The True Cost of Economic Rights Jurisprudence

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> [A] man has a property in his opinions and the free communication of them. . . . In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.[1]

INTRODUCTION

In contemporary political discourse, rights are often discussed as belonging to one of two exclusive camps – the individual rights and the economic rights.[2] In this context, individual rights conjure images of being free in one's person, including such rights as reproductive freedom, freedom of expression, and a right to privacy.[3] Meanwhile, economic rights connote freedom in wealth and industry, such as property rights; freedom of contract; and a right to earn, save, and exchange capital freely.[4] Interestingly, this distinction translates into terms

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1 James Madison, *Property*, NATIONAL GAZETTE, Mar. 29, 1792, at 171, *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865).

2 Economic rights and individual rights are loosely construed terms of art, and there is admitted variance in the use of this vernacular. Economic rights may be coined, among other things, "property rights," "fiscal rights," or "proprietarian rights." Likewise, individual rights are known to go by such epithets as "personal rights," "political rights," or "social rights," to name a few. On a more basic level, the term "rights" itself will be used throughout this Article to discuss the theoretical concept of an asserted liberty interest, whether or not the Court has recognized it as a right. The mere labeling of an asserted liberty interest as a "right" should not be mistaken for advocacy of the Court's recognition of this right. Furthermore, the question of whether a liberty interest that is not recognized and protected by the government is a "right" is beyond the scope of this article.

3 Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492 (1989).

4 ECONOMIC RIGHTS vii (Ellen F. Paul et al. eds., Cambridge Univ. Press 1992) (defining economic rights as the ability to "use, possess, exchange and otherwise dispose of property."); Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, in ECONOMIC RIGHTS, at 62-94.

of partisan politics with some measure of accuracy. Modern liberals[5] typically champion individual rights, while advocating deference to the legislature on all matters economic.[6] In contrast, conservatives show a marked preference for freedoms of the economic sort, while supporting regulation over much individual behavior.[7] Proving that the judicial system is a political being, this divide has permeated our modern legal jurisprudence. To be certain, one need only look to the unbroken line of U.S. Supreme Court cases applying different levels of scrutiny to economic regulation as opposed to laws constituting a prior restraint on speech.[8]

This Article, however, will argue that economic rights cannot be neatly distinguished from noneconomic rights. More so, this Article will show that, due to an inextricable link between the two, the very attempt to distinguish and adjudicate the two spheres separately has had pronounced, unintended consequences on individual rights. Section I of this Article provides a brief history of the bifurcation of rights into economic and individual groupings. Section II will then highlight several modern political issues, such as campaign finance law and commercial speech regulation, which blur the distinction between "economic" and "individual" rights. Section III will show that the very attempt to adjudicate claims of economic rights separately from other rights has had collateral, unaccounted-for effects on many rights more properly considered individual in nature. Finally, Section IV will argue that this

[5] The labels "conservative" and "liberal" are used in their modern, popular sense with full recognition that both are sweeping caricatures that fail to encompass the complexity of the philosophy they purport to describe. For example, a growing number of liberal authors and scholars recognize that protections for economic functions are vital in modern society. *See, e.g.*, Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 273-77 (criticizing the two-step analysis of due process claims). Nonetheless, as generalizations, they contain some degree of truth and provide valuable insight into the political perspectives of our time.

[6] William S. Maddox and Stuart A. Lilie, *Beyond Liberal and Conservative* (Washington: Cato Institute, 1984) at 5; Richard Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 361-64 (1995). As an illustration, the mission statement of the National Lawyers Guild, a liberal jurist association, includes the following mantra: "to the end that human rights shall be regarded as more sacred than property interests." http://www.nlg.org/about/aboutus.htm.

[7] Levy, *supra* note 6, at 342-48. Think tax reform, privatizing Social Security, and industry deregulation on the one hand and the Defense of Marriage Act on the other.

[8] *See* Peter Linzer, *The Carolene Products Footnote And The Preferred Position of Individual Rights: Louis Lusky And John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277 (1995). *Compare* Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955) (declaring that state legislatures may pursue economic regulation with impunity, even with actions that are "unwise, improvident.") *with* Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) (unanimously declaring that prior restraints on speech are presumptively unconstitutional).

distinction between individual and economic rights is somewhat fallacious and that the only way to provide meaningful protection to either is through equal reverence to both.

I. A BRIEF HISTORY OF THE BIFURCATION OF RIGHTS

Throughout the ages, Anglo-American jurisprudence has been concerned in large part with protecting economic rights.[9] Early constitutional law

[9] Regal respect for property interests in the English common law can be traced back as far as the Charter of Henry I, which predates the Magna Carta by more than a century. Bernard H. Siegan, ECONOMIC LIBERTIES AND THE CONSTITUTION 1 (1980) [hereinafter Siegan, ECONOMIC LIBERTIES]. Two of the three paragraphs of this charter relate to property -- eliminating high redemption rates to heirs of land and returning property taken after the death of Henry's brother and predecessor, Rufus. *Id.* The Magna Carta of 1215 went even further by making the prototypical pledge not to deprive innocent people of life, liberty, or *property*. Arthur R. Hogue, ORIGINS OF THE COMMON LAW 112 (1966). John Locke's Two Treatises of Government, eminently influential on the English common law, is replete with assertions that the chief end of civil society is the preservation of property. John Locke, TWO TREATISES OF GOVERNMENT 141, 145, 165, 261 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); Karen Iversen Vaughn, *The Economic Background to Locke's Two Treatises of Government*, *in* JOHN LOCKE'S TWO TREATISES OF GOVERNMENT 119 (Edward J. Harpham ed., 1992) ("Indeed, the whole tenor of Locke's arguments is suffused with economic presuppositions."). By some accounts, security of economic rights was the motivating force behind the development of English common law, which was the single most imminent influence on the development of American jurisprudence. Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43 (2003) [hereinafter Siegan, *Protecting Economic Liberties*]. That the emerging American legal system incorporated these protections is no surprise, as the American Revolution was in large part a response to economic oppression, such as the Stamp Act of 1765, the Townshend Revenue Act of 1767, and the Tea Tax of 1773. H. Commager, DOCUMENTS OF AMERICAN HISTORY, 104 (8th ed. 1968); see also, Jennifer Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 92 (1990) ("The great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty."). Indeed, the Virginia Declaration of Rights, drafted by George Mason in 1776, extols the "inherent right" of "acquiring and possessing property" in its very first section. *Preamble of the Virginia Constitution*, PENNSYLVANIA GAZETTE, June 12, 1776, *reprinted in* Pauline Maier, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 126-27 (1997). This document was a template for many subsequent state bills of rights and is thought to have influenced Thomas Jefferson when drafting the United States Declaration of Independence as well as James Madison when drafting the Bill of Rights. Madison himself showed a prophetic concern for the disparate treatment of rights, declaring "I see no reason why the rights of property which chiefly bears the burden of Government and is so much an object of Legislation should not be respected as well as personal rights in the choice of Rulers." James Madison, 8 PAPERS OF JAMES MADISON 353 (Robert A. Rutland & William M.E. Rachal eds., 1973). Some even suggest that Jefferson might have substituted "pursuit of happiness" in the Declaration of Independence in place of Mason's "property" because he regarded "pursuit of happiness" as "a kind of generic term for a bundle of rights that included property rights." David N. Mayer, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 78 (1994). Finally, the United States

jurisprudence viewed economic regulation with almost unshakable disapproval,[10] striking down restrictions on the right to contract,[11] limitations on working hours,[12] barriers to market entry,[13] regulation of prices,[14] regulatory takings,[15] mandates on wages,[16] and anti-trust laws.[17] During the 1930s, however, the Court faced enormous political pressure[18] to abandon its previous proclivity for economic rights.[19] Even before the onset of the Great Depression, President Franklin D. Roosevelt championed sweeping regulation of many industries, a plan he later coined the New Deal.[20] Much to President Roosevelt's frustration, the Court presented a formidable obstacle in implementing the New Deal;[21] between 1934 and 1936, the Hughes Court

Constitution of course promises to protect "life, liberty and property." U.S. CONST. amend. XIV, § 1.

[10] Siegan, ECONOMIC LIBERTY, *supra* note 9, at 178-79.

[11] *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897) (unanimously striking down prohibition on contracting with out of state insurance carriers as a violation of due process); Central of Ga. Ry. Co. v. Wright, 248 U.S. 525, 527 (1919) (finding revocation of state charter invalid as violation of the Contract Clause).

[12] *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (striking down regulation of the number of hours that bakers could work on substantive due process grounds).

[13] *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262 (1932); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (striking down a licensing scheme for laundry businesses as a violation of equal protection, noting "[t]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself").

[14] *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 515 (1934); A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 542 (1935).

[15] Pennsylvania Coal v. Mahon, 260 U.S. 393, 414-15 (1922) (finding a requirement to leave coal in place totally destroyed mineral owner's interests and, thus, was a taking).

[16] *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[17] *See, e.g.*, U.S. v. E.C. Knight, 156 U.S. 1 (1895) (finding sugar refining to be manufacturing not commerce, and therefore, not subject to the Interstate Commerce Act).

[18] William E. Leuchtenburg, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 169 (1995); 2 Bruce A. Ackerman, WE THE PEOPLE: TRANSFORMATIONS 306 (1998) (referring to soon-to-be President Roosevelt's agenda as an "irresistible force [] on a collision course with an immoveable object"). *But see*, G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 5 (2000) (arguing that the jurisprudential change came not from political pressures, but from a conceptual response to several factors in modern society).

[19] Siegan, ECONOMIC LIBERTIES, *supra* note 9, at 184-85 (attributing the pre-New Deal Court's opposition to economic regulation to a belief in the "efficacy of Adam Smith's celebrated observations that the wealth of a nation largely depends on privately created production").

[20] *Id.* at 191-195. Professor Siegan notes that, "[i]t is a myth that the New Deal was adopted as a result of the Great Depression." *Id.* at 194.

[21] Siegan, ECONOMIC LIBERTIES, *supra* note 9, at 107 (noting that from 1890 to 1936 the Court invalidated an average of 8.6 congressional acts per year).

struck down some sixteen of its acts.[22] In 1938, however, the Court blinked.[23] In the totemic *United States v. Carolene Products*[24] decision, the Supreme Court set forth a mandate of legislative deference that would forever change judicial review of both individual and economic rights.

Carolene Products considered the constitutionality of the Filled Milk Act of 1923,[25] "which prohibit[ed] the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream."[26] The Carolene Products Company challenged the act, asserting that it was not within Congress' power to regulate commerce and, thus, a violation of the powers reserved to the States.[27]

Justice Stone dismissed these arguments, citing a need to defer to Congress' findings on the injurious nature of filled milk.[28] But in the famous footnote four, the Court observed that some legislation may warrant a "more exacting judicial scrutiny."

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[22] Henry J. Abraham, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 299-320 (7th ed., 1998).

[23] President Roosevelt's "Court packing plan" may have contributed to the Court's change of heart, although there is some dispute about the significance of Roosevelt's threat. Richard Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995); Daniel A. Farber, *Who Killed Lochner?*, 90 GEO. L.J. 985, 997 (2002) (reviewing G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000)). Regardless of the effect, if any, of the Court packing plan, President Roosevelt was able to appoint eight new Justices during his twelve years in office, which no doubt contributed to the ideological shift in the Court. Siegan, ECONOMIC LIBERTIES, *supra* note 9, at 175.

[24] 304 U.S. 144 (1938). The Carolene Products Company was indicted for shipping in interstate commerce packages of "Milnut," a compound of skim milk and coconut oil. U.S. v. Carolene Prods., 7 F.Supp. 500, 501 (S.D. Ill. 1934).

[25] 21 U. S. C. §§ 61-63 (1923). Professor Geoffrey Miller has referred to the Filled Milk Act as "an utterly unprincipled example of special interest legislation." Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 398. The legislation, according to Professor Miller, was supported by various farmer associations: breed groups, county, state, and national political organizations; dairy newspapers; agricultural colleges and universities; granges; and dairy promotional organizations. These dairy interests were threatened by filled milk products, which could be sold for a cheaper price than pure dairy products. Thus, the statute had more to do with driving small producers out of the market than its purported purpose of protecting consumers from what essentially amounts to skim milk. The statute also disadvantaged the working class and poor people, who were deprived of a healthful, nutritious, and low cost food. *Id.* at 399.

[26] 21 U.S.C. § 61(c) (1923); 304 U.S. at 145-46.

[27] 304 U.S. at 146-47. The Carolene Products Company also argued that the Act constituted a denial of equal protection and due process in violation of the Fifth Amendment. *Id.*

[28] *Id.* at 154.

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . . Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[29]

In other words, the Court should exercise a pronounced level of deference to the legislature's wisdom, except where the allegedly offensive regulation infringes upon a fundamental right or discriminates against a "discrete and insular minority." It is a framework of constitutional presumption with exceptions of "more searching judicial inquiry."[30]

Although only dicta, this footnote has had the effect of establishing a hierarchy among asserted rights.[31] While the Ninth Amendment promises that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people[,]"[32] the jurisprudence of *Carolene*

[29] *Id.* at 153, n.4.

[30] In a notable line of history, several famous subsequent cases were decided in agreement with *Carolene Products*, such as *Nebbia v. New York*, 291 U.S. 502 (1934), *West Coast Hotel v. Parrish*, 300 U.S. 100 (1941), and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). For a thorough treatment of this period *see, e.g.*, Siegan, ECONOMIC LIBERTIES, *supra* note 9, at 107-75. These cases were astonishingly successful in eviscerating economic rights, leading Professor McCloskey to comment that "it is hard to think of another instance when the Court so thoroughly and quickly demolished a constitutional doctrine of such far-reaching significance." Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 36.

[31] *See, e.g.,* Braunfeld v. Brown, 366 U.S. 599, 611-13 (1960) (Brennan, J., concurring in part, dissenting in part) (noting the preferential slot reserved for religious freedom). "The honored place of religious freedom in our constitutional hierarchy, suggested long ago by the argument of counsel in Permoli v. Municipality, and foreshadowed by a prescient footnote in United States v. Carolene Products Co. . . . must now be taken to be settled." *Id.*

[32] U.S. CONST. amend. IX.

Products has had precisely that effect.[33] Under this framework, the Court affords a more searching level of scrutiny to legislation affecting "fundamental" rights, while examining legislation affecting "nonfundamental" rights for mere perceptions of reasonableness.[34] [35] Predictably, favored rights, such as the

[33] *See e.g.*, Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 21-80 (2006) (arguing for a common sense interpretation of the Ninth Amendment supported by crucial pieces of historical evidence, such as Madison's Bill of Rights speech, Roger Sherman's Draft Bill of Rights, and the Virginia Debates over the Ninth Amendment). The Ninth Amendment, Professor Barnett notes, "specifically negates the judicial philosophy adopted in the first paragraph of the famous Footnote Four of United States v. Carolene Products Co." *Id.* at 14.

[34] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES, 625, 792 (3d. ed. 2006). In a decision that presaged this movement, Nebbia v. New York, 291 U.S. 502 (1934), the Court argued for the disparate treatment of economic rights. "So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . ." *Id.* at 537.

[35] The rights outside of the specific provisions of the Bill of Rights that the Court has found fundamental is a relatively short list, including the right to marry, Loving v. Virginia, 388 U.S. 1 (1967); the right to procreate, Skinner v. Oklahoma, 316 U.S. 535, 536 (1942); the right of parental custody of children, Santosky v. Kramer, 455 U.S. 745, 753 (1982); the right to control the upbringing of children, Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925); the right to keep one's family together, Moore v. City of East Cleveland, 431 U.S. 494 (1977); the right to marital privacy and to purchase and use contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972); to bodily integrity, Rochin v. California, 342 U.S. 165 (1952); the right to abortion, Roe v. Wade, 410 U.S. 113 (1973); the right to travel, United States v. Guest, 383 U.S. 745 (1966); and the right to vote, Reynolds v. Simms, 377 U.S. 533, 555 (1964). Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (collecting cases).

There is much debate about which rights *should* be found fundamental under the Due Process Clause. *See, e.g.*, Robert H. Bork, THE TEMPTING OF AMERICA (1990); Mark Tushnet, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); John Hart Ely, DEMOCRACY AND DISTRUST (1980); Michael J. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982). Some argue that only those rights specifically mentioned or clearly implicit in the text of the Constitution are properly labeled fundamental. Ely, *supra*, at 1. This view is generally labeled originalism. Still, others argue that courts should go beyond the four corners of the Constitution when deciding what constitutes a fundamental right. *Id.* Predictably, this view is labeled nonoriginalism.

Other theories are also advanced for determining whether a right is fundamental. For example, moderate originalists believe courts should apply the framers' general intent, but not necessarily follow strict adherence to their exact views. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. REV. 204, 205 (1980). Professor Lessig argues that the debate should be phrased in terms of "fidelity" to the historical understandings. *See, e.g.,* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997); Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997). Some argue that courts should only recognize nontextual fundamental rights that further the goals of adequate representation and perfecting the political process. Ely, *supra*, at 1. Others would argue that courts should use principles of natural law in deciding which rights will

freedom of speech, are drafted into the "fundamental" camp,[36] while economic rights are cast into the disfavored "nonfundamental" group.[37] Although protections for economic rights may be found within the text of the Constitution,[38] the jurisprudence of the Progressive Era effectively demoted economic rights to the status of a "poor relation."[39] This court-conceived double standard[40] is the judicial embodiment of the individual/economic rights distinction.

The mechanics of legislative deference is as follows: If the right in question has been identified as nonfundamental, or if the legislation does not implicate a suspect minority, the Court applies the least searching level of scrutiny – the rational basis test.[41] To survive, the legislation must only be rationally related to a legitimate government interest.[42] The rational basis test, as formulated by modern courts, is succinctly described in *FCC v. Beach Communications*.[43] Under this test, the Court will uphold legislation "if there is any reasonably conceivable state of facts that could provide a rational basis" for it.[44] Such

receive fundamental status. *See, e.g.,* Harry V. Jaffa, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION (1994). Some would argue that courts should recognize fundamental rights supported by strong moral consensus among society. *See, e.g.,* Harry H Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221, 284 (1973). At times, the Court articulates the definition of a fundamental right as those "deeply rooted in our Nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). But in practice, this definition does little to predict which rights the courts may find fundamental. Not only is there difficulty in ascertaining what amount of tradition is sufficient, there is also the question of at what level of abstraction the asserted right will be described. CHEMERINSKY, *supra* note 34, at 795. For example, a parent's right to control visitation times of grandparents may be stated as just that. Or it may be framed as a right to determine the upbringing of one's children. Naturally, the more specifically the right is described, the harder it will be to find a history and tradition of its protection. *Id.*

[36] CHEMERINSKY, *supra* note 34, at 792.

[37] *Id.* at 625.

[38] *See, e.g.*, U.S. CONST. amend. XIV, § 1 (guaranteeing the protection of "life, liberty and property."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Law impairing the Obligation of Contracts. . . .")

[39] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

[40] Henry J. Abraham and Barbara A. Perry, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 11 (8th ed. 2003).

[41] *See, e.g.,* Williamson v. Lee Optical, 348 U.S. 483 (1955). In contrast, if the examined legislation infringes upon a fundamental right or discriminates against a discrete and insular minority, the exacting standard of strict scrutiny is triggered. To survive, the allegedly offensive legislation must be narrowly tailored to a compelling government interest. CHEMERINSKY, *supra* note 34, at 795.

[42] Williamson, 348 U.S. 483.

[43] 508 U.S. 307, 313-15 (1993).

[44] *Id.*

legislation has a "strong presumption of validity," and challengers of the legislation must "negative every conceivable basis which might support it."[45] Under such an inquiry, the legislature responsible for the regulation is not even required to articulate its reasons for enacting the law; a court may support a law by "rational speculation unsupported by evidence or empirical data."[46] Although professing to provide some measure of scrutiny, the rational basis test has been described as little more than a vehicle for judicial abdication of responsibility.[47] And while the test was spawned in contemplation of economic regulations,[48] its use would not be confined to the economic sphere.[49]

II. CERTAIN RIGHTS CANNOT BE NEATLY CABINED INTO ECONOMIC AND INDIVIDUAL CATEGORIES

Despite the best efforts of partisan factions, many asserted rights cannot be neatly cabined into economic or individual categories.[50] Moreover, in certain areas, the Court has flatly rejected this distinction, doing much to blur the lines between so-called individual and economic rights.[51] Campaign finance law, and its surrounding acrimony, provides a useful starting point for this discussion.

A. Campaign Finance Law

Freedom of speech is among the most highly revered guarantees of the Bill of Rights.[52] Within this domain, political speech is thought to be one of the most

[45] *Id.* at 314-15.

[46] *Id.*

[47] Clark Neily, *One Test, Two Standards: The On-And-Off Role Of "Plausibility" In Rational Basis Review*, 4 GEO. J. L. & PUB. POL'Y 199 (2006) (arguing that the rational basis test is the Supreme Court's junk drawer for disfavored constitutional rights that, while not explicitly repudiated, are not enforced in any meaningful way).

[48] As noted *supra*, *Carolene Products* is credited with the conception of the rational basis test while upholding the Filled Milk Act, a classic New Deal economic regulation. 304 U.S. 144 (1938).

[49] *See infra* Part III.

[50] *See infra* Part I.A-E.

[51] *See infra* Part I.D.

[52] *See e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (commenting that "the ultimate good desired is better reached by free trade in ideas" and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (characterizing the First Amendment as "the matrix, the indispensable condition, of nearly every other form of freedom"); Frank S. Sengstock, *Achieving a Workable Definition of Free Speech: A Symposium on the Nature and Scope of the Constitutional Guarantee of Freedom of Expression*, 47 J. URB. L. 395, 396 (1970) (stating simply that "freedom of speech is essential to democracy"). Indeed, even the placement of free speech protection within the very first amendment to the Constitution suggests its value.

evolved forms of expression.[53] According to the Supreme Court, "the First Amendment has its 'fullest and most urgent application' to speech uttered during a campaign for political office."[54] Equally firm is our resolve to rid the electoral process of the corrupting influence of financial interests.[55] Campaign finance regulation represents the point of intersection between these two, sometimes competing policies.[56]

In campaign finance law, the debate is commonly concerned with whether financial contributions to campaigns for public office constitute an expression of protected political speech.[57] Decidedly not, argue proponents of campaign finance laws, who tout regulation of contributions as a necessary prophylactic from the "political potentialities of wealth."[58] In contrast, critics of campaign finance regulation argue that, in a world where political speech is expensive, restricting the ability to fundraise for political advertising is tantamount to restricting the message itself.[59] As a matter of instinct, adherents to the

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[53] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("[T]he First Amendment affords the broadest protection to [] political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (citing Roth v. United States, 354 U.S. 476, 484 (1957)); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government.") (citing Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

[54] Eu v. S.F. County Democratic Central Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

[55] *See, e.g.*, Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, AN ANTHOLOGY 158 (2d. ed., Frederick G. Slabach ed., 2006).

[56] *Id.*

[57] *Compare* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, AN ANTHOLOGY (2d. ed., Frederick G. Slabach ed., 2006) (arguing that the view that campaign monies are tantamount to speech is a misconception of the First Amendment because it fails to embrace a community process whereby politicians prevail based on their worth, not based on their warchests), *with* Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, *in* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, AN ANTHOLOGY 147 (2d. ed., Frederick G. Slabach ed., 2006) ("Not only does money permit the purchase of communication, but . . . political giving and spending are themselves communicative acts.").

[58] McConnell v. Federal Election Com'n, 540 U.S. 93, 116 (2003). *See also*, 2 Rodney A. Smolla, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, 16-16 (2006) ("Expenditure limits attempt to curb the political market power of the wealthy, serving the egalitarian goal of leveling the influence of various individuals among the populace – a sort of 'one person, one dollar, one vote' ideal.").

[59] *See, e.g.*, Floyd Abrams, *Campaign Finance Restrictions Violate the Constitution*, Wall St. J., Apr. 9, 1998, at A22; Edward Crane, *Hard Boot for Soft Money?*, N.Y. Daily News, Sept. 30, 1997; Lillian

individual/economic rights dichotomy may side with the former clique in arguing that money bears no relation to speech. In *Buckley v. Valeo*,[60] however, the Supreme Court rejected this very notion.[61] In a per curiam decision, 150 pages in length, the Court held that certain campaign expenditures are, in fact, a protected form of expression.[62] The length and complexity of the decision alone suggest the difficulty of the issue presented.[63]

The *Buckley* Court considered a challenge to the 1974 amendments to the Federal Election Campaign Act of 1971 ("FECA").[64] The portions of the amendments most relevant to this Article imposed limits on both direct contributions to candidates and independent expenditures by individuals and groups "relative to a clearly identified candidate."[65] The Court of Appeals for the District of Columbia Circuit upheld the Act's limits on contributions and independent expenditures on the grounds that they should properly be regarded as regulating conduct, not speech.[66] Thus, to some degree, the Court of Appeals seems to have sided with those who insist that financial contributions are distinct from speech. The Supreme Court, however, expressly rejected this view and instead acknowledged that

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of

R. BeVier, *Campaign Finance "Reform" Proposals: A First Amendment Analysis*, CATO INST. POL'Y ANALYSIS No. 282, Sept. 4, 1997.

[60] 424 U.S. 1 (1976).

[61] *Id.* at 19.

[62] *Id.* at 45.

[63] Similarly, a more recent Supreme Court case to consider campaign finance laws, McConnell v. Fed. Election Comm'n, resulted in a lengthy, 300 page, 5-4 decision. 540 U.S. 93 (2003).

[64] Buckley, 424 U.S. at 6. These amendments, adopted in the wake of the Watergate scandal, sought to curb what was seen as the harmful effects of financial contributions on the election process. 2 U.S.C. § 441; Final Report S. Senate, S. Rep. No. 93-981, 93d Cong., 2d Sess. (1974).

[65] 424 U.S. at 7. The amendments also limited expenditures by a candidate, created disclosure requirements, established public funding for presidential elections, and established the Federal Elections Committee. *Id.*

[66] *Id.* at 15-16; Buckley v. Valeo, 519 F.2d 821 (D.C. Cir 1975). In reaching this conclusion, the Court of Appeals relied upon *United States v. O'Brien*, 391 U.S. 367 (1968), which formulated a test for evaluating restrictions on conduct that accompanied speech, but was not itself pure speech. 424 U.S. 15-16.

> communicating ideas in today's mass society requires the expenditure of money.[67]

Notably, the Court observed that "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."[68] Thus, the Court struck down the provisions of FECA restricting independent expenditures by individuals and groups on behalf of candidates.[69] In so doing, the Court recognized that freedom of speech in the political arena is contingent, to some degree, upon having the liberty to purchase the means of communication – a decidedly economic affair.[70]

This relation of money to speech would seem to confound the strictest iterations of the individual/economic rights dichotomy; the Court has essentially declared that certain economic activities are protected as political speech.[71] But the Court did not fully commit to this position. Although it struck down the restrictions on independent expenditures on behalf of candidates, the Court upheld limitations on individual or group contributions directly to a specific candidate.[72] This distinction is highly criticized[73] and

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[67] 424 U.S. at 19.

[68] *Id.* at 19, n.18.

[69] 424 U.S. at 48-49.

[70] *See*, Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1277 (1994).

[71] *Id.* at 15-23, 39; The Court explained:

> The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech . . . . It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms."

Id. (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

[72] *Id.* at 29. The *Buckley* Court asserted that limits on such contributions impose "only a marginal restriction" on free speech and that a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 20-21. Thus, contributions by individuals directly to a candidate for Senate may be limited, but the same individual's own purchase of a full page newspaper advertisement on behalf of that candidate may not.

[73] *See, e.g.,* Jamin B. Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994). Justice Thomas commented, "I would reject the framework established by *Buckley v. Valeo* . . . . Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions

perhaps a product of the inherent difficulty of distinguishing economic and noneconomic activities. Certainly, even those who insist that individual and economic rights are categorically distinct must agree that the exercise of political speech often depends on having some measure of economic liberty, be it purchasing network airtime, printing pamphlets, or even buying a soapbox on which to stand.[74] Although the Court stopped short of a full proclamation that money is speech, at a minimum, *Buckley* leaves us with the assertion that some financial expenditures are tantamount to speech and warrant protection as such.[75]

The Washington State Supreme Court recently decided a campaign finance case that uniquely illustrates the difficulty in distinguishing economic contributions from protected speech.[76] Kirby Wilbur and John Carlson, two radio personalities on KVI 570 AM in Seattle, Washington, promoted a ballot initiative on-air that would roll back a recent gas tax increase.[77] Local prosecutors brought a complaint against the sponsors of the ballot initiative, alleging that the on-air promotion by Wilbur and Carlson constituted an in-kind contribution.[78] The Thurston County Superior Court agreed and issued a preliminary injunction, ordering the campaign to disclose the on-air discussions as in-kind contributions.[79] Notably, Washington law prohibits contributions to initiative campaigns in excess of $5,000 within 21 days of a general election.[80]

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and expenditures: both forms of speech are central to the First Amendment." Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 631, 640 (1996) (Thomas, J., concurring in part, dissenting in part).

[74] BeVier, *Money and Politics*, *supra* note 57, at 147 (succinctly noting that "money permit[s] the purchase of communication.").

[75] *See* BeVier, *supra* note 70. *But see* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001 (1976).

[76] San Juan County v. No New Gas Tax, No. 77966-0, 2007 Wash. LEXIS 297 (Wash. Apr. 26, 2007).

[77] Senate Bill 6103 increased the state's gasoline tax by 9.5 cents per gallon over four years. The internet incarnation of this campaign was nonewgastax.com.

[78] San Juan County v. No New Gas Tax, No. 05-2-01205-3, slip op. at 1-2 (Thurston County Super. Ct. Oct. 25, 2005). An in-kind contribution is a non-monetary donation, such as printing services or telephone equipment, which can be given a cash value. *Id.*

[79] San Juan County v. No New Gas Tax, No. 05-2-01205-3, slip op. at 1-2 (Thurston County Super. Ct. July 1, 2005) (Order Granting Preliminary Injunction Requiring compliance With Fair Campaign Practices Act).

[80] RCW 42.17.105(8). This section of the statute states:

> It is a violation of this chapter for any person to make, or for any candidate or political committee to accept from any one person, contributions reportable under RCW 42.17.090 in the aggregate exceeding fifty thousand dollars for any campaign for statewide office or exceeding five thousand dollars for any other campaign subject to the provisions of this chapter within twenty-one days of a general election. This

Thus, if an on-air discussion is valued at over $5,000, campaign finance regulations could literally be used to silence political speech. The Washington Supreme Court reversed the lower court's ruling,[81] but the implication remains clear: money and speech are not always easily divorced.

Certainly, the commodification of speech in any form offends the individual/economic rights dichotomy, which would suggest that speech is inherently distinct from money and cannot be reduced to mere financial value. By assigning a dollar amount to Wilbur and Carlson's on-air speech, the Thurston County Superior Court illustrated the point that money is simply a medium of exchange and may represent other goods or forms of expression. Ironically, it is under the same framework of campaign finance law supported by those who argue that money is distinct from speech that speech has been equated to money. Whether one agrees with the *Buckley* Court or the Thurston County Superior Court, both decisions complicate purist views of the individual/economic rights dichotomy. Likewise, both provide compelling authority for a less dogmatic approach to distinguishing rights along economic or noneconomic lines.

B. Commercial Speech

In similar fashion, the jurisprudence of commercial speech further complicates the individual/economic rights dichotomy. At the heart of this issue, some argue that speech should be afforded less protection when tainted with the indicia of commerce.[82] Commercial speech, according to this argument, does nothing to serve the objectives of the First Amendment, namely, promoting self-government by increasing participation in the political process.[83] Others

subsection does not apply to contributions made by, or accepted from, a bona fide political party as defined in this chapter, excluding the county central committee or legislative district committee.

Id.

[81] San Juan County v. No New Gas Tax, No. 77966-0, 2007 Wash. LEXIS 297 (Wash. Apr. 26, 2007).

[82] *See*, *e.g.*, Thomas Jackson & John Jeffries, Jr., *Commercial Speech: Economic Due Process and The First Amendment*, 65 VA. L. REV. 1 (1979); Lillian BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978) (arguing against constitutional protection for commercial speech as it promotes neither the political process nor public decision making).

[83] Jackson & Jeffries, *supra* note 82, at 5-6 ("The first amendment guarantee of freedom of speech and press protects only certain identifiable values. Chief among them is effective self-government. Additionally, the first amendment may protect the opportunity for individual self-fulfillment through free expression. Neither value is implicated by governmental regulation of

argue that commercial speech provides important information to consumers and is indistinguishable from other forms of speech.[84] Sadly, the Court's many attempts at settling this issue have left more questions than answers.[85]

Initially, in *Valentine v. Chrestensen*,[86] the Court experimented with the notion that the First Amendment provided no protection for commercial speech. Over a First Amendment challenge, the Court upheld a New York City ordinance that singled out commercial speech by prohibiting the distribution of any "handbill . . . or other advertising matter in or upon any street or public place."[87] F.J. Chrestensen was advised by the Police Commissioner that he could not distribute handbills advertising the exhibition of a former U.S. Navy submarine that he owned.[88] Under this ordinance, however, handbills devoted to "information or a public protest" were allowed.[89] Perhaps befuddled by this confounded distinction, Chrestensen reprinted the handbills.[90] On one side was the original advertisement minus the mention of an admission fee, and on the other side was a protest against the City Dock Department for refusing him wharfage facilities.[91] Chrestensen was detained for distributing the new double-sided handbills, and he sought an injunction against enforcement of the ordinance.[92] The District Court granted his injunction, invalidating the ordinance,[93] and the Circuit Court of Appeals affirmed.[94] Nonetheless, Justice

commercial speech."); BeVier, *supra* note 82, at 358 ("The sole legitimate first amendment principle protects only speech that participates in the process of representative democracy.")

[84] *See*, *e.g.*, Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1222-35 (1983) (arguing that commercial speech is difficult to separate from political speech); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780-81 (1993) (arguing that commercial speech should have a presumption of protection because there is no convincing argument for its exclusion and because "[i]t is only the linkage between commercial speech and a commercial transaction that gives government the theoretical leverage to presume to regulate the speech at all."). Smolla also argues that Supreme Court case law suggests that the mere motive of profit is not enough to disqualify commercial speech from full First Amendment protection. *Id.* at 781-82.

[85] Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 486 (1985); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

[86] 316 U.S. 52 (1942).

[87] *Id.* at 53.

[88] 316 U.S. at 52-53.

[89] *Id.* at 53, n.1.

[90] *Id.* at 53.

[91] *Id.* at 53.

[92] *Id.* at 53-54.

[93] Chrestensen v. Valentine, 34 F. Supp. 596 (S.D.N.Y. 1940).

[94] Chrestensen v. Valentine, 122 F.2d 511 (2d Cir. 1941).

Roberts declared, with neither analysis nor explanation, that "[w]e are [] clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[95] Thus, in bold strokes, Justice Roberts upheld the individual/economic rights distinction.

Commercial speech remained unprotected until 1975, when the Court reconsidered this position. In *Bigelow v. Virginia*, the Court struck down a state law that made it a crime to "encourage or promote" abortions "by the sale or circulation of any publication."[96] Jeffrey Cole Bigelow had been convicted under this statute for running an advertisement in his newspaper, The *Virginia Weekly*, which indicated the availability of low-cost abortions in New York.[97] The Supreme Court of Virginia upheld Bigelow's conviction on the assumption that the First Amendment did not protect commercial speech,[98] but Justice Blackmun reversed, expressly holding that "speech is not stripped of First Amendment protection merely because it appears" in commercial form.[99] The Court further declared that "[t]he fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees."[100]

A year later, in *Virginia Pharmacy*,[101] the Court reaffirmed the notion that commercial speech was protected by the First Amendment. Here, the Court struck down a Virginia state law that prohibited advertising the price of prescription drugs.[102] Justice Blackmun again declared that speech that "does no more than propose a commercial transaction" is protected by the First Amendment.[103] Observing that the interests of contestants in a labor dispute are no less economic, the Court declared that the motives of the speaker should

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[95] Chrestensen, 316 U.S. at 54.

[96] 421 U.S. 809, 813 n.3 (1975); VA. CODE ANN. § 18.1-63 (1960) ("If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."). The Court noted that the statute dated back to 1878, but that "Bigelow's was the first prosecution under the statute 'in modern times,' and perhaps the only prosecution under it 'at any time.'" 421 U.S. at 813 n.2 (citing Transcript of Oral Arguments, 40).

[97] *Id.* at 811.

[98] *Id.* at 818.

[99] *Id.*

[100] 412 U.S. at 818.

[101] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976).

[102] *Id.* at 749 (quoting VA. CODE ANN. § 54-524.35 (1974) ("a pharmacist licensed in Virginia is guilty of unprofessional conduct if he '(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms... for any drugs which may be dispensed only by prescription.'").

[103] *Id.* at 762.

not determine the level of protection afforded to the speech.[104] The opinion practically reveres commercial speech.

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.[105]

To this day, commercial speech is afforded constitutional protection, but it is not on par with the level of protection afforded noncommercial speech.[106] On this issue, the Court seems to adhere to some degree to the

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[104] *Id.* at 762-63.

[105] *Id.* at 763-64. In *Virginia Pharmacy*, Justice Blackmun even addressed and rejected the argument that commercial speech does not contribute to the self-government rationale for the First Amendment:

> Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

429 U.S. at 765.

[106] Unlike its noncommercial counterpart, commercial speech involving illegal activity or false and misleading expressions does not enjoy First Amendment protections. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) (upholding a ban on advertising an illegal product, viz., gender-specific employment); Friedman v. Rogers, 440 U.S. 1 (1979) (upholding regulation of the use of trade names in commercial advertising). Also, the overbreadth doctrine does not apply to commercial speech. Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Commercial speech is also analyzed under a less searching standard of review than is noncommercial speech. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980).

individual/economic rights distinction. Nonetheless, the Court has never offered a convincing explanation of why commercial speech is subject to less protection.[107]

The *Central Hudson* Court articulated an intricate four-part test for evaluating the constitutionality of commercial speech regulation,[108] but offered little in the way of justifying this distinction. Speaking through Justice Powell, the Court purportedly "recognized 'the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to governmental regulation, and other varieties of speech.'"[109] Justice Powell concluded, "[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[110] But this justification does little more than declare that commercial speech warrants less protection because it occurs in a commercial zone. Such tautology does little to explain the Court's disparate treatment of commercial and noncommercial speech.[111]

In addition to the debate over whether or why commercial speech should be protected is the question of how to define commercial speech. Obviously, advertising product pricing information is commercial speech.[112] But the definition of commercial speech as "advertising" is at the same time too broad and too narrow.[113] This definition would include some forms of pure political speech, such as the "editorial advertisement"[114] protesting the treatment of civil rights leaders that was the basis for *New York Times v. Sullivan*.[115] But this definition would not include commercial speech other than advertising, such as

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[107] Smolla, *supra* note 84, at 780 ("In my view, there are no convincing arguments for disqualifying most modern mass advertising from constitutional protection.").
[108] 447 U.S. at 566.
[109] Central Hudson, 447 U.S. at 562.
[110] 447 U.S. at 563.
[111] *See* Smolla, *supra* note 84, at 780. Also, singling out commercial speech by affording it a lesser degree of protection seems to violate the prime directive of First Amendment theory, that content-based distinctions are presumptively unconstitutional. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").
[112] CHEMERINSKY, *infra* note 34, at 1088.
[113] *Id.*
[114] New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (reversing judgment for plaintiff in civil libel act and establishing the "actual malice" standard for defamation and libel.).
[115] *Id.* at 256.

a lobbyist's communiqué to a government official or a corporate financial statement issued to a stockholder.[116]

In *Central Hudson*,[117] the Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience."[118] This definition, however, also has its shortcomings.[119] A newspaper publisher or a business school professor may have purely economic motives for printing papers or lecturing, just as the reader or student may have the same economic motives for reading the paper or listening to the lectures.[120] Nonetheless, these forms of expression cannot rightly be considered commercial.

In *Bolger v. Youngs Drug Products Corp.*,[121] the Court directly addressed the issue of what constitutes commercial speech. Youngs, the manufacturer of Trojan brand condoms, was distributing flyers and pamphlets with such titles as "Condoms and Human Sexuality" and "Plain Talk about Venereal Disease," which discussed both prophylactics in general and particular products of Youngs.'[122] In an attempt to describe commercial speech, the Court stated:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. The combination of *all* these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech.[123]

Thus, according to the Court, commercial speech has three characteristics: (1) it is an advertisement, (2) referring to specific products, and (3) is economically motivated.[124] However well-articulated this test may be, it is no conclusive

[116] *See* CHEMERINSKY, *infra* note 34, at 1088.
[117] 447 U.S. 557 (1980).
[118] Central Hudson, 447 U.S. at 561.
[119] CHEMERINSKY, *infra* note 34, at 1088.
[120] *See id.*
[121] 463 U.S. 60 (1983).
[122] *Id.* at 62.
[123] *Id.* at 67 (citations omitted; emphasis in original).
[124] *Id.*

definition.[125] In the Court's own words, it merely "provides strong support" for a finding of commercial speech.[126] Furthermore, this description fails to capture as commercial speech advertisements promoting the image of a brand rather than a specific product.[127]

Truthfully, the distinction between commercial speech and "pure" speech cannot easily be drawn; speech is not always identifiable as commercial or noncommercial.[128] As the Honorable Loren A. Smith has observed, "[a] political commercial is hardly different in length, mass, chemical composition, or albedo than one for Pepsi or Marlboro."[129] Likewise, a picket organized by a labor union aims to influence consumer choice among available goods but is not typically considered commercial speech. As the Court's numerous false starts indicate, attempts to distinguish commercial from political speech are futile.[130] Indeed, considering the myriad financial rewards available to holders of public office, a candidate's motives for running for political office may consist largely of economic concerns. Does a certain composition of economic interest color speech commercial? If so, what level of economic interest is appropriate and, more importantly, how is a court to measure this interest?

Furthermore, despite its disfavored status, commercial speech may, nonetheless, provide some measure of political value.[131] An independent merchant advertising his outlet as an alternative to big box retailers may allow the listener to make both an economic and political choice. More over, the ability to advertise profit-making products has been the engine of the free press.[132] Without revenues from advertising, countless print, broadcast, and online media would struggle to stay in business, let alone provide quality content, including political coverage, to the masses. At a minimum, the difficulty in distinguishing between commercial speech and noncommercial

125 *See* Shiffrin, *supra* note 84, at 1223.
126 463 U.S. at 67.
127 *See* Laura Lin, Note, *Corporate Image Advertising and the First Amendment*, 61 S. CAL. L. REV. 459 (1988).
128 Ronald K.L. Collins & David M. Skover, THE DEATH OF DISCOURSE 70 (2d ed. 2005) (arguing that "public expression cannot be significantly separated from the influences of commercialism.").
129 Hon. Loren A. Smith, *Life, Liberty & Whose Property?: An Essay on Prop Rights*, 30 U. RICH. L. REV. 1055 (1996).
130 Shiffrin, *supra* note 84, at 1223.
131 Bruce M. Owen, ECONOMICS AND FREEDOM OF EXPRESSION, MEDIA STRUCTURE AND THE FIRST AMENDMENT 29 (1975).
132 *Id.* ("Thus 'popular' (economically viable) editorial content is sometimes produced in order to facilitate the consumption of advertising, as in sugar coating a pill.").

speech is emblematic of the larger difficulty of compartmentalizing rights into individual and economic spheres.[133]

C. Takings

In the context of takings, the Court has flatly rejected the individual/economic rights distinction.[134] Subscribers to the rights dichotomy would likely argue that a place of residence warrants greater privacy protection than does a place of business, which is already subject to myriad other regulations.[135] In *Dolan v. City of Tigard*,[136] the Court considered this very issue. After being denied a variance from the City's grant of a conditional construction permit,[137] Florance Dolan claimed that the City's actions violated the Fifth Amendment as a taking without just compensation. Despite the City's pleas that Dolan's property was a business and, thus, subject to less protection, the Court sided with Dolan.

Justice Stevens' dissent argued that economic rights are distinguishable from noneconomic rights in the takings context;[138] he would have dismissed the claim, finding the permit condition a mere "business regulation."[139] But in his majority opinion, Chief Justice Rehnquist rejected this argument, declaring that "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation"[140] when applied to property being used for a business. Thus, the Court declined to adopt a different standard of deference when considering takings of commercial versus

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133 *See infra* Part IV.

134 *See infra* note 139 and accompanying text.

135 *See. e.g.*, Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for A Rationale*, 52 CORNELL L. Q. 871, 923 (1967).

> The subdivider is a manufacturer, processer, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations.

Id.

136 512 U.S. 374 (1994).

137 *Id.* at 377. Florance Dolan, an owner of a plumbing store, brought a challenge to the comprehensive land use plans of Tigard, Oregon. *Id.* After applying for a permit to expand the size of her store and pave a parking lot, the City granted her permit application, subject to the condition that she dedicate ten percent of her property for a bike path and greenway to alleviate congestion and flood water runoff from the pavement. *Id.* at 381.

138 *Id.* at 402 (Stevens, J., dissenting).

139 *Id.*

140 512 U.S. at 392.

noncommercial property. In this instance, the Court has rejected the distinction, if any, between individual and economic rights.

D. Congressional Legislation Under the Commerce Clause

In passing legislation under the Commerce Clause, Congress itself has provided many instances that blur the line between economic and noneconomic rights. Congress, no doubt, has the power to regulate interstate commerce.[141] On this one point, all serious theories of constitutional interpretation agree. What constitutes interstate commerce, however, has changed over time and is still a point of contentious debate. When the original Constitution was ratified, "commerce" consisted of "selling, buying, and bartering, as well as transporting for these purposes."[142] Thus, under this originalist view, Congress' ability to regulate interstate commerce would not reach activities such as manufacturing[143] or agriculture.[144]

While offering various tests for evaluating legislation passed under the Commerce Clause, the modern Court has provided little consistency in defining what constitutes a commercial action.[145] In *United States v. Lopez*, the Court recognized that, under the Commerce Clause, Congress may regulate three categories of activity, the "channels of interstate commerce," the "instrumentalities of interstate commerce," and "activities having a substantial relation to interstate commerce."[146] But each category depends upon some measure of tautology, simply rehashing the word "commerce."[147] Later in the

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[141] U.S. CONST. art. I, § 8, cl. 3. ("The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.")

[142] United States v. Lopez, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring). *See also*, Compare Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (supporting Justice Thomas' view of commerce as selling, buying, and bartering and transporting for those purposes). *But see*, Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 13-20 (1999) (arguing that commerce originally referred to any gainful activity).

[143] *See, e.g.*, United States v. E.C. Knight, 156 U.S. 1 (1895) (distinguishing commerce from manufacturing and agriculture).

[144] *Id.*

[145] *Compare* United States v. Lopez, 115 S. Ct. 1624, 1643 (1995) (suggesting that commerce denotes "sale and/or transport rather than business generally") (Thomas, J., concurring), *and* Kidd v. Pearson, 128 U.S. 1, 20 (1888) ("The buying and selling and the transportation incidental thereto constitute commerce"), *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1936) ("The term 'commerce' means trade, traffic, commerce, transportation, or communication"), *and* Gibbons v. Ogden, 22 U.S. 1, (1824) (defining commerce as "intercourse").

[146] *Id.* at 558-59.

[147] 514 U.S. 549, 558 (1995).

opinion, Chief Justice Rehnquist refers to an "economic enterprise" but offers no further definition of this amorphous term.[148] Does the mere involvement of money make an act commercial? Is bartering a commercial action? Does a trophy wife engage in an "economic enterprise?" Is it the motive of the actor, the character of the act, or the environment in which the act takes place that determines its status as commercial or noncommercial?

Whatever the definition of a commercial act, adherents of the rights dichotomy would anticipate Commerce Clause legislation to be focused on common sense notions of commercial actions. However, much legislation passed under the broad auspices of the Commerce Clause has been aimed at decidedly noncommercial behavior, instead implicating rights of a more individual nature.[149] Touching on issues such as gambling, prostitution, drug use, and even consensual sex between partners, the following decisions reflect a nexus between economic and noneconomic interests propounded by both the Court and Congress.

1. The Lottery Case

In the nineteenth century, the federal government had no power to police public health, safety, and morals.[150] Rather, this domain was exclusively reserved to the states.[151] Nonetheless, in the early twentieth century, Congress

[148] *Id.* at 561.

[149] *See infra* Part III.E.1-2; Robert J. Steamer, *Commerce Power*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 168 (Kermit L. Hall et al. eds., 1992) (explaining Congress' indirect regulation of the public health, morals, safety, and welfare under the Commerce Clause).

[150] Under the Constitution, Congress has explicit power to criminalize only counterfeiting, "Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," offenses committed on federal property, see *Id.* at cl. 17; and treason. U.S. CONST. art. I, 8, cl. 6, 10, 17; *Id.* at art. III, 3, cl. 2. Although the First Congress soon criminalized other conduct, such as obstruction of justice in federal courts, see Crimes Act of 1790, 1 Stat. 112, until the Reconstruction era, federal criminal law was limited to "punishment of acts directly injurious to the central government." L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 65 (1948). See also Dwight F. Henderson, CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829 (1985). On this basis, Justice Thomas would question the legitimacy of the current federal police power doctrine. United States v. Lopez, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring) ("[t]he Federal Government has nothing approaching a police power.").

[151] U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). See also, United States v. E. C. Knight Co., 156 U.S. 1, 11 (1895).

> It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the

extracted unprecedented mileage out of the Commerce Clause, directly regulating the public's health and morals.[152] In 1895, under its authority to regulate commerce, Congress passed the Lottery Act,[153] which prohibited transporting tickets offering "prizes dependent upon lot or chance" from one state to another.[154] In *Champion v. Ames*,[155] the Court considered the constitutionality of this Act.

Depending upon how the debate is framed, the Lottery Act could be seen as the regulation of economic or noneconomic actions. Some may argue that the Lottery Act restricted the operations of a shipping business, or even the end user's ability to spend, and occasionally win, money on games of chance. On the other hand, some may argue that the Act regulates an immoral individual action – gambling. As the Lottery Act was passed under the Commerce Clause, one would expect its proponents to champion the former view, noting the presence of money. The Court, however, upheld the Lottery Act for an admittedly noneconomic purpose: eradicating the "widespread pestilence of lotteries."[156]

Rather than arguing that the conduct in question was indeed commerce, and that the regulation of this commerce was proper, the Court boldly asserted that the federal government, similar to the states, had the power to regulate elements "injurious to the public morals."[157] Justice Harlan declared,

> [i]f a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested

> power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

Id.

[152] Russell L. Weaver, *Federalism and the Criminal Justice System: Lopez and the Federalization Of Criminal Law*, 98 W. VA. L. REV. 815 (1996) (documenting early statutes in which Congress federalized many aspects of the criminal law).

[153] 28 U.S.C. § 963 (1895) (more formally known as "An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States").

[154] *Id.*

[155] Champion v. Ames, 188 U.S. 321 (1903). Charles Champion was convicted under the act and challenged it, insisting that carrying lottery tickets from one state to another did not constitute commerce within the meaning of the commerce clause. *Id.* at 322.

[156] *Id.* at 356.

[157] *Id.* at 357.

> with power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution.[158]

With good reason, some may remain unconvinced that gambling is an individual act, rather than an economic act; gambling does usually involve transfers of wealth. But rather than addressing this issue, the Court, in broad strokes, asserted that Congress, under its power to regulate commerce, also had the power to regulate morality, a decidedly noneconomic sphere. Thus, even though it could be fairly argued that the Lottery Act affected economic behavior, the Court did not even bother professing it as such. Instead, the Court conflated the power to regulate commerce with the ability to regulate morality and, in so doing, rejected even a surface-level adherence to the view that economic rights are distinct from other interests.

2. The Mann Act

Another early example of the Commerce Clause being used to target primarily noncommercial behavior is the Mann Act, which prohibited transporting women across state lines for "immoral purposes."[159] In *Hoke v. United States*,[160] the Court considered the constitutionality of the Mann Act in the face of a claim that the Commerce Clause did not grant Congress the authority to regulate "prostitution or any other immorality of citizens of the several states . . . ."[161]

This debate should have centered on the legitimate question of whether prostitution is a form of commerce subject to regulation by Congress. Arguably, prostitution is an "economic endeavor;" prostitution, by definition,

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[158] *Id.* at 356; In this decision, the Court also made clear that the power to regulate commerce included the power to prohibit it. *Id.* at 358-62.

[159] 36 Stat. 825, c. 395. The Mann Act was more formally known as "An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes." Notable persons prosecuted under the Mann Act include Chuck Berry, Charlie Chaplin, Rex Ingram, Jack Johnson, W. I. Thomas, and Frank Lloyd Wright.

[160] Hoke v. US, 227 U.S. 308 (1913).

[161] *Id.* at 319.

involves an exchange of money,[162] and some men and women certainly earn their living through such exchanges. But instead of even addressing this issue, the Court openly acknowledged that the purpose of the Act was to regulate morality where the states could not. Justice McKenna declared,

> There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for--not against--its legality.[163]

And thus, the Court found the Mann Act valid, while admitting it had more to do with regulating morality than regulating economic activities. Although prostitution may arguably be an act of commerce, the Court declared that Congress' power to regulate commerce may be wielded toward a noncommercial end.[164] With this understanding of the Commerce Clause, the application of the Mann Act to noncommercial consensual extramarital sex is somewhat less difficult to swallow. In *Caminetti v. United States*,[165] the Court considered this very issue.

Caminetti was convicted under the Mann Act[166] and challenged its constitutionality, arguing that the Mann Act reached only "commercialized vice."[167] Again, instead of focusing on whether the conduct in question was of a commercial nature, Justice Day inquired into whether transporting a woman for the purpose of becoming a concubine was an "immoral practice"[168] within the plain meaning[169] of that term. Finding that it was,[170] the Court upheld the

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[162] BLACK'S LAW DICTIONARY (8th ed. 2004) (defining prostitution as "[t]he act or practice of engaging in sexual activity for money or its equivalent; commercialized sex.").
[163] 227 U.S. at 321.
[164] *See id.*
[165] Caminetti v. US, 242 U.S. 470 (1917); This case is a consolidation of three cases. For purposes of this paper, the central focus is on the Caminetti case.
[166] Caminetti was convicted for transporting a woman from Sacramento, California, to Reno, Nevada, for the purpose of making her his "mistress and concubine." *Id.* at 483.
[167] *Id.* at 484.
[168] *Id.* at 486
[169] This case is also notable as being one of the first to embrace the Plain Meaning Rule of statutory construction, whereby a court is encouraged to interpret and enforce an otherwise constitutional statute according to the ordinary meaning of the its language. *Id.* at 485.
[170] Caminetti, 242 U.S. at 485.

Mann Act, as applied to noncommercial consensual extramarital sex, as a valid exercise of Congress' power to regulate commerce.[171]

For better or for worse, the power of Congress to "regulate commerce among the several states"[172] has reached spheres of human action that cannot rightly be considered commercial.[173] By extending the power to regulate commerce to include the regulation of individual morality, the Court and Congress have, to some extent, blurred the distinction between individual and economic rights.[174]

> To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to wit, becoming a concubine or mistress. . . would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning. While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine, from being the execution of purposes within the meaning of this law.

Id.

[171] Polygamy was also found to be an "immoral purpose" under the Act in Cleveland v. US, 329 U.S. 14, 16-17 (1946).

[172] U.S. CONST. art. I, § 8, cl. 3.

[173] *See* Steamer, *supra* note 149.

[174] Other legislative action has also blurred the line between individual and economic rights and warrants brief exploration. The 1996 Solomon Amendment, 10 U.S.C. § 983(b), allows Congress to withhold federal grants from an institution of higher education if it denies equal campus access to military recruiters. Conditional spending is certainly an economic activity, but this issue, nonetheless, implicates an individual right, free association. Rumsfield v. Forum for Academic & Institutional Rights, 547 U.S. ___, 126 S. Ct. 1297 (2006), recently upheld the Solomon Amendment as a valid exercise of Congress' power under the Spending Clause. In U.S. v. United Foods, Inc., 533 U.S. 405 (2001), a tax on generic mushroom handlers that was used, in part, to subsidize generic advertising to promote mushroom sales was found to violate the First Amendment. Harris v. McRae, 448 U.S. 297 (1980) upheld the Hyde Amendment, which severely limited the use of federal funds to reimburse the cost of abortions under the medicaid program. Prince v. Massachusettes, 321 U.S. 158 (1944) upheld state child labor laws over a freedom of religion claim by a mother who brought her child "street preaching." Certain other licensing requirements and secular regulations impose burdens on religious practice. *See e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Murdock v. Pennsylvania, 319 U.S. 105 (1943). First Amendment issues have been intermingled with right-to-work issues in *Schware v. Board of Bar* Examiners, 353 U.S. 232 (1957) and *Barsky v. Board of Regents*, 347 U.S. 442 (1954). Each of these examples illustrates an area of debate in which both economic and individual interests are at stake, and each case defies any attempt to neatly cabin these interests into one category or the other.

It is perhaps due to the amorphous nature of commercial behavior that the Commerce Clause has proven to be such a fertile basis for congressional legislation.[175]

E. Meyer v. Nebraska*, A Counter-Example*

The 1923 Supreme Court decision in *Meyer v. Nebraska*[176] is a useful example of constitutional adjudication prior to the adoption of the individual and economic rights dichotomy. Here, the Court considered a Nebraska law that prohibited teaching foreign languages in public schools prior to the eighth grade.[177] The Court struck down the statute as a violation of "liberty" as guaranteed by the Fourteenth Amendment.[178] Justice McReynolds, in a slight, four-page opinion, commented on this "liberty" with no apparent discrimination between rights of an economic and individual nature.

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to dictates of his own conscience, and generally to enjoy those privileges long recognized by common law as essential to the orderly pursuit of happiness by free men.[179]

[175] As most administrative enabling acts are passed under Congress' power to regulate commerce, this authority could be seen as the catalyst for the proliferation of the modern administrative state. Furthermore, it is difficult to conceive an overt human action that cannot be said to effect commerce. Even sexual intercourse, one of man's most intimate acts, often involves products purchased in the market place, such as prophylactics or contraceptives. More so, intercourse may have the most magnificent economic effects when such products are not used. Even abstaining from sex entirely could be said to effect commerce, as demand for sexual accoutrements would diminish and appetite for substitutes may rise. As Justice McReynolds has observed, "[a]lmost anything -- marriage, birth, death -- may in some fashion affect commerce." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 99 (1937) (McReynolds, J., dissenting, joined by Van Devanter, Sutherland, and Butler, JJ.). In response to Justice Hughes' expansive view of the Commerce Clause, Justice McReynolds later argued that "So construed, the power to regulate interstate commerce brings within the ambit of federal control most if not all activities of the Nation . . . ." NLRB v. Fainblatt, 306 U.S. 601, 610 (1939) (McReynolds, J., dissenting, joined by Butler, J.).

[176] 262 U.S. 390 (1923).

[177] *Id.* at 397. Under this law, Robert Meyer was convicted for teaching German to a ten year-old student. *Id.* at 396.

[178] *Id.* at 403.

[179] *Id.* at 399.

The Court evidently found teaching to be within the "orderly pursuit of happiness" and recognized the interests of both Mr. Meyer and the parents who employed him. "Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth A]mendment."[180]

The *Meyer* Court, perhaps rightly so, made no attempt to frame the question as either an individual or economic rights problem. Certainly, some may argue that the law at issue in *Meyer* is nothing more than a form of occupational licensing, an all too common incarnation of economic regulation. And perhaps Mr. Meyer *was* motivated by economic interests. On the other hand, maybe Mr. Meyer was motivated by an affinity for the German language, or even political incentives, such as promoting peaceful relations among foreign nations through common communication. In any event, the interests of the parents who employed Mr. Meyer cannot likely be considered exclusively commercial. More likely, these parents were interested in providing a well-rounded education for their children. Is the mere presence of financial compensation enough to taint the transaction as commercial?

Instead of conducting an inquisition into the motives of the actors, the *Meyer* Court recognized that legislation may have an impact on multiple spheres of human interest, such as the right to contract for employment, the right to contract for services, and even the "natural duty of the parent to give his children education."[181] In this instance, the Court made no attempt to apply the distinction between so-called individual and economic rights. Unfortunately, subsequent cases would not employ such a holistic view of constitutional rights.

III. ECONOMIC RIGHTS JURISPRUDENCE DIMINISHES PROTECTION FOR INDIVIDUAL RIGHTS

To uphold the sweeping new economic regulation of the Progressive Era, the Court constructed an unprecedented framework of legislative deference.[182] Perhaps due to the difficulty of distinguishing economic and noneconomic action,[183] the Court has been unable to confine its capitulations to issues of so-called economic rights. Rather, this philosophy of deference has spilled-over into rights more commonly considered individual in nature, such as access to medication and reproductive rights. The ultimate irony is that the system of deference advocated by early twentieth-century progressives in order to quash

[180] 262 U.S. at 400.
[181] *Id.*

economic rights is the very system through which many individual rights, championed by modern liberals, have met their demise.

Although sacking economic rights was the impetus for the rational basis test,[184] it is commonly applied to rights not enumerated in the text of the Constitution, including individual rights.[185] Thus, claims of unenumerated individual rights, such as access to physician assisted suicide, access to medical marijuana, and homosexual rights, are all subject to the rational basis test, the most flaccid standard of review.[186] Even reproductive rights, perhaps the holiest of liberal institutions, has suffered diminished protection as a result of the Court's earlier contempt for economic rights.[187]

A. Physician-Assisted Suicide

In *Washington v. Glucksberg*, the Court considered the constitutionality of a Washington statute that criminalized aiding in the suicide of another.[188] Although this issue is more properly considered individual in nature, it would ultimately be felled by the rational basis test, which was established to dispense with claims of economic rights.

In *Glucksberg*, the Court first rejected the argument that physician-assisted suicide was a fundamental right protected by the Due Process Clause.[189] Once

182 *See supra* Part II.

183 *See supra* Part III.

184 *See*, *e.g.*, Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post-Lochner Era*, 102 DICK. L. REV. 327, 333 (1998) ("Carolene Products distinguished economic and property rights from fundamental rights.").

185 *See infra* Part III.A-D; *see, e.g.,* Gonzales v. Raich, 545 U.S. 1 (2005) (applying the rational basis test to an asserted right to medical marijuana); Lawrence v. Texas, 539 U.S. 558 (2003) (applying the rational basis test to the unenumerated right to homosexual sodomy); Washington v. Glucksberg, 521 U.S. 702 (1997) (applying the rational basis test to the unenumerated right to physician assisted suicide); Michael H. v. Gerald D., 491 U.S. 110, 131 (1989) (applying the "rational relationship" test to a child's unenumerated right to rebut the presumption of her legitimacy).

186 *See* Neily, *supra* note 47.

187 *See infra* Part III.C-D.

188 521 U.S. 702, 705 (1997) (considering WASH. REV. CODE § 9A.36.060(1) (1994) ("A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide.")). Here, four physicians, three patients, and a nonprofit organization challenged the Washington statute, claiming that it was facially unconstitutional as a deprivation of their due process rights. *Id.* at 707-08.

189 *Id.* at 728. In making a determination, the Court, speaking through Chief Justice Rehnquist, first conducted a lengthy review of our history of prohibiting assisted suicide. *Id.* at 710-19. Next, the Court noted that the due process clause only protects as fundamental a right "deeply rooted in this Nation's history and tradition[.]" *Id.* at 720-21 (quoting Moore v. City of East

the right in question was deemed nonfundamental, the Court deployed the rational basis standard of review. To survive, the statute only needed to be rationally related to a legitimate government interest, a standard the Court found was "unquestionably met here."[190] To support this finding, the Court pointed to state interests such as the preservation of human life[191] and protecting the integrity and ethics of the medical profession.[192] The plaintiffs acknowledged these interests, but claimed they could be better served by the regulation, rather than the prohibition, of assisted suicide.[193] However, as the right in question was only being examined under the rational basis test, the Court explained that the inquiry was "limited to the question whether the State's prohibition is rationally related to legitimate state interests."[194] Thus, under the framework of due process analysis suggested by *Carolene Products*, a vestige of the Court's scorn for economic rights, access to physician-assisted suicide, a right more properly considered individual in nature, found no meaningful protection. Instead, the advocates of this right were visited with the same brand of dismissive justice that earlier proponents of economic rights had received: "The legislature knows best."

That this issue can be couched in terms of partisan ideology is no surprise. A right to assisted suicide is chiefly concerned with the person, so, generally, one would expect liberals to advocate its protection and conservatives to crusade for its regulation. In this expectation, one would not be disappointed. To illustrate, groups that filed amici briefs in *Glucksberg* in favor of the plaintiffs included the ACLU, the Center for Reproductive Law & Policy, Gay Men's Health Crisis, and the National Women's Health Network.[195] In contrast, amici were filed on behalf of the government by the American Center for Law and Justice, the Christian Legal Society, the National Right to Life Committee, and U.S. Senator Orrin Hatch.[196] The ultimate irony is that an issue close to the hearts of many modern liberals fell victim to the framework of legislative deference championed by their ancestors in power during the Progressive Era. Notably, the *Glucksberg* decision was unanimous, suggesting that even the

Cleveland, 431 U.S. 494, 503 (1977)). Ultimately, the Court concluded that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." 521 U.S. at 728. The Court drew the same conclusion with respect to the Equal Protection Clause in *Vacco v. Quill*. 521 U.S. 793 (1997).

190 521 U.S. at 728.

191 *Id.* at 728-29.

192 *Id.* at 731.

193 *Id.* at 728, n.21.

194 *Id.*

195 *Id.*

196 *Id.*

liberal-leaning jurists on the bench – Justices Stevens, Breyer, Ginsburg, and Souter – could not find meaningful protection under modern due process jurisprudence.[197]

Had the earlier analysis of the *Meyer* Court prevailed, the *Glucksberg* plaintiffs might have relied on a host of interests involved, such as the right of the patients to contract for services and the right of physicians to seek gainful employment, as well as the right of an individual to end his own life. But the jurisprudence used to subjugate economic rights effectively removed these arguments from the Court's consideration, leaving it to question only whether the legislation was rational. At a minimum, a more searching standard of review, exhibited by the *Meyer* Court, would examine whether the legislation being scrutinized actually served the State's purported interests. Of course, it is uncertain whether the asserted right to physician-assisted suicide would be protected under a different framework. Under the rational basis test, however, its demise was almost certain.

B. Medicinal Cannabis

The U.S. Supreme Court decision in *Gonzales v. Raich*[198] is a striking example of economic jurisprudence beaching itself on the sandy shores of an asserted individual right, namely, access to physician-prescribed medicinal cannabis. After being subject to a raid by Federal Marshals, plaintiffs Raich and Monson[199] challenged the Controlled Substances Act[200] ("CSA") as applied to

[197] The OYEZ Project, Washington v. Glucksberg, 521 U.S. 702 (1997), *available at* http://www.oyez.org/cases/case?case=1990-1999/1996/1996_96_110.

[198] 545 U.S. 1 (2005). *Raich*, of course, upheld the Controlled Substances Act as a valid congressional prohibition of "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law." *Id.* at 8 (2005) (quoting Raich v. Ashcroft, 352 F.3d 1222, 1228 (9th Cir. 2003)).

[199] Angel Raich and Diane Monson used medical marijuana to ameliorate symptoms related to a host of illnesses. Specifically, Raich suffers from "an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders. Appellant Monson suffers from severe chronic back pain and constant, painful muscle spasms caused by a degenerative disease of the spine." Raich v. Ashcroft, 352 F.3d 1222, 1225 (9th Cir. 2003). On August 15, 2002, Drug Enforcement Agents came to Monson's home and seized and destroyed her cannabis plants. *Id.* Subsequently, Raich and Monson sought injunctive and declaratory relief prohibiting the enforcement of the CSA on the grounds that their behavior did not constitute commerce within the scope of the Commerce Clause. *Id.*

[200] 21 U.S.C. § 801. The CSA sought to combat the traffic of illicit drugs by establishing a closed regulatory system, which made unlawful the manufacture, distribution, or possession of controlled substance, such as marijuana, in a manner not prescribed by the CSA. In passing the CSA, Congress was particularly concerned with preventing "the diversion of drugs from

medical cannabis used in accordance with California's Compassionate Use Act.[201] Although acknowledging that the Plaintiffs' actions were both *intrastate* and *noncommercial*,[202] the Court, nonetheless, found that the CSA was a valid use of Congress' power to regulate *interstate commerce*.[203] To the uninitiated, the application of the CSA to activity that is admittedly neither interstate nor commercial would appear patently offensive. This apparent anomaly, however, is easily explained by economic rights jurisprudence.

In upholding the CSA, Justice Stevens relied heavily on the Court's 1942 decision in *Wickard v. Filburn*.[204] Wickard challenged the Agricultural Adjustment Act of 1938 (the "Act"), which was classic New Deal legislation, limiting the volume of wheat any individual farm was permitted to grow.[205] In deciding that Congress could even regulate wheat grown for personal consumption, Justice Jackson declared that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[206] The *Raich* Court directly quoted this language from *Wickard* and found that privately cultivated cannabis could have such a

legitimate to illicit channels." 545 U.S. at 12-14 (citing United States v. Moore, 423 U.S. 122, 135 (1975); H. R. Rep., at 22.).

[201] CAL. HEALTH & SAFETY CODE ANN. § 11362.5. The act provided immunity for physicians. "Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes." *Id.* § 11362.5(c). Patients and caregivers were also protected under the act.

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

Id. § 11362.5(d).

[202] *Id.* at 8. Raich received locally grown cannabis from caregivers free of charge, and Monson personally cultivated her own cannabis. *Id.* at 7.

[203] *Id.* at 9.

[204] 317 U.S. 111 (1942). *Wickard* upheld the Agricultural Adjustment Act of 1938 (the "Act"), which,. *Id.* at 115. , but he sowed 23 acres and harvested 239 bushels, which constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $ 117.11 total. *Id.* at 114-15.

[205] The regulations were passed in an effort to stymie excess supply of crops. *Id.* at 114-15. They established a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat per acre for Filburn's 1941 wheat crop. *Id.* Filburn was charged with violating the Act and challenged this violation, urging that his wheat crop was grown wholly for consumption on the farm and, thus, not subject to regulations on commerce. *Id.* at 118.

[206] 545 U.S. at 17 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

"substantial economic effect on interstate commerce" because of the ease with which homegrown cannabis could slip into the illicit drug market.[207]

Although the *Wickard* Court contemplated federal regulation aimed at arguably economic behavior, wheat production,[208] the *Raich* Court was forced to apply the same deferential standard to a virtually indistinguishable case involving a right more at home among individual liberties, access to physician-prescribed medication.[209] Indeed, the plaintiffs in each case were engaged in nearly identical behavior, growing a crop at home for personal consumption. Thus, if Congress could regulate Wickard's wheat, so too could Congress regulate Raich and Monson's weed. Perhaps the cases can be distinguished because Wickard was also selling wheat on the open market. Regardless, this distinction was too slight to warrant even a nod from the Court. At a minimum, these two cases show a connection between economic and noneconomic action; greater respect by the earlier Court for the economic rights of farmers may have resulted in more significant protection for the individual rights of terminally ill patients. Instead, by zealously upholding economic regulation, the Court weakened protections for both individual and economic rights.

Politically, the case resulted in a somewhat topsy-turvy decision. The liberals of the Court, Justices Stevens, Ginsburg, Souter, and Breyer, joined by Justice Scalia, voted *against* access to medicinal cannabis. Meanwhile, the conservatives of the Court, Justices Thomas, Rehnquist, and O'Connor, voted *for* access to medicinal cannabis. When analyzing the problem through the lens of economic rights, however, the apparent anomaly is easily explained. The liberal justices were unwilling, and the conservative justices all too willing, to curtail Congress' power to regulate commerce. If Congress was unable to regulate the actions of Raich and Monson, the modern framework of sweeping economic regulations might be next on the chopping block. In this instance, it should not go unnoticed that the exact piece of *economic* regulation enacted by Progressives of the New Deal era proved fatal to medicinal cannabis, an *individual* right championed by modern liberals.

C. Access to Contraception

The enigmatic distinction between individual and economic rights has also left its mark on reproductive rights. The Court in *Griswold v. Connecticut*[210] upheld the right of an individual to purchase and use contraceptives.[211] It did so, however,

[207] *Id.* at 30-33.
[208] 317 U.S. at 125.
[209] 545 U.S. at 8.
[210] 381 U.S. 479 (1965).
[211] *Id.* at 480.

on an unstable and intellectually dishonest foundation in order to distinguish the case from the unbroken line of economic rights decisions, leading the Honorable Louis H. Pollak to diplomatically refer to the opinion as a "non-starter."[212] From the outset of the opinion, Justice Douglas vowed not to rest the decision upon substantive due process rights,[213] which had been the basis

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[212] Hon. Louis H. Pollak, *"Liberty": Enumerated Rights? Unenumerated Rights? Penumbral Rights? Other?,"* 8 U. PA. J. CONST. L. 905, 908 (2006). *See also*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, at 9 (1971) ("Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it.").

[213] 381 U.S. at 481. In examining the propriety of this decision, it is profitable to explore Justice Douglas' exact language declaring that the case would not rest upon due process rights.

> Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that invitation as we did in [many cases]. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

Id. at 481. In truth, the invitation to which Justice Douglas refers was never issued. Pollak, *supra* note 212, at 910. Counsel for appellants, Thomas I. Emerson, stated during oral argument that "we are not asking this Court to revive Lochner against New York." *Id.*; Transcript of Oral Argument, Griswold v. Connecticut (Mar. 29, 1965), *reprinted in* 61 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 413 (Philip B. Kurland & Gerhard Casper eds., 1975). Then the following colloquy took place:

> The Court: It sounds to me like you're asking us to follow the constitutional philosophy of that case.
> Mr. Emerson: No, Your Honor. We are asking you to follow the philosophy of Meyer against Nebraska and Pierce against the Society of Sisters, which dealt with - Meyer against Nebraska
> The Court: Was the one that held it was unconstitutional, as I recall it, for a state to try to regulate the size of loaves of bread -
> Mr. Emerson: No, no, no.
> The Court: - because people were being defrauded; was that it?
> Mr. Emerson: That was the Lochner case, Your Honor. Meyer against Nebraska held that it was unconstitutional for a state to enact a law prohibiting the teaching of the German language to children who had not passed the eighth grade. And Pierce against the Society of Sisters held that it was unconstitutional for a state to prevent the operation of private schools in a state. And those were both due process cases, were decided as due process cases. . . . All were due process cases which related to individual rights and liberties, and we distinguish those from the cases which involved commercial operations like Lochner against New York and West Coast Hotel against Parrish. We make that very definite distinction.

for the Court's previous protection of economic liberties.[214] By closing off this avenue of analysis, Justice Douglas was forced to find the favored right in unusual places, an approach that has proved to be a precarious basis protection.

Specifically, the *Griswold* Court declared unconstitutional a Connecticut statute that prohibited the use and distribution of contraceptives. In order to avoid breaking his pledge to avoid the Due Process Clause, Justice Douglas asserted that certain rights are protected within penumbra formed by emanations from specific guarantees in the Bill of Rights.[215] The right to privacy, argued Justice Douglas, was one such right.[216] As Justice Douglas further explained, prohibiting married couples from using contraceptives violated this penumbral right to privacy. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[217]

Thus, to avoid relying on the unfashionable Due Process Clause, Justice Douglas was forced first to apply a disingenuous label (privacy) and second to find protection for the proffered right in a fantastic and elaborate hodgepodge

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Id. Thus, Mr. Emerson appealed to the dichotomy between individual and economic rights in an effort to distinguish his case from the disfavored economic rights due process cases.

[214] *See*, *e.g.*, Lochner v. New York, 198 U.S. 45 (1905).

[215] *Id.* at 484.

[216] *Id.* at 484-85 (citations omitted).

> The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' The Fourth and Fifth Amendments were described . . . as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred . . . to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'

Id. Justice Douglas cites *Pierce v. Society of Sisters* and *Meyer v. Nebraska* as upholding the right of association and privacy under the First and Fourteenth Amendments, but neither decision so much as mentioned the First Amendment. Pollak, *supra* note 212, at 914. Nor could they have because they both predated the incorporation of the First Amendment against the states in 1925. *Id.*

[217] *Id.* at 485-86.

of other rights. What was really at issue, of course, was not privacy. It was liberty of action. But Justice Douglas, who lived through the *Lochner*-era, realized that liberty of action, if recognized in this context, would be impossible to distinguish from liberty of action in the economic context. As such, the Court would be forced to recognize less popular rights, such as the right to contract freely, to start a business, or to work as much as one pleases.

Surely the right to use contraceptives at issue in *Griswold* would have been safer under the broad protections of the Due Process Clause. As Justice Harlan's concurrence recognizes, "the proper constitutional inquiry… is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'"[218] Instead, by relying on privacy, *Griswold* would seem to condone a prohibition on the sale, rather than use, of contraceptives; such a ban would be enforced in places of business and would not require police to "search the sacred precincts of marital bedrooms." Subsequent cases have continued to find protection for access to contraceptives.[219] However, the future of such rights based on an unstable foundation is uncertain.[220] Furthermore, these rights could only be strengthened by proper respect for a full spectrum of due process rights, including economic liberties. Indeed, the right to *use* contraceptives is of little use without the right to *purchase* contraceptives. The approach employed by the *Meyer* Court would consider a host of interests, including economic rights, such as the right of the clinic operator to choose a lawful calling, the right of the pharmacist to tender his wares, or the right of the consumer to purchase useful products. Under this holistic view, the right of access to contraceptives would be covered in a protective shroud of constitutional rights, all interlocking to provide meaningful protection to each other.

D. Partial Birth Abortion

[218] 381 U.S. at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
[219] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services Intl., 431 U.S. 678 (1977).
[220] *See infra* Part I.D.

Even more recently, the Court's treatment of economic rights has implicated one of the individual rights most revered among the political left, access to abortion. In 2003, under its power to regulate interstate commerce, Congress passed into law the Partial-Birth Abortion Ban Act[221] (the "PBABA"), which prohibits an abortive procedure medically known as intact dilation and extraction. The plaintiffs in *Gonzales v. Carhart*[222] challenged the PBABA under the modern framework of abortion rights. Finding that it did not present an undue burden to a woman's right to an abortion, the Court upheld the PBABA as a valid congressional act.

The modern right to access to abortion can be traced back to the right to privacy found in *Griswold v. Connecticut*.[223] Justice Douglas, of course, constructed the right to privacy in *Griswold* in order to avoid relying on the Due Process Clause, which had been the Court's previous basis for invalidating so much economic regulation. However, under the framework of a right to privacy, erected to expedite the evisceration of economic rights, the right to partial birth abortion found no meaningful protection. Of course, one can only speculate as to whether the PBABA would have survived under the more robust Due Process Clause in existence prior to the bifurcation of rights; nonetheless, the Court's distaste for economic rights foreclosed several arguments for the *Carhart* plaintiffs.

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[221] 18 U.S.C. § 1531 (2003). The PBA Ban provides that

> [a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment [enacted Nov. 5, 2003].

18 U.S.C. § 1531(a) (2003).

[222] 550 U.S. 124 (2007).

[223] *Eisenstadt v. Baird* extended to unmarried individuals the right to privacy recognized by *Griswold v. Connecticut*. Eisenstadt v. Baird, 405 U.S. 438 (1972). *Roe v. Wade* then declared that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Roe v. Wade, 410 U.S. 113, 153 (1973). *Planned Parenthood v. Casey* then affirmed *Roe's* holding but altered it to prohibit states from imposing an "undue burden" on access to abortion. Planned Parenthood v. Casey, 505 U.S. 833 (1992). Finally, in *Stenberg v. Carhart*, the Court struck down a state-imposed ban on partial birth abortion, according to the Court, imposed an undue burden on access to other types of abortions and lacked an exception for the health of the mother. Stenberg v. Carhart, 530 U.S. 914, 930-51 (2000).

A theory of rights that equally respects economic and individual interests, as exhibited by the *Meyer* Court, would consider a host of interests encompassed by the concept of "liberty" and not an artificial analysis of whether a right is "fundamental." As the *Meyer* Court would have recognized, the rights at stake in *Gonzales v. Carhart* are diverse. One may frame the debate in terms of a physician's right to pursue lawful employment, a consumer's right to purchase services, or the right of individuals to freely contract among themselves. The subjugation of economic rights, however, has essentially removed these arguments from the Court's consideration and left individuals to grasp instead at a guest list of favored rights, such as privacy.

Access to partial birth abortion could also find more significant protection if economic rights were more respected within the realm of Commerce Clause jurisprudence. Indeed, even though the parties did not raise the issue, Justice Thomas' concurrence in *Gonzales v. Carhart*, joined by Justice Scalia, signaled an openness to the argument that the PBABA exceeded Congress' power to regulate interstate commerce.[224]

Originally, "commerce" consisted solely of "selling, buying, and bartering, as well as transporting for these purposes."[225] Thus, under its power to regulate commerce, Congress could only regulate "selling, buying, and bartering" and not activities such as manufacturing and agriculture.[226] Perhaps due to the amorphous nature of economic actions, or perhaps due to the Court's eagerness to uphold economic regulation, the Commerce Clause now applies to industry in nearly all its forms.[227] Justice Stevens even questioned during oral arguments whether the PBABA, passed under Congress' power to regulate commerce, would apply to free clinics.[228] Justice Stevens, author of the Court's

[224] 550 U.S. at 169 (Thomas, J., concurring) ("I also note that whether the Act constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.") (citations omitted).

[225] *See supra* note 142 and accompanying text.

[226] *See supra* note 143 and 143 and accompanying text.

[227] From 1945 to 1995, the Supreme Court did not strike down a single piece of legislation on the grounds that Congress surpassed its Commerce Clause powers. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 83-84 (1999);

[228] Transcript of Oral Argument at 21-22, Gonzales v. Planned Parenthood (Nov. 8, 2006) (No. 05-1382).

> JUSTICE STEVENS: General Clement, [t]hat brings up a question I was intending to ask you. I notice the finding says nothing about interstate commerce but the statute says any physician who in or affecting interstate commerce performs the procedures. Does that mean that the procedure is

majority opinion in *Raich*, could have easily answered his own question. *Raich*, relying on *Wickard*, upheld the application of the Commerce Clause to noncommercial intrastate action. Thus, the PBABA would seem to apply even to clinics that do not operate for profit.

And with an expansive view of the Commerce Clause, the application of the PBABA to free clinics is only natural; any behavior can be said to effect commerce on some level. To uphold a ban on partial birth abortions, even in free clinics, a court need only hypothesize about the various ways in which partial birth abortions may affect interstate commerce. Undoubtedly, this procedure requires the use of products – from catheters to curettes, forceps to fetoscopes – that are shipped in interstate commerce. And by the same rationale used in *Wickard* and *Raich*, abortions at free clinics may affect the national commercial market for abortions by reducing their demand in the open market. Most significantly, an abortion may be said to effect commerce by preventing the consumption of goods accompanying the birth, and life, of a potential consumer. With any of these speculations and an expansive view of the Commerce Clause, the constitutionality of the PBABA as a valid exercise of Congress' power to regulate interstate commerce is practically a foregone conclusion.

However, under a more modest interpretation of the Commerce Clause, consistent with meaningful protection for economic rights, Congress would not have the power to prohibit partial birth abortions. In fact, the Court in *United States v. Lopez*[229] and *United States v. Morrison*[230] made broad strides toward the curtailment of the Commerce Clause. Certainly, if the Commerce Clause did not reach manufacturing or agriculture, as was the case before the subjugation

> performed in a free clinic, as opposed to a profit organization, it would not be covered?
>
> GENERAL CLEMENT: Justice Stevens, I don't think we have taken, the Federal Government hasn't taken a definitive position on that. I think it could be interpreted either way. I think my understanding is the face context, a free clinic would be covered. There's not a jurisdictional element in the face statute. So there may be differences as, in application.
>
> JUSTICE STEVENS: But how could the Commerce Clause justify application to a free clinic? I don't understand.

Id.

[229] 514 U.S. 549 (1995) (striking down congressional regulation of gun possession near schools as beyond Congress' power to regulate commerce).

[230] 529 U.S. 598 (2000) (striking down congressional regulation of domestic violence as beyond Congress' power to regulate commerce).

of economic rights, the PBABA would also be beyond Congress' power to regulate commerce and, thus, be found unconstitutional.

Gonzales v. Carhart provides an important illustration of the interconnection of individual and economic rights. Here, the legislative deference preached throughout the Progressive Era to justify sweeping economic regulation led to the marginalization of the Due Process Clause and the expansion of the Commerce Clause. As a result, plaintiffs, such as those in *Carhart*, are left with a smaller shield, and Congress a larger sword, when congressional action and individual rights inevitably clash. If nothing else, *Carhart* shows that the subjugation of economic rights has led to diminished protection for certain individual rights. By the same reasoning, more meaningful protection for economic rights may lead to more significant protections for many individual rights. Not surprisingly, it is the conservative justices who are most likely to advocate stronger protection for economic rights.[231] Although it remains to be seen, it is noteworthy that on this one issue abortion rights activists may become bedfellows with conservative justices.

IV. DISCUSSION

A. Perhaps Economic Rights Are No Different From Individual Rights

Arguably, the distinction between individual and economic rights is a false one.[232] Rights spring forth from human interests, and human interests cannot

[231] For example, in the majority opinions of *United States v. Lopez* and *United States v. Morrison* were Justices Thomas, Scalia, Rehnquist, Kennedy, and O'Connor. Dissenting in both were Justices Stevens, Ginsburg, Souter, and Breyer.

[232] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1373-74 (2d. ed. 1988); Jonathan R. Macey, *Some Courses and Consequences of the Bifurcated Treatment of Economic Rights and 'Other' Rights Under the United States Constitution*, 9 SOC. PHIL. & POL. 141, 145-55 (1992); Joseph Becker, Note, *Procrustean Jurisprudence: An Austrian School Economic Critique of the Separation and Regulation of Liberties in the Twentieth Century*, 15 N. ILL. U. L. REV. 671, 705-712 (1995). Austrian Economics explains that the separation of liberties is a scientific impossibility because (1) all human action is economic; (2) all actions or liberty require property; (3) the regulation of property necessarily devalues the individual owner of property; (4) it is impossible to know the true motive of an actor and whether the action is an end or a mean; (5) judicial devaluation of economic liberties is inherently pareto inferior; and (6) resources required to engage in individual rights will be scarce if not protected by property rights and allocated by market mechanisms). *Id.* Becker also argues that the rights separation scheme creates uncertainty and economic stagnation as courts embracing this fallacy will produce arbitrary judicial decisions, causing spending to shift from investment to consumption and resulting in lower levels of economic growth. *Id.* at 712. From an Austrian Economics perspective, socio-economic regulation would not even pass the rational basis test because no legislature could rationally know that redistributionist legislation would result in a paraeto-superior exchange, unless,

be neatly splintered into purely economic or noneconomic categories.[233] Realistically, people are not comprised of diametrically opposed economic and noneconomic beings; thus, many human actions are motivated by a combination of economic and noneconomic interests.[234] As Professor Shiffrin would put it, "[a] person listening to commercial advertising is not hermetically sealed off from his or her place in the world -- as homo economicus."[235] As Justice Blackmun observed, the interests of contestants in a labor dispute may implicate the right to assemble as well as so-called economic rights.[236] Likewise, the motives of a political candidate or an independent retailer may consist of a mixture of economic and noneconomic interests. If the motive of the actor is even the right query, any attempt to capture the precise bounds of an actor's interests is surely rife with complications.[237]

More so, in a market economy, economic gains are no more than a mere commodification of one's ability to exercise individual liberties.[238] A taxi cab driver does not seek his paycheck as an end unto itself.[239] More likely, he is seeking the food it will allow him to purchase and the shelter he is able to provide for his family. Thus, any regulation on his so-called economic rights necessitates some measure of infringement on other activities considered to be noneconomic.[240]

Likewise, the ability to exercise many individual rights directly depends on having the economic wherewithal to purchase the necessary accoutrements. As

Becker muses, "minimizing societal wealth is the judicially desired 'rational' end." *Id.* at 714-16. *Cf.* PURDUE, REEXAMINATION OF DISTINCTION 1252 (noting the difficulty in distinguishing between conduct regulating rules versus loss allocation rules). "[C]ompensation and deterrence cannot be separated." *Id.*

This Article will focus on the argument that economic rights cannot be neatly distinguished from noneconomic rights as a matter of form. For a useful treatment of the related argument that economic rights are equally as important as noneconomic rights, *see, e.g.*, Siegan, *Protecting Economic Liberties*, *supra* note 9, at 473-81.

233 *See* LUDWIG VON MISES, HUMAN ACTION 13-14 (3d rev. ed. 1966).

234 *See* Shiffrin, *supra* note 84, at 1222.

235 *Id.* (criticizing the Court's decision in *Central Hudson* by arguing that "[t]hose who paid attention to Central Hudson's promotion of electricity did not process its message by shunting the message into an exclusive economic compartment entirely removed from all thinking about energy problems"). Likewise, Professor Shiffrin notes that it is "curious" to describe a divorce attorney's advertisement as relating solely to the listener's economic interests. *Id.*

236 425 U.S. at 763.

237 VON MISES, *supra* note 233, at 92-93, 96, 233-34.

238 *See* HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM 15 (1989); Macey *supra* note 232, at 148.

239 *See* VON MISES, *supra* note 233, at 233-34.

240 *See* Hans-Hermann Hoppe, *The Ultimate Justification of the Private Property Ethic*, LIBERTY, Sept. 1988, at 21.

Murray Rothbard points out, "the human right of a free press is the property right to buy materials and then print leaflets or books and to sell them to those who are willing to buy."[241] Similarly, the right to use contraceptives depends upon the manufacturer having the right to produce contraceptives as well as the consumer having the right to purchase contraceptives.[242] We may enjoy as much privacy in the bedroom as we like, but the enjoyment of this right is necessarily diminished for some if the government remains free to ban the sale of erotic devices to adults, as Alabama has recently done.[243]

In *Lynch v. Household Finance Corp.*, Justice Stewart realized the fallacy of attempting to distinguish economic from personal rights.

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.[244]

In the parlance of our times, does a blogger engage in commercial speech when she posts a review of an album on her website? Perhaps so, according to the Federal Trade Commission; new regulations require bloggers to disclose endorsements and promotional items they have received.[245]

At their core, economic rights and individual rights share the same concern – liberty of action. The naked truth is that some actions for economic gains are indistinguishable from actions motivated by other concerns.[246] Just as no court

241 MURRAY N. ROTHBARD, FOR A NEW LIBERTY 43 (rev. ed. 1978).
242 *See* Hoppe, *supra*.
243 Williams v. Atty General of Ala, 378 F.3d 1232 (11th Cir. 2004), *aff'd*, 478 F.3d 1316 (11th Cir. 2007) (upholding a ban on the commercial distribution of certain sexual devices and finding the law rationally related to the government interest of preserving and promoting public morality).
244 Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).
245 FTC Guidelines Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2009), *available at* http://ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf.
246 VON MISES, *supra* note 233, at 92-93, 96, 233-34; *see supra* Part II.

can define commercial speech as separate from political speech,[247] no legislature can purport to distinguish labor for money from a labor of love. As far back as 1688, John Locke understood that there was no clear distinction between property and liberty interests, instead referring to "lives, liberties, and estates, which I call by the general Name, 'Property.'"[248] As long as laws are aimed at actions and not motives, any attempt to adjudicate rights based on economic or noneconomic categories will be a mere semantic flimflam.[249]

As a testament to the inextricable link between the two, the jurisprudence attempting to distinguish and dismiss economic rights has had a visible impact on many rights more commonly considered individual in nature.[250] The Court's zealous evisceration of economic rights, such as freely contracting or earning an honest living, has diminished protections for even the most sacred of individual rights.[251] Although conceived to dispense claims of economic rights, the rational basis test has proven to be the demise of rights more properly traditionally individual, such as access to physician-assisted suicide and medicinal cannabis.[252] Likewise, the hearty expansion of the Commerce Clause has been the basis for congressional regulation of decidedly noneconomic action.[253] This outcome, however, does not surprise one who understands the interconnected nature of so-called individual and economic rights;[254] a government that has been granted carte blanche to regulate one sphere can play fast and loose with

247 *See supra* Part I.B.

248 John Locke, The Second Treatise of Government § 123 (Peter Laslett ed., 2d ed., Cambridge Univ. Press 1967) (1688).

249 M. C. Jensen and W. H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," *Journal of Financial Economics*, vol. 3 (1976), at 307, n. 6 ("the introduction of the wholly false distinction between property rights and human rights in many policy discussions is surely one of the all time great semantic flimflams").

250 Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2004 CATO SUP. CT. REV. 9, 13 (2004) (arguing that the Constitution protects both economic and individual liberties and that the Court's repudiation of economic rights has weakened the foundation of personal rights by forcing "inept" opinions, such as *Griswold v. Connecticut*). Dellinger notes that "[t]he failure to protect either economic or personal liberty inevitably weakens both" because deference to the legislature on economic matters has taken away the argument that the government must justify laws amounting to an intrusion upon unenumerated liberties. *Id.* at 18. *See also* Macey *supra* note 232, at 157 (arguing that the Court's failure to protect economic liberties has led to the proliferation of special interest legislation).

251 *See supra* Part III.C-D.

252 *See supra* Part III.A-B.

253 *See supra* Part II.D.

254 *See supra* Part IV; Macey *supra* note 232, at 149 ("The political reality is that noneconomic freedom does not last long where economic freedom has been destroyed.); Margaret Jan Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1014-15 (1982) (arguing that economic rights facilitate the exercise of speech and voting).

nearly all human rights.[255] Thus, an attempt to safeguard one group of interests, while offering the other a subordinate place in the hierarchy of rights, may have the collateral effect of sacrificing both to some extent.[256] Perhaps the selective protection of rights creates a sort of Maginot Line, easily circumvented by excessive regulation in less favored areas.[257] Even while professing bold protection for speech, a society may nonetheless approve of a host of economic regulations -- such as zoning ordinances, licensing requirements, distribution restrictions, advertising controls, price restrictions, or antitrust regulations -- which impact a newspaper publisher as much, if not more, than direct censorship.[258] The Austrian economist Ludwig Von Mises warned of the inherent danger in bifurcating liberties into economic and noneconomic categories:

> The fallacy of this argument stems from the spurious distinction between two realms of human life and action, entirely separated from one another, viz., the 'economic' sphere and the 'noneconomic' sphere . . . .
>
> . . .
>
> . . . as soon as the economic freedom which the market economy grants to its members is removed, all political liberties and bills of rights become humbug. Freedom of the press is a mere blind if the authority controls all printing offices and paper plants. And so are all the other rights of men.[259]

Thus, the exercise of speech may be impaired not only by the formal censorship of speech itself, but by increasing the cost of exercising that speech.[260] Alluding to occupational licensing schemes, Professor McCloskey notes that "Mark Twain would surely have felt constrained in the most fundamental sense, if his youthful aspiration to be a river-boat pilot had been

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255 *See supra* Part IV.

256 *See supra* Parts III-IV. *Cf.* MARY ANN T. GLENDON, THE IMPOVERISHMENT OF POLITICAL DISCOURSE 24-25 (1991) (arguing that an emphasis on individual rights hampers women's achievement of economic rights).

257 See, e.g., Richard A. Epstein, *Takings: Of Maginot Lines and Constitutional Compromises*, in LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 173 (Ellen Frankel Paul & Howard Dickman, eds, SUNY, 1990).

258 ROTHBARD, *supra* note 241.

259 VON MISES, *supra* note 233, at 285, 287.

260 *See id.*

frustrated by a State-ordained system of nepotism."[261] Professor McCloskey's analogy illustrates that this "cost" imposed on expression is not always a financial burden; it may easily be a personal burden that one is forced to suffer in the name of economic regulation.

B. Solution: Protect Our Body Of Rights As A Whole

Given the interconnected nature of rights, courts should strive to analyze legislation under a more holistic view of our entire body of rights, considering possible effects on both economic and individual spheres. If reluctant to abandon this dubious distinction in its entirety, courts should, in the first instance, account for potential collateral consequences when determining whether legislative action is "rational."[262] The body politic should also realize that valuing all constitutional rights consistently would only strengthen protections for the rights one holds most dear.

Ideally, courts should abandon the fictional distinction between individual and economic rights and recognize that both are equally important constitutional rights.[263] Courts, however, may find lukewarm the idea of weaning themselves from the individual/economic rights cleavage. Either for convenience or for fear of being themselves subject to an ill-fitting label, such as judicial activist, courts will likely continue labeling and adjudicating rights according to this suspect nomenclature. If loathe to upset almost a century of precedent, a court may, at the very least, find additional grounds for striking down already offensive legislation by setting forth a comprehensive account of all interests at stake. When reviewing economic regulation for rationality, a court may inventory the many important interests at stake, such as those of the producer, the consumer, and the individual. As exemplified by the *Meyer* Court, a holistic view of rights, including both economic and individual, would provide meaningful protection for both on an intellectually honest foundation. Such an approach, at a minimum, may transform the rational basis test into a meaningful standard of review. With a complete accounting of affected interests, a court may find that many legislative actions are not even rationally related to their purported government interests.

The body politic should also take heed of the collateral, unintended consequences of advocating deference to the legislature for laws affecting

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[261] *See*, Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46 (citing Kotch v. Pilot Commissioners, 330 U.S. 552 (1947) (upholding state occupational licensing law after acknowledging its allowance for nepotism)).

[262] *See* Becker, *supra* note 232 (arguing that the subjugation and regulation of economic rights is never rational).

[263] Siegan, *Protecting Economic Liberties*, *supra* note 9, at 473-81.

disfavored rights. As history has shown, the legislative deference one preaches may be the very standard under which one's most revered rights are summarily dismissed.[264] Only by recognizing that economic interests are no different from, and no less important than, other personal interests, can any political ideology acquire the consistency necessary to achieve its own agenda. Indeed, it may only be through equal reverence to both "economic" and "individual" rights that we can ever expect to have meaningful protection for either.

[264] *See supra* Part III.