1	0	1	0	0	0	3
Washington	0	1	2	0	0	0	0	3
West Virginia	0	3	1	1	0	0	0	5
Wisconsin	0	0	2	0	0	1	0	3
Wyoming	0	0	2	0	0	0	0	2
Total	68	96	67	48	11	8	3	