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

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INTRODUCTION

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

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

[2] *See* Brennan, *supra* note 1, at 491. State courts repeatedly emphasize their independent ability afford greater protection under their own constitutions than is federally required. *See, e.g.*, People v. Dunn, 564 N.E.2d 1054, 1057 (N.Y. 1990) ("[T]his Court has not hesitated to interpret article I, § 12 independently of its Federal counterpart when the analysis by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions.").

Brennan focused on three areas in his article: equal protection,[3] procedural due process protections of governmental benefits[4] (often labeled the "new property"[5]), and the "specific guarantees of the Bill of Rights,"[6] especially criminal procedure.[7] In these areas state courts were "now beginning to emphasize the protections of their states' own bills of rights."[8] He saw the development as something of recent vintage that needed to grow. Other writings of the time entitled this development the "New Judicial Federalism."[9]

Justice Brennan's exhortation was a needed recognition of the importance of state constitutions in our system of federalism, and a timely reminder to the legal community not to forget our dual system of constitutionalism.[10] That being said, for some inexplicable reason Justice Brennan completely omitted a field of state constitutional law where states had been actively pursuing this "New Judicial Federalism" for years. The omission is truly staggering. The field he neglected to add to the three mentioned above is the protection of economic liberties. These liberties include the right to contract and the right to make a living, especially as protected through the doctrine of "economic substantive due process."[11] Justice Brennan even went so far as to suggest that this field did not exist, asserting "courts do not today substitute their personal economic beliefs for

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[3] *See id.* (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and *Baker v. Carr*, 369 U.S. 186 (1962), among other cases).

[4] *See id.* 491-92 ("The root requirement of due process is that, except for some extraordinary situations, as individual be given an opportunity for a hearing before he is deprived of any significant 'liberty' or 'property' interest.").

[5] *See* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (citing Charles A. Reich, *The New Property*, 73 Yale L. J. 733 (1964)).

[6] *See* Brennan, *supra* note 1, at 492.

[7] *See id.* (noting that the incorporation of many aspects of the Bill of Rights against the states has been particularly strong in "the administration of the criminal justice system").

[8] *Id.* at 495.

[9] *See, e.g.*, Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

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

[11] *See infra* Part I.A.

the judgments of our democratically elected legislatures."[12] By "do not today" he was referencing the practices of the Supreme Court during the "*Lochner* era" where the Court utilized the Constitution's due process clauses to strike down economic regulations and protect economic liberties.[13]

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

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[12] Brennan, *supra* note 1, at 490-91 (citing Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). It might be suggested that Justice Brennan was referring to federal courts with this statement, but then why the complete lack of any reference to recent state court protection of economic liberties?

[13] *See infra* notes 69-73 and accompanying text.

[14] *See infra* notes 74-81 and accompanying text.

[15] Many scholarly articles have documented the preservation of economic substantive due process in the state courts. For those before 1977 see, for example, A.E. Dick Howard, *State Courts & Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 883 (1976) ("[N]otwithstanding the Supreme Court's post-1937 'hands-off' posture in the economic sphere, studies of state court decisions have made it clear that substantive due process has lived on in the states."); Note, *Counterrevolution in State Constitutional Law*, 15 STAN. L. REV. 309, 321 (1963) ("The increasing frequency of such decisions indicates that economic due process is neither dead nor dying and that it is the United States Supreme Court, rather than the state courts, which is resisting the current drift in constitutional interpretation."); John A.C. Hetherington, *State Economic Regulation & Substantive Due Process of Law*, 53 NW. U. L. R. 226, 226-27 (1958) ("Since the abandonment by the Supreme Court of substantive due process as a test of the validity of state economic regulation, there have been many conflicting decisions in the substantive due process field in the state courts."); John A. Hoskins & David A. Katz, *Substantive Due Process in the States Revisited*, 18 OHIO ST. L.J. 384, 386 (1957) ("These state courts continue to insist, as did the pre-1934 federal judiciary, that legislative enactment of state public policy be tempered by what the state courts believe to be desirable, effective and proper."); Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L, REV. 91, 92 (1950) ("[S]ome state supreme courts when interpreting the due process clause or its equivalent in their state constitutions have continued to interfere freely with legislative policies.").

The fact that these numerous studies exist has not prevented more recent studies from ignoring post-New Deal economic substantive due process under state constitutional law. *See, e.g.*, Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1412 n.5 (1998). Shapiro cites G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 165-66 (1998), for the proposition that from 1950-1969 "state courts relied on state constitutions to afford greater protection than was available under the [United States] constitution only 10 times." *Id.* As this Article illustrates, that proposition is completely false. It may stem from an understanding of rights that only encompasses those embraced by Justice Brennan, *see supra* notes 3-8 and accompanying text, and rejects economic liberties. If that is so, it would be helpful for such studies to point that understanding out.

from 1937 through to the present day, almost every state court of highest review has interpreted its own constitution's due process clause, and similar provisions, to strike down economic regulations. These state courts have done so even when explicitly acknowledging that the United States Supreme Court has interpreted the equivalent language in the United States Constitution to not extend such protection of economic liberties.[16] This protection includes the invalidation of economic regulations in many different areas of economic affairs, such as occupational licensing, advertising, and price controls.[17]

Past studies of this phenomenon have covered all of these areas and have given a great deal of in-depth analysis of specific state court decisions that this Article cannot match.[18] What all past studies have lacked, however, is a systematic attempt to catalog every economic substantive due process opinion under state constitutional law since the close of the *Lochner* era. This Article does just that. It presents every instance of a state court of highest review protecting economic liberties through the use of the doctrine of economic substantive due process, as that term is defined in Part I, under state constitution law since 1940.[19]

The absence of a full-fledged "compendium" of economic substantive due process cases under state constitutional law has frustrated attempts to more deeply inquire into how frequently states courts have protected economic liberty via economic substantive due process, and what the trends in that frequency have been. Admitted one scholar in 1981, "[n]o single study has purported to collect all the state cases in this area . . . ."[20]

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[16] *See especially infra* Appendix A (listing all cases uncovered by this study where state courts have used economic substantive due process to protect economic liberties, with the exception of land use zoning cases); *see also infra* notes 172-184 and accompanying text (providing examples of state courts protecting economic liberties even when they acknowledge other courts would not).

[17] *See infra* Part I.B.2.

[18] *See, e.g.*, Joshua A. Newberg, *In Defense of* Aston Park*: The Case For State Substantive Due Process Review of Health Care Regulation*, 68 N.C. L. REV. 253, 257-59 (1990); Gabriella S. Tussusov, *A Modern Look at Substantive Due Process: Judicial Review of State Economic Regulation Under the New York and Federal Constitutions*, 33 N.Y.L. SCH. L. REV. 529, 567 (1988).

[19] Appendix A presents the complete enumeration of the relevant cases. The inclusion of only state courts of highest review, which are generically referred to below as "state supreme courts," instead of *all* state courts, is made for reasons of research convenience. LEXIS and WESTLAW searches of fifty courts covering sixty-five years of case law is long enough for one researcher. The Author invites other scholars, but this time with an army of research assistants, to complete the job in the state lower courts. He suspects, however, that the trends (although, obviously, not the number of cases) would not differ significantly.

[20] Kirby, *supra* note 10, at 252; *see also* Tussusov, *supra* note 18, at 530 n.7 ("While no single study has attempted to collect all the state decisions illustrating state judicial

Another, admitting she lacked the benefit of an overall analysis data set, stated that "an overwhelming majority of states *appear* to have viable precedents for judicial invalidation of economic measures on due process grounds."[21] Not only this, but because she lacked a comprehensive set of cases in the area, it was reasonable of her to conclude, in 1988, that there was a "*growing* national trend on the state level toward active review" of economic regulation.[22] This study's data illustrate that by 1988 the actual trend was moving in the opposite direction.

Pursuant to its data, this Article presents the discovery that in the 1970s, and especially the 1980s, state court enforcement of economic substantive due process began to wane. This discovery leads one to believe that, in spite of his omissions, perhaps Justice Brennan was on to something when he omitted an area of state constitutional law otherwise worthy of the "New Judicial Federalism." This does not mean that by 1977 economic substantive due process under state constitutional law was dead, just that it was about to enter a much leaner stage than before.[23]

This Article begins in Part I with the methodology used in determining when a case falls under the definition of "economic substantive due process" used here. Part II opens with a brief history of the doctrine of economic substantive due process and of how it found favor in the *Lochner* era of the early Twentieth Century. It then moves on to an overview of state court applications of economic substantive due process since 1940 and of the different contexts in which it has arisen. Part III presents the state-by-state findings of the study, summarizing the data included in the Appendixes and highlighting a few states that are particularly revealing of the trends in economic substantive due process at the state level over the last sixty-five years.[24] Finally, in Part IV the Article addresses the question

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activism in the economic area, an overwhelming majority of states appear to have viable precedents for judicial invalidation of economic measures on due process grounds.").

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

[22] Tussusov, *supra* note 18, at 567. The Author himself was also taken in by the seductive allure of isolated state cases not set against a comprehensive study of trends in the law. *See* Anthony B. Sanders, *Comment: Exhumation Through Burial: How Casket Regulations Unearthed Economic Substantive Due Process in* Craigmiles v. Giles 88 Minn. L Rev. 668, 678 (2004) (stating that federal *and* state courts have recently enforced the doctrine of economic substantive due process to a greater degree). The trend in lower federal courts, however, does appear (but, yes, only "appear") to be on the upswing, despite the Supreme Court's refusal to revive it. *See id.* at 678-80 (listing recent federal cases striking down economic regulations under a substantive reading of the Fourteenth Amendment's Due Process Clause).

[23] *See infra* notes 135-146 and accompanying text.

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

of why the rate at which state courts used economic substantive due process dropped so precipitously in the 1970s and 1980s. What the Article suggests is that in the wake of the non-economic substantive due process case *Roe v. Wade*,[25] and similar "right to privacy" cases, former defenders of the doctrine recognized its similarity with that underlying *Roe*. These former defenders of economic substantive due process, and otherwise supporters of the free market, chose to then shy away from the doctrine instead of pursuing the more problematic task of distinguishing it from its non-economic cousin.

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

Before diving into the findings of this study, or presenting its historical background, this Part briefly outlines the study's methodology. The following explains what qualifies a case to be included in the study. This is more complicated than it may at first appear, and is highly contingent on the right that a court protects, and the constitutional basis the court uses in protecting that right.[26]

A. What is Under the "Economic Substantive Due Process" Umbrella

This study is a comprehensive review of when state courts of highest review have struck down economic regulations through the doctrine of economic substantive due process under state constitutional law since 1940. Simply put, the study has included cases that fall under the rubric of *Lochner* era jurisprudence. The cases that qualify for this understanding are

[25] 410 U.S. 113, 153 (1973).

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

instances of state courts protecting Lockean rights of an economic nature.[27] Whatever the merits of "natural rights theory," it is these rights, i.e. the right to contract, to hold property, to be free from government-imposed monopolies, etc., that the *Lochner*-era court often protected.[28] The *Lochner*-era court, and, indeed today's United States Supreme Court, also protected other "natural rights" of a non-economic nature, but they fall outside of the scope of this study.[29] For the sake of convenience this Article employs the term "economic liberties" in referring to these "natural rights of an economic nature."

For the most part the *Lochner* court protected economic liberties through the Due Process clauses of the Fourteenth and Fifth amendments. On the whole, state courts that have struck down economic regulations on the grounds that they violate an individual's economic liberties have also

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[27] This term, of course, relates back to English Enlightenment philosopher John Locke. Locke argued that prior to the institution of government every man has the right to preserve himself, and lacks the right to "take away or impair the life, or what tends to the preservation of life, the liberty, health, limb, or goods of another." JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 6 (Thomas P. Peardon ed., Bobbs-Merrill Co., Inc. 1952) (1690). That is, without government, one has a right to one's own life, liberty, and property, but not to governmental protection of them. For a discussion of "Lockean" rights and their place in interpreting the United States Constitution see RICHARD A. EPSTEIN, TAKINGS 10-18 (1985) (attempting to interpret the Takings Clause in a way "which is consistent with the basic Lockean design); Randy E. Barnett, *The Proper Scope of the Police Power*, 72 NOTRE DAME L. REV. 429, 443 (2004) ("[T]he basic concept of natural rights was clear: Natural or inherent rights are the rights persons have independent of those they are granted by government . . . .").

[28] *See* cases listed *infra* notes 69-73 and accompanying text. Some scholars, most notably Professor Sunstein, take the view that the *Lochner*-era Court was not in the business of protecting Lockean rights so much as enforcing the proper scope of the police power set against the baseline of the common law. *See, e.g.* Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 882 (1987). Another set have argued that *Lochner* era decisions involved the judiciary's attempt to combat class-legislation, and not to preserve *laissez-faire*. *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE 6-10 (1993) (reviewing revisionist legal historians and their contentions that the courts of the time scrutinized legislation through an equality context). *But see* Barnett, *supra* note 27, at 489 (stating that Gillman misses how "the resistance to class-based legislation was seen as a means to the protection of natural rights, rather than an end in itself"). The Author notes these alternate views here, but contends that they do not alter which cases should be included in this study. Whether the cases in Appendix A were decided in order to protect the public from special interests, or in order to defend the rights of certain members of the public, the end result is that the courts struck down economic regulations and in so doing protected economic liberties.

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

grounded their opinions in due process clauses.[30] This is not entirely true, however. Many, many times state courts have struck down economic regulations because the regulations are an illegitimate use of the "police power."[31] The "police power" plays a central role because the government will usually argue that its actions are justified under its authority to protect the public health, safety, welfare, and morals—otherwise known as its police power authority.[32] This is especially true when it comes to courts examining local ordinances. Often a state's constitutional structure is such that a local government only possesses the powers ceded to it by the state legislature.[33] One often-ceded power is that of promoting the public health and safety, or some similar area.[34] A court will typically inquire into what this ceded "police power" encompasses and whether the challenged governmental action is a valid, or invalid, use of the power.[35] When a court invalidates an economic regulation in this manner the result is the protection of an economic liberty. For the same reasons this study includes cases that do not mention the words "police power" or "due process" at all but merely conclude that a regulation is "arbitrary and unreasonable,"[36] or "not affected

[30] *See* Howard, *supra* note 15, at 882.

[31] *See, e.g.*, Hand v. H & R Block, Inc., 528 S.W.2d 916, 923 (Ark. 1975) (concluding that franchise regulation was effectively a minimum price requirement and beyond the state's police power); United Interchange, Inc. of Mass. v. Harding, 145 A.2d 9497 (Me. 1958) (striking down bar on real estate advertising in magazines as beyond the police power).

[32] A typical description of the police power, and its legitimate uses, appearing in the cases appearing in Appendix A is the following from the Florida Supreme Court's opinion in *Larson v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958): "It requires no extensive citation of authorities to support the proposition that in order to justify the exercise of the police power the Legislature must be supported by some sound basis of necessity to protect the public morals, health, safety or welfare." Compare the very similar language from *Lochner* itself: "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. . . . the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . ?" Lochner v. New York, 198 U.S. 45, 56 (1905).

[33] *See, e.g.*, Mont. Const. art. XI §§ 4-6 (ceding limited power to local governments, except when a local government specially petitions for greater powers, or where the legislature grants them).

[34] *See, e.g.*, City of Osceola v. Blair, 2 N.W.2d 83, 84 (Iowa 1942) (noting the legislature's grant of power to municipal corporations "to pass ordinances necessary for the safety, health, prosperity, order, comfort, convenience, etc., of its inhabitants").

[35] *See, e.g.*, *id.* (characterizing ordinance as "an unreasonable restraint on a lawful business").

[36] *See, e.g.*, City of Jackson v. Murray-Reed-Slone & Co., 178 S.W.2d 847, 848 (Ky. 1944) (determining ordinance preventing restaurant from opening between midnight and 4 a.m. is arbitrary and unreasonable); Lutz v. Armour, 151 A.2d 108, 111 (Pa. 1959) (determining

by a public interest."[37] The same is true for various other formulations state supreme courts have used to strike down economic regulations without citing to specific constitutional regulations.[38] All of these formulations are used to protect Lockean economic rights, and therefore this study includes them.[39]

Lawyers whose entire experience with constitutional law consists of reading the United States Constitution and Supreme Court interpretations of it might be surprised to discover that "due process" clauses are only one of the provisions through which state constitutions protect economic liberties. Each state constitution presents, of course, a different text with different clauses to interpret. Not only that, but a few state constitutions lack a "due process" clause entirely.[40] In spite of this, since 1940, courts in all states lacking a due process clause have protected economic liberty through the use of "economic substantive due process,"[41] and courts in many others have used constitutional clauses to protect economic liberty in addition to their respective due process clauses.

The states lacking a "due process" clause usually have a "law of the land" clause that its highest court has interpreted as possessing an identical meaning to "due process."[42] In addition, some states have used other,

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that ordinance banning the importation of garbage into a town is arbitrary and unreasonable).

[37] *See, e.g.*, Estell v. City of Birmingham, 286 So.2d 872, 876 (Ala. 1973) (concluding anti-scalping law to not be affected with a public interest and thus unconstitutional in the limitations it places on ticket resellers); Strickland v. Ports Petroleum Co., Inc., 353 S.E.2d 17, 18 (Ga. 1987) (invalidating Below Sales Cost Act because the oil industry is not affected with the public interest).

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

[39] For a full discussion of the historical understanding of the "police power" and its relation to the protection of natural rights, see sources cited *supra* in note 28.

[40] *See infra*, note 42 and accompanying text.

[41] The only three states that have not protected economic liberty through economic substantive due process under state constitutional law since 1940 are Alaska, Hawai'i, and Rhode Island. *See infra* Appendix B. The constitutions of all three have a "due process clause." *See* Alaska Const. art. I § 7; Hawai'i Const. art. I § 5; R.I. Const. art. I § 2.

[42] *See, e.g.*, Commonwealth v. Lyons, 492 N.E.2d 1142, 1144 (Mass. 1986) ("The phrase 'law of the land' does not refer to the statutory law of the Commonwealth, as it exists from time to time. Rather, if refers, in language found in Magna Charta, to the concept of due process of law."); Commonwealth v. Devlin, 333 A.2d 888, 891 (Pa. 1975) ("It has been a

sometimes unique, clauses to protect economic liberties. Since 1940 state supreme courts have found economic regulations unconstitutional because they violate Arkansas' "Individual Liberty,"[43] and anti-monopoly[44] clauses, Kentucky's "Absolute and Arbitrary Power" Clause,[45] Montana's "Life's Basic Necessities" Clause,[46] and Pennsylvania's "Declaration of Rights,"[47] to name a few. Many cases interpreting these clauses do essentially the same thing: conclude that a regulation impermissibly violates an individual's economic liberties.[48]

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

B. What is not Included in This Study

Although this study includes cases where state supreme courts have protected economic liberties under due process clauses, it purposely does not include many other cases where state supreme courts have done much the same thing under other clauses. A court may strike down an economic regulation on, of course, a variety of constitutional grounds. For instance, federal courts may employ the Due Process clauses of the Fifth and

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long-standing tenet of Pennsylvania jurisprudence that 'the law of the land' in Article I, Section 9 is synonymous with 'due process of law.'").

[43] McCastlain v. R. & B. Tobacco Co., 411 S.W.2d 882, 885 (Ark. 1967) (determining regulation requiring cigarette wholesaler to obtain letter of credit to offend the state constitution's Individual Liberty Clause).

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

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

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

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

[48] An early article concerning economic substantive due process in state courts since the demise of the *Lochner* era also lumped together "due process" cases proper, and those protecting economic liberties through similar constitutional clauses. Paulsen, *supra* note 15, at 93 n.10 ("Throughout this article the phrase 'due process' has been used to refer to clauses in state constitutions which are phrased differently from the Fourteenth Amendment as well as those which are identical to it. . . . Whatever the wording these clauses . . . have placed unspecified general limitations on legislative power.").

Fourteenth Amendments, but they also have at their disposal the Equal Protection Clause,[49] the Takings Clause,[50] and the Contracts Clause.[51] State courts have utilized equivalents of all of these examples in striking down economic regulations.[52] However, just as they are under the United States Constitution, state court interpretations of these various constitutional provisions are historically distinct from the doctrine of economic substantive due process. To include such clauses in this study would turn the Article into a demonstration of how state courts protect economic liberties at large, and not the more-focused question of how the underpinnings of the *Lochner* court have survived to this day under state constitutional law.

This study also does not include some instances of state supreme courts striking down economic regulations under what might be labeled substantive applications of a due process clause. One example is statutory caps on tort damages.[53] They are not examples of the protection of Lockean rights but of the protection of governmental procedural guarantees. Therefore, they fall outside the scope of this study.

Additionally, this study largely excludes review of local governmental land use zoning decisions. The reason for the exclusion is that courts often treat due process challenges to local land use zoning decisions quite differently from review of other economic regulations. Instead of a deferential rational basis test, where the regulation at issue is heavily presumed to be constitutional, when it comes to land use zoning courts often apply a mere "clear and convincing evidence" presumption.[54] This is much less demanding than the traditional "rational-basis test."[55] The

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[49] U.S. Const. amend. XIV § 14 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[50] U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation.").

[51] U.S. Const. art. I § 10 ("No state shall . . . pass any . . . law impairing the obligation of contracts.").

[52] *See, e.g.*, Hasegawa v. Maui Pineapple Co., 475 P.2d 679 (Haw. 1970) (state equal protection clause); County of Wayne v. Hathcock, 684 N.W.2d 765, 785 (Mich. 2004) (state takings clause); Clem v. Christole, Inc., 582 N.E.2d 780 (Ind. 1991) (state contracts clause).

[53] Patricia J. Chupkovich, *Comment: Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Health Care?*, 9 CONTEMP. HEALTH L. & POL'Y 337, 352-53 (1993) (discussing cases).

[54] *See, e.g.*, La Salle Nat. Bank of Chicago v. County of Cook, 145 N.E.2d 65, 69 (1957) ("A zoning ordinance is presumptively valid, this presumption may be overcome only by clear and convincing evidence.").

[55] *See, e.g.*, R.L. Jordan Co. v. Boardman Petroleum, Inc., 527 S.E.2d 763, 765 (S.C. 2000) (adopting the deferential standard of "[w]hether [the statute being challenged] bears a reasonable relationship to any legitimate interest of government").

affinity for applying economic substantive due process to land use zoning even extends to the federal courts. Although the United States Supreme Court has not done so, many federal district and circuit courts, even in recent years, have overturned land use zoning decisions on Fourteenth Amendment economic substantive due process grounds.[56] These decisions do apply the federal rational basis test, but nonetheless often result in the invalidation of the questioned regulation. Regarding this strange quirk in constitutional law, one commentator has noted that "federal courts have allowed economic substantive due process—an endangered species of constitutional doctrine—to escape extinction (and in some instances even to flourish) within the ecosystem that is land development law."[57] Including land use zoning decisions in this study would therefore mix different doctrines together, similarly to including equal protection or takings cases. It would not yield a representative account of recent trends in the doctrine of economic substantive due process.

This is not to say that all "zoning" cases were excluded from this study. Just because a court or city council labels a regulation as "land use" or "zoning" does not mean it is a regulation that courts treat differently in economic substantive due process challenges. For instance, included is the Pennsylvania case *Exton Quarries, Inc. v. Zoning Board of Adjustment*.[58] There, the local government sought to ban the operation of all quarries in a township.[59] Such a total exclusion is more akin to a ban on the practice of an occupation[60] than, for example, a decision to zone a plot of land as residential rather than commercial.[61] Because these "zoning" decisions are more akin to economic substantive due process cases in the non-zoning arena, this study includes them.[62]

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[56] *See* Robert Ashbrook, *Comment: Land Development, the* Graham *Doctrine, & the Extinction of Economic Substantive Due Process*, 150 U. Pa. L. Rev. 1255, 1257 (2002).
[57] *Id.*
[58] 228 A.2d 169, 182 (Pa. 1967).
[59] *See id.* at 172.
[60] *See, e.g.*, Delight Wholesale Co. v. City of Overland Park, 453 P.2d 82, 87 (Kan. 1969) (holding that the absolute prohibition of "huckstering and peddling" is beyond the police power).
[61] *See, e.g.*, Lake County v. MacNeal, 181 N.E.2d 85, 92, (Ill. 1962) (determining that zoning of lakeside property to be residential is not reasonably related to "the public health, safety, welfare or morals").
[62] Other examples include U.S. Mining & Exploration Natural Res. Co. v. City of Beattyville, 548 S.W.2d 833, 835 (Ky. 1977) (holding that a coal tipple may not be completely prohibited); State v. Brown, 108 S.E.2d 74, 78 (N.C. 1959) (striking down restrictions on operation of junk yards on the grounds that the law was only justified on aesthetic grounds, and such grounds are not enough to invoke the police power), *overruled by* State v. Jones, 290 S.E.2d 675, 677 (N.C. 1982). Also included are cases involving *state* government (as opposed to local government) land use zoning regulations. *See, e.g.*,

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

The roots of the story of economic substantive due process under state constitutional law trail back to the founding of the Republic and beyond. Rather than belabor a history already voluminously treated elsewhere in the literature this Part notes only the essential highlights.[63] It then provides an overview of economic substantive due process under state constitutional law since the New Deal, focusing on some of the areas of economic life where state courts have been particularly active in applying the doctrine.

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

At least since Justice Chase's dictum in *Calder v. Bull*, American courts have recognized the principle of judicial review in interpreting the economic policies of legislatures.[64] In the years preceding the Civil War, whether in the guise of due process clauses, takings clauses, contracts clauses, or other provisions of the United States Constitution and the constitutions of the several states, federal and state courts frequently struck down economic regulations as infringing the People's economic liberties.[65] The opportunity for protection of economic liberties greatly expanded after the Civil War with the ratification of the Fourteenth Amendment and its Privilege or Immunities, Due Process, and Equal Protection clauses.[66] After the narrow reading of the Privileges or Immunities Clause in *The Slaughterhouse Cases* of 1872, it appeared that the Fourteenth Amendment

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

[63] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 560-86 (2d ed. 1988); Gillman, *supra* note 28, *passim*.

[64] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) (stating that it would offend "all justice and reason" to allow a legislature to take from A and give to B).

[65] *See, e.g.*, Note, *supra* note 15, at 312 n.20 ("Before the Civil War the due process clauses of state constitutions were frequently used to invalidate actions of the legislatures which would now be called adjudicative in character. . . . Thus due process came to mean that the courts would not enforce any legislation which was not prospective in character and general in application."); Paulsen, *supra* note 15, at 93 ("The doctrine of substantive due process was not invented in 1890 by the federal courts. Clear traces of the concept can be found in state court opinions applying state constitutional provisions before the Civil War.").

[66] *See* Kimberly c. Shankman & Roger Pilon, 3 TEX. REV. LAW & POL. 1, 3 (1998) (discussing the ratification of the Fourteenth Amendment and the protections that grew out of it).

would not be read expansively so as to protect the American citizenry's economic liberties.[67] However, by 1887 it was becoming clear that the Supreme Court was open to a more expansive reading of the Due Process Clause,[68] and in 1897, with *Allgeyer v. Louisiana*,[69] the Court opened a forty-year period of regularly protecting economic liberties through a substantive reading of that clause.[70] The most famous of these opinions, *Lochner v. New York*,[71] gave the period its name: the *Lochner* era.

The United States Supreme Court was not alone in this enterprise. Various state supreme courts led the way in this post-Civil War endeavor, striking down economic regulations when the courts judged that they violated the economic liberties retained by the people and protected by state constitutions.[72] Once the *Lochner* era was underway, the two levels of judiciary worked hand-in-hand, with state courts protecting economic liberties through both the United States Constitution and their respective state constitutions.[73]

Then, at least as abruptly as it began, the *Lochner* era came to an end. In 1934, while upholding a milk price-support law, the Court in *Nebbia v. New York* articulated that as long as a rational basis existed for an economic regulation it was not its business to determine it unconstitutional.[74] Then, in 1937, the Court signaled the end of substantive due process review in *West Coast Hotel* by concluding that it was within the state's police power authority to enact minimum wage legislation, overruling the precedent of *Adkins v. Children's Hospital* that it had relied

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[67] *SlaughterHouse Cases*, 83 U.S. 36, 79-80 (1873) (defining the "Privileges or Immunities" of American citizens to merely consist of the right to travel to the nation's seat of government, use navigable waters, and various other narrow rights).

[68] *See* Mulger v. Kansas 123 U.S. 623, 661 (1887) (stating that although the liquor regulation at issue was constitutional, mentioning in dicta that courts must come to their own conclusions on whether legislation is a proper exercise of the police power).

[69] Allgeyer v. Louisiana, 165 U.S. 578, 590 (1897).

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

[71] 198 U.S. 45, 56 (1905).

[72] *See, e.g.*, In the Matter of Jacobs, 98 N.Y. 98, 112-115 (N.Y. 1885) (restrictions on cigar making); Millett v. People, 7 N.E. 631, 636 (1886) (requirement that coal-mining contracts be regulated by weight).

[73] State court opinions of the time include State v. Goldstein, 93 So. 308, 314 (Ala. 1922) (price-control measure); State v. Legendre, 70 So. 70, 71 (La. 1915) (firemen working hours). Federal opinions include New State Ice, Co. v. Liebmann, 285 U.S. 262, 277 (1932) (state-imposed ice vendor monopoly); Louis K. Liggett, Co. v. Baldridge, 278 U.S. 105, 113 (1928) (pharmacy ownership restriction); Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (minimum wage law for women); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (bar on employers forbidding union membership).

[74] Nebbia v. New York, 291 U.S. 502, 510-11 (1934).

upon only a year earlier.[75] The Court has not struck down an economic regulation on substantive due process grounds since *West Coast Hotel*.[76]

It was perhaps not immediately apparent after 1937 that this new deference would allow no practical opportunity to strike down economic regulations under a substantive reading of the Due Process Clause.[77] After all, even if the new "rational basis" review made it harder to protect economic liberties, it was by no means an outlandish proposition to argue that such a possibility still existed. Soon, however, that view grew much harder to maintain. In 1941, in upholding a Nebraska regulation limiting the price employment agencies may charge their customers, Justice Douglas announced for the Court, "There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field."[78] The only constitutional limits on the legislation were notions of policy and "[s]ince [the notions] do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined."[79] Following this black-and-white language,[80] in the next two decades, and up through the present day, the Court has resisted any urge to bring back some of the life of *Lochner*, instead emphatically concluding that it will not sit as a "superlegislature" in judging the wisdom of economic regulations.[81]

B. Persistence in the State Courts after the Lochner Era

For whatever reason, the state courts didn't get the memo. From 1937 until now, state courts have continued to protect economic liberty through applying substantive due process to economic regulations. In

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[75] West Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937). The case from one year before, the last instance of the Court protecting economic liberty through economic substantive due process, was *Morehead v. New York ex rel. Tipaldo*. 298 U.S. 587, 609 (1936).

[76] Tussusov, *supra* note 18, at 536.

[77] *See* Note, *supra* note 15, at 315 (arguing that the rational basis analysis offered by *Nebbia* and *West Coast Hotel* was interpreted by some courts to merely mean a more deferential level of scrutiny, not abandonment of economic substantive due process).

[78] Olson v. Nebraska, 313 U.S. 236, 246 (1941).

[79] *Id.* at 247.

[80] As one commentator put it, after such a statement "[s]tate courts could no longer legitimately claim that any form of trade regulation violated fourteenth amendment due process . . . ." Note, *supra* note 15, at 316.

[81] Ferguson v. Skrupa, 372 U.S. 726, 732 (1963). The Court often has left open the possibility, however nominal, that it could strike down an economic regulation if it truly were irrational. *See* Williamson v. Lee Optical, 348 U.S. 483, 487-91 (1955); Sanders, *supra* note 15, at 672-73 (arguing that the Supreme Court has continued to leave open the possibility, following the method of *Lee Optical* and not *Ferguson*.).

addition to utilizing the various constitutional methods discussed earlier,[82] state courts have often concluded that a regulation violates the United States Constitution as well. They have done so *even after* the Supreme Court made it crystal clear that this would constitute an incorrect application of the Due Process Clause of the Fourteenth Amendment.[83]

1. The Inability of State Courts to Let Go

Although this Article concerns state constitutional law, it is worth briefly reviewing state court use of the Fourteenth Amendment in protecting economic liberty since 1940.[84] As is quite common in much constitutional litigation in state courts, many cases consider whether a statute violates the state and United States constitutions.[85] If a state court concludes, as they often have in the decades following 1937,[86] that a law violates both constitutions there exists a presumption that the case may not be appealed to the United States Supreme Court. This is because reversing the holding on Fourteenth Amendment grounds would not change the fact that the law is still unconstitutional on "adequate and independent" state constitutional grounds.[87] Therefore, state courts are generally insulated in concluding that an economic regulation violates the Fourteenth Amendment's Due Process Clause as long as they similarly conclude when interpreting the state constitution.

These insulated holdings give us a glimpse into the mindset of state justices in the years following the close of the *Lochner* era. Many of these cases relied upon the most "infamous" *Lochner* era opinions, including

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[82] *See supra* Part I.A.

[83] *See, e.g.*, *infra* Part I.B.2.a (describing state court invalidation of fair trade acts after the United State Supreme Court had concluded they did not violate economic substantive due process).

[84] The relevant language of the Fourteenth Amendment states: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. 14 § 1.

[85] This is because counsel often raise both federal and state constitutional arguments or defenses. *See* Kirby, *supra* note 10, at 252 ("[C]onstitutional challenges to economic regulations can be, and usually are, made on both state and federal constitutional grounds.").

[86] *See infra* notes 135-146 and accompanying text.

[87] *See* Michigan v. Long, 463 U.S. 1032, 1042 (1983). Under *Long*, there exists the possibility the United States Supreme Court may grant review when a state court may ostensibly strikes down a law under its own constitution, but the interpretation is so reliant on federal law that "it is not clear from the opinion itself that the state court relief upon an adequate and independent state ground . . . ." *Id.* *See also* Kirby, *supra* note 10, at 243 (stating adequate and independent state grounds standard); Tussusov, *supra* note 18, at 530 n.6 (discussing an arguable reversal of the presumption in *Long*).

Liggett v. Baldridge,[88] *New State Ice v. Lieberman*,[89] and even *Lochner* itself.[90] The state justices knew, of course, about the renunciation of the method of these cases in opinions such as *West Coast Hotel*,[91] *Olson v. Nebraska*,[92] *Lee Optical*,[93] and *Ferguson*.[94] It appears, however, that they just did not care. They relied on these *Lochner* era precedents not just as persuasive authority in interpreting their own state constitutions, but in interpreting the Fourteenth Amendment. In case after case, state courts played the part of an ostrich, burying their heads in the pages of pre-1937 case reporters and proceeding as though these *Lochner* era precedents were still "good law" in interpreting the United States Constitution.

But under state constitutions, good law they often were. As discussed in more detail below, in the 1940s, 1950s, and 1960s the highest courts of appeal in almost every state struck down state statutes and local ordinances as violating economic substantive due process.[95] The number of cases where a state supreme court protected economic liberty through use of the doctrine in the 1950s actually exceeded—far and away exceeded—the number of similar cases of the 1940s.[96] Furthermore, the number of cases in the 1960s was less than that of the 1950s, but equaled that of the 1940s.[97] Thus, thirty years after the United States Supreme Court had emphatically stated that it was not in the business of protecting economic liberties through economic substantive due process, the supreme courts of many

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[88] 278 U.S. 105, 113 (1928). Post-1940 citations to *Liggett* by a state court using economic substantive due process to protect economic liberty include City and County of Denver v. Thrailkill, 244 P.2d 1074, 1080 (Colo. 1952);. Dep't of Fin. Insts. v. Holt, 108 N.E.2d 629, 635 (Ind. 1952).

[89] 285 U.S. 262, 277 (1932). Similar citations to *New State Ice* include *General Electric Co. v. Wahle*, 296 P.2d 635, 647 (Or. 1956); *In re Aston Park*, 193 S.E.2d , 729, 735 (N.C. 1973).

[90] 198 U.S. 45, 56 (1905). Other examples include *Edwards v. State Board of Barber Examiners*, 231 P.2d 450, 453 (Ariz. 1951); *State Board of Barber Examiners v. Cloud*, 44 N.E.2d 972, 980 (Ind. 1942).

[91] West Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937); *see supra* notes 75-76 and accompanying text.

[92] 313 U.S. 236, 246-47 (1941); *see supra* notes 78-81 and accompanying text.

[93] Williamson v. Lee Optical, 348 U.S. 483, 487-91 (1955).

[94] Ferguson v. Skrupa, 372 U.S. 726, 732 (1963).

[95] *See infra* notes 135-146 and accompanying text; *see also* Appendix A (listing economic substantive due process cases since 1940 by state).

[96] *See infra* discussion, notes 136-137 and accompanying text; Appendix B.

[97] *See infra* notes 136-137; Appendix B. In 1963 a commentator could confidently (and, at that time, correctly) assert that, "The increasing frequency of [economic substantive due process] decisions indicates that economic due process is neither dead nor dying and that it is the United States Supreme Court, rather than the state courts, which is resisting the current drift in constitutional interpretation." Note, *supra* note 15, at 321.

states either ignored or openly thumbed their nose at the new jurisprudence of the highest court in the land.

This level of defiance did not last forever, although it continues today at a much-diminished frequency. The number of cases where state supreme courts protected economic liberties through applying economic substantive due process in the 1970s fell considerably when compared to the 1960s, and by the 1980s only a handful of states continued to strike down economic regulations on substantive due process grounds, and then only on occasion.[98] Some states repudiated their earlier adherence to *Lochner* era protections of economic liberties,[99] while in others a heightened degree of protection still stands as good law, but is rarely called upon.[100] For reasons that are a bit unclear, but briefly examined below, the adherence to *Lochner* era protection of economic liberties could not sustain itself at such a strong level for more than three decades after *West Coast Hotel*.[101]

It is important to note that although the level of protection afforded by state courts since 1937 has greatly exceeded that of the modern United States Supreme Court, there are few examples of state supreme courts striking down economic regulations with the regularity that the United States Supreme Court did during the *Lochner* era. Although scholars have greatly inflated the "activism" of the pre-1937 Court over the years,[102] the Court regularly struck down economic regulations on substantive due process grounds at the rate of just over one per year.[103] Since 1940 only the 1950s Florida Supreme Court has approached that level of activity.[104]

2. Areas of Protection Extended Under State Economic Substantive Due Process

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[98] *See infra* Appendix B.

[99] See states discussed *supra* Part III.B; *see also* David Smith, *Economic Substantive Due Process in Arizona: A Survey*, 20 Ariz. St. L.J. 327,341 (stating that the Arizona Supreme Court has adopted a "rational basis test" in examining economic substantive due process claims).

[100] See states discussed *supra* Part III.A.

[101] *See infra* Part IV (hypothesizing that the rise of the United State Supreme Court's "right to privacy" jurisprudence undermined support for economic substantive due process).

[102] *See* Michael J. Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049, 1080 (1997) (documenting that the number of state regulations invalidated under economic substantive due process during the *Lochner* era was a total of fifty-five and not the 200 claimed elsewhere).

[103] *See id.*

[104] *See infra* Appendix B; Part III.A.1 (discussing the Florida Supreme Court's heavy use of economic substantive due process when compared to other state courts of highest review).

Since 1940, the year the research underlying this Article begins, state supreme courts have used economic substantive due process to protect economic liberty in all manner of areas of economic life. The examples range from bans on frog gigging[105] to price controls on cigarettes.[106] The reach of the cases is so wide-ranging that it is difficult to categorize all of them into discrete subject areas. Nevertheless, a few subjects stand out. To gain a full appreciation for the breadth and impact of the material underlying the trends discussed below in Part III, the remainder of this Section outlines a few areas where state courts have been particularly active in applying the doctrine of economic substantive due process. These areas are state fair trade acts, advertising restrictions, price controls, occupational licensing, and Sunday closing laws.

a. Fair Trade Acts

More than any other area, the state court treatment of fair trade acts stands out as an example of the "New Judicial Federalism" in the economic substantive due process arena. Legislation generally known as "fair trade acts" allowed suppliers of goods "sold under a trademark, trade name, or brand name to regulate by contract the price at which their products were sold at retail."[107] What often undermined the acts' constitutionality was the inclusion of a "nonsigner clause" which allowed a supplier to sue a seller for trading for less than the contract price *even if* the seller was not a party to the contract.[108] In 1936, in the twilight of the *Lochner* era, the United States Supreme Court upheld Illinois' fair trade act as constitutional under the Fourteenth Amendment.[109] However, between 1940 and 1975, when Congress amended the Sherman Act so as to once again[110] prohibit such

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

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

[107] Robert H. Jerry, II & Reginald L. Robinson, *Statutory Prohibitions on the Negotiation of Insurance Agent Commissions: Substantive Due Process Review Under State Constitutions*, 51 OHIO ST. L.J. 773, 803 (1990).

[108] *See id.* Even though not a signer, if the trademark holder wished to enforce the contract price the nonsigning reseller would have to have knowledge of the contract. *See* Howard, *supra* note 15, at 883 n.46.

[109] Old Dearborn Co. Distrib. v. Seagram-Distillers Corp., 299 U.S. 183, 193 (1936).

[110] Originally, the Supreme Court had concluded that contracts between wholesalers and retailers fixing the price sold to consumers were a "restraint of trade" and violated the Sherman Act. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 400, 407-09 (1911) Much later, Congress amended the law to allow states to provide for such contracts. *See* Miller-Tydings Act, 50 Stat. 693 (1937). In 1975, Congress changed its

state legislation, at least twenty-one state supreme courts struck down fair trade acts on economic substantive due process grounds.[111] Interestingly, the history of judicial invalidation of fair trade acts is evidence of the acceleration of economic substantive due process under state constitutional law even as the country moved away from the New Deal. By 1956 only four states had declared such legislation unconstitutional under economic substantive due process.[112] Again, by 1975 that number had grown exponentially.

b. Advertising Restrictions

Almost as many state supreme courts have used economic substantive due process to invalidate state restrictions on advertising, particularly the advertising of prices. The state courts decided most of the relevant cases before the United States Supreme Court recognized that the First Amendment protects commercial speech.[113] Therefore, today state courts would find many of the regulations at issue in these cases unconstitutional under the United States Constitution, and can avoid the

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mind, and re-enacted the prohibition. *See* Consumer Goods Pricing Act, 89 Stat. 801 (1975) (codified as amended at 15 U.S.C. §§ 1, 45 (2004)); *see also* Jerry & Robinson, *supra* note 107, 802-03 (discussing congressional history).

[111] *See, e.g.*, Bulova Watch Co. v. Zale Jewelry Co., 147 So.2d 797, 799 (Ala. 1962); Union Carbide & Carbon Corp. v. White River Distribs., 275 S.W.2d 455, 461 (Ark. 1955); Olin Mathieson Chem. Corp. v. Francis, 301 P.2d 139, 152 (Colo. 1956); Miles Labs., Inc. v. Eckerd, 73 So.2d 680, 682 (Fla. 1954); Cox v. Gen. Elec. Co., 85 S.E.2d 514, 519 (Ga. 1955); Gen. Elec. Co. v. Am. Buyers Corp., 316 S.W.2d 354, 361 (Ky. 1958); Opinion of the Justices, 132 A.2d 47, 49 (Me. 1957); Loughran v. Lord Baltimore Candy & Tobacco Co., 12 A.2d 201, 207 (Md. 1940); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 54 N.W.2d 268, 269-70 (Mich. 1952); Union Carbide & Carbon Corp. v. Skaggs Drug Center, Inc., 359 P.2d 644, 654 (Mont. 1961); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 721-22, 68 N.W.2d 608, 618 (Neb. 1955); Zale-Las Vegas, Inc. v. Bulova Watch Co., 396 P.2d 683, 693 (Nev. 1964); Skaggs Drug Center v. Gen. Elec. Co., 315 P.2d 967, 974 (N.M 1957); Bulva Watch Co. v. Brand Distrib., Inc., 206 S.E.2d 141, 151 (N.C. 1974); Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 147 N.E.2d 481, 484 (Ohio 1958); Am. Home Prods. Corp. v. Homsey, 361 P.2d 297, 303 (Okla. 1961); Gen. Elec. Co. v. Wahle, 296 P.2d 635, 647 (Or. 1956); Commonwealth v. Zasloff, 13 A.2d 67, 72 (Pa. 1940); Rogers-Kent, Inc. v. Gen. Elec. Co., 99 S.E.2d 665, 672 (S.C. 1957); Remington Arms Co. v. Skaggs, 345 P.2d 1085, 1090-91 (Wa. 1959); Gen. Elec. Co. v. Dandy Appliance Co., 103 S.E.2d 310, 313 (W.Va. 1958); Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne, 371 P.2d 409, 420-21. Prior studies have contended that a full majority of states supreme courts did so since 1936. *See* Howard, *supra* note 15, at 883 (citing 2 CCH TRADE REG. REP. ¶ 6041 (Mar. 15, 1976)). This, of course, may be correct as the present study only begins in 1940.

[112] *See* Howard, *supra* note 15, at 883.

[113] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976).

"*Lochner* label" by instead applying the commercial speech doctrine.[114] The pre-commercial speech cases themselves usually involved very little discussion, if any, of free speech, and instead emphasized property rights and the arbitrariness of governmental power.[115] At least fifteen state supreme courts have struck down advertising regulations since 1940 on state economic substantive due process grounds.[116] Many involve whether gas stations may advertise prices,[117] and several others concern advertising by specific occupations.[118]

c. Price Controls

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[114] *Compare* Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (demanding a "substantial" governmental interest to justify the regulation) *with* Stadnik v. Shell's City, Inc., 140 So. 2d 871, 875 (Fla. 1962) (holding regulation banning the advertising of prescription drugs to have no rational basis). Had *Central Hudson* been available to the *Stadnik* court, it would not have had to justify the invalidation of the regulation through using the rational basis test.

[115] *See, e.g.*, City of Lafayette v. Justus, 161 So.2d 747, 749 (La. 1964) (striking down ban on advertising gasoline prices as restriction violates substantive due process); Levy v. Pontiac, 49 N.W.2d 80, 82-83 (Mich. 1951) (striking down restriction on the size of gasoline price signs as violating substantive due process).

[116] *See, e.g.*, Ala. Indep. Serv. Station Ass'n v. McDowell, 6 So.2d 502, 507 (Ala. 1942); Mott's Super Markets, Inc. v. Frassinelli, 172 A.2d 381, 386 (Conn. 1961); State v. Hobson, 83 A.2d 846, 858-59 (Del. 1951); State *ex rel.* Walters v. Blackburn, 104 So.2d 19, 20-21 (Fla. 1958); Needham v. Proffit, 41 N.E.2d 606, 607 (Ind. 1942); Sears, Roebuck and Co. v. City of New Orleans, 117 So.2d 64, 66 (La. 1960); United Interchange, Inc. of Mass. v. Harding, 145 A.2d 94, 97 (Me. 1958); Md. Bd. of Pharmacy v. Sav-A-Lot, Inc., 311 A.2d 242, 252 (Md. 1973); Levy v. Pontiac, 49 N.W.2d 80, 82-83 (Mich. 1951); State v. Redman Petroleum Corp., 360 P.2d 842, 845, 846 (Nev. 1961); State v. Boston Juvenile Shoes, 288 A.2d 7, 11 (N.J. 1972); Jones v. Bontempo, 32 N.E.2d 17, 18 (Ohio 1941); Little Pep Delmonico Rest., Inc. v. Charlotte, 113 S.E.2d 422, 423 (N.C. 1960), *overruled by* State v. Jones, 290 S.E.2d 675, 677 (N.C. 1982); Jones v. Bontempo, 32 N.E.2d 17, 18 (Ohio 1941); Pa. State Bd. of Pharmacy v. Pastor, 272 A.2d 487, 490, 495 (Pa. 1971); Pride Oil Co. v. Salt Lake County, 370 P.2d 355, 356-57 (Utah 1962).

[117] *See, e.g.*, State v. Miller, 12 A.2d 192, ___ (Conn. 1940) (concluding that prohibition on gas station price signs is unconstitutional); State *ex rel.* Walters v. Blackburn, 104 So.2d 19, 20-21 (Fla. 1958); Pride Oil Co. v. Salt Lake County, 370 P.2d 355, 356-57 (Utah 1962) (concluding that restriction on the placement of gas price signs violates the right to own and enjoy property).

[118] *See, e.g.*, Amsel v. Brooks, 106 A.2d 152, 158 (Conn. 1954) (concluding restriction on dental advertising has no reasonable relation to the public welfare); Needham v. Proffit, 41 N.E.2d 606, 607 (Ind. 1942) (concluding that ban on print advertisements of funeral directors and embalmers is unconstitutional); Jones v. Bontempo, 32 N.E.2d 17, 18 (Ohio 1941) (holding that ban on the advertising of barbering prices interferes with property rights).

Invalidating regulations on prices, whether in striking down minimum wage laws[119] or in nullifying price supports for commodities,[120] was a bread-and-butter practice of the *Lochner*-era Court. Unsurprisingly, such behavior has also characterized state constitutional protection of economic liberties since 1940. At least nineteen state supreme courts have concluded that certain controls on prices violate economic substantive due process under their respective state constitutions.[121] The United States Supreme Court concluded in *Nebbia* that price supports are constitutional under the Fourteenth Amendment's Due Process Clause as long as they are rationally related to a legitimate governmental interest.[122] In concluding otherwise under their own constitutions, state courts have often ignored *Nebbia*, sometimes explicitly adopting the reasoning of Justice McReynolds' dissenting opinion.[123] This is not to say that state courts have brazenly invalidated price controls across the board. For example, in many of the cases involving prohibitions on sales below cost—the sale of an item for less than its original purchase price—courts have carefully held that sales below cost may be made illegal, but only when the seller has the "predatory intent" to undermine a competitor.[124]

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[119] *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 609 (1936); Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923).

[120] *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 239 (1929) (gasoline prices).

[121] *See, e.g.*, Ports Petroleum Co., Inc. of Ohio v. Tucker, 916 S.W.2d 749, 751 (Ark.1996); Edwards v. State Bd. of Barber Exam'rs, 231 P.2d 450, 453-54 (Ariz. 1951); State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 254 P.2d 29, 36 (Cal. 1953); Mott's Super Mkts., Inc. v. Frassinelli, 172 A.2d 381, 386 (Conn. 1961); Batton-Jackson Oil Co., Inc. v. Reeves, 340 S.E.2d 16, 18-19 (Ga. 1986); Dep't of Fin. Insts. v. Holt, 108 N.E.2d 629, 637 (Ind. 1952); State *ex rel.* Anderson v. Fleming Co., 339 P.2d 12, 18 (Kan. 1959); Remote Servs., Inc. v. FDR Corp., 764 S.W.2d 80, 83 (Ky. 1989); City of Lafayette v. Justus, 161 So.2d 747, 749 (La. 1964); Wiley v. Sampson-Ripley Co., 120 A.2d 289, 291 (Me. 1956); Traveler's Indemnity Co. v. Comm'r of Ins., 265 N.E.2d 90, 92 (Mass. 1970); Gillette Dairy, Inc. v. Neb. Dairy Prods. Bd., 219 N.W.2d 214, 221 (Neb. 1974); Serrer v. Cigarette Service Co., 76 N.E.2d 91, 91 (Ohio 1947); Englebrecht v. Day, 208 P.2d 538, 544 (Okla. 1949); Richbourg's Shoppers Fair, Inc. v. Stone, 153 S.E.2d 895, 899 (S.C. 1967), *overruled by* R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 527 S.E.2d 763, 765 (S.C. 2000); San Antonio Retail Grocers, Inc. v. Lafferty, 297 S.W.2d 813 (Tex. 1957); State v. Wender, 141 S.E.2d 359, 363 (W.Va. 1965), *overruled by* Hartsock-Flsher Candy Co. v. Wheeling Wholesale Grocery Co., 328 S.E.2d 144, 150 (W.Va. 1984).

[122] *See* Nebbia v. New York, 291 U.S. 502, 510-11 (1934).

[123] Gwynette v. Myers, 115 S.E.2d 673, 679 (S.C. 1960) (stating that the court agreed with the *Nebbia* dissent's contention that prices may only be regulated if the industry is affected with the public interest), *overruled by* R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 527 S.E.2d 763, 765 (S.C. 2000).

[124] *See, e.g.*, Ports Petroleum Co., Inc. of Ohio v. Tucker, 916 S.W.2d 749, 751 (Ark.1996) (striking down, as a violation of substantive due process, an anti-predatory pricing law that failed to require a showing of predatory intent); State *ex rel.* Anderson v. Fleming Co., 339 P.2d 12, 18 (Kan. 1959) (declaring milk sales law unconstitutional where legislation

d. Occupational Licensing

More than in any other field, except perhaps for review of local land use regulation,[125] state courts in the post-*Lochner* era have utilized economic substantive due process to protect the right to make a living. State supreme courts have invalidated licensing laws outright (including those extending exclusive monopolies or completely banning certain professions),[126] or have determined them to be too restrictive because they require unreasonable prerequisites in order to gain a license.[127] Overall, thirty state supreme courts, three-fifths of the several states, have protected the right to make a living through nullifying licensing or pseudo-licensing laws.[128] Many courts did so in the 1940s, still perhaps believing that the

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criminalized selling below cost even when the seller lacked the intent to sell below cost); Englebrecht v. Day, 208 P.2d 538, 544 (Okla. 1949) (striking down law banning below-cost sales as violating substantive due process because the law included sales made without intent to harm competitors).

[125] As explained above, the invalidation of local land use decisions are not included in this study. *See supra* notes 54-62 and accompanying text.

[126] *See, e.g.*, North Little Rock Transp. Co. v. City of No. Little Rock, 184 S.W.2d 52, 54 (Ark. 1944) (striking down taxi licensing scheme as a violation of state constitution's anti-monopoly clause).

[127] *See, e.g.*, Cleere v. Bullock, 361 P.2d 616, 621 (Colo. 1961) (concluding licensing scheme requiring funeral directors to be qualified embalmers to be beyond the police power).

[128] *See, e.g.*, Lisenba v. Griffin, 8 So.2d 175, 177 (Ala. 1942); Buehman v. Bechtel, 114 P.2d 227, 232 (Ariz. 1941); North Little Rock Transp. Co. v. City of No. Little Rock, 184 S.W.2d 52, 54 (Ark. 1944); Abdoo v. City and County of Denver, 397 P.2d 222, 223 (Colo. 1964); Hart v. Bd. of Exam'rs of Embalmers, 26 A.2d 780, 782 (Conn. 1942); Sullivan v. DeCerb, 23 So.2d 571, 572 (Fla. 1945); Berry v. Summers, 283 P.2d 1093, 1096 (Idaho 1955); Church v. State, 646 N.E.2d 572, 580, (Ill. 1995); City of Osceola v. Blair, 2 N.W.2d 83, 85 (Iowa 1942); Delight Wholesale Co. v. City of Overland Park, 453 P.2d 82, 87 (Kan. 1969); City of Mt. Sterling v. Donaldson Baking Co., 155 S.W.2d 237, 239 (Ky. 1941); City of Shreveport v. Restivo, 491 So.2d 377, 380 (La. 1986); Opinion of the Justices, 79 N.E.2d 883, 888 (Mass. 1948); Moore v. Grillis, 39 So.2d 505, 509, 512 (Miss. 1949); State v. Gleason, 277 P.2d 530,533-34 (Mont. 1954); Jewel Tea Co. v. City of Geneva, 291 N.W. 664, 670 (Neb. 1940); State v. Moore, 13 A.2d 143, 148 (N.H. 1940); N.J. Good Humor, Inc. v. Bd. of Comm'rs of Borough of Bradley Beach, 11 A.2d 113, 118 (N.J. 1940); Good Humor Corp. v. City of New York, 49 N.E.2d 153, 157 (N.Y. 1943); Roller v. Allen, 96 S.E.2d 851, 859 (N.C. 1957); State v. Cromwell, 9 N.W.2d 914, 922 (N.D. 1943); Frecker v. Dayton, 90 N.E.2d 851, 854 (Ohio 1950); Whittle v. State Bd. of Exam'rs of Psychologists, 483 P.2d 328, 329-30 (Okla. 1971); Hertz Corp. v. Heltzel, 341 P.2d 1063, 1069 (Or. 1959); Olan Mills, Inc. v. Sharon, 92 A.2d 222, 224 (Pa. 1952); City of Rapid City v. Schmitt, 71 N.W.2d 297, 298 (S.D. 1955); Livesay v. Tenn. Bd. of Exam'rs in Watchmaking, 322 S.W.2d 209, 213 (Tenn. 1959); Vermont Salvage Corp. v. St. Johnsbury, 34 A.2d 188, 197 (Vt. 1943); Moore v. Sutton, 39 S.E.2d 348, 351-52 (Va. 1946); Thorne v. Roush, 261 S.E.2d 72, 75 (W.Va. 1979).

Lochner era had not drawn to a close, but other examples present themselves up through the present day.[129]

e. Sunday Closing Laws

Whereas the invalidation of many advertising restrictions by state courts under economic substantive due process review presaged the United States Supreme Court invalidating many such restrictions under the First Amendment's Free Speech Clause,[130] the invalidation of Sunday closing laws by many state courts has occurred in spite of the Supreme Court's refusal to strike down such laws as *per se* violations of the First Amendment's Establishment Clause.[131] The Supreme Court has held that a legislature may mandate a uniform day of rest as long as it is for a secular purpose and does not substantially burden one's religion.[132] Ten state supreme courts, however, often caring not a whit whether the law possesses a religious purpose, have struck down Sunday closing laws as unreasonable and anticompetitive.[133] This is an area of economic substantive due process that has weathered the passage of time much better than others, as several cases were decided in recent decades.[134]

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

As stated above,[135] and set forth in detail in the Appendixes, the persistence of economic substantive due process review under state constitutional law in state supreme courts during the 1940s, 1950s, and

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[129] *See, e.g.*, Church v. State, 646 N.E.2d 572, 580, (Ill. 1995) (determining private alarm contractor licensing scheme unconstitutional as invalid use of the police power); Nixon v. Dep't of Pub. Welfare, 839 A.2d 277, 290 (Pa. 2003) (concluding that law restricting recently released criminals from working in nursing homes "unconstitutionally infringes on the Employees' right to pursue an occupation").
[130] *See supra* Part II.B.2.b.
[131] *See* Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion).
[132] Sherbert v. Verner, 374 U.S. 398, 407 (1963)
[133] *See* Handy Dan Imp. Center, Inc. v. Adams, 633 S.W.2d 699, 703 (Ark. 1982); Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey, 640 A.2d 101, 107-08 (Conn. 1994); Rogers v. State, 199 A.2d 895, 897 (Del. 1964); Moore v. Thompson, 126 So.2d 543, 551 (Fla. 1961); West v. Town of Winnsboro, 211 So.2d 665, 672, (La. 1967); Terry Carpenter, Inc. v. Wood, 129 N.W.2d 475, 481 (Neb. 1964); State v. Smith, 143 S.E.2d 293, 299 (N.C. 1965); Spartan's Indus., Inc. v. City of Okla. City, 498 P.2d 399, 402 (Okla. 1972); Dodge Town v. Romney, 480 P.2d 461, 462 (Utah 1971); Nation v. Giant Drug Co., 396 P.2d 431, 437 (Wyo.1964).
[134] *See* cases listed in *supra* note 133.
[135] *See supra* Part II.B.1.

1960s is quite astonishing considering such review was all but nominally abandoned by the United States Supreme Court. As Appendix B illustrates, in the 1940s state courts of highest review invalidated economic regulations sixty-eight times under economic substantive due process.[136] In the 1950s this number *grew* to ninety -six instances. This was in the face of the continued, and relentless, insistence of the United States Supreme Court that it was no longer in the business of economic substantive due process. In the 1960s the numbers fell, but only back to the level of the 1940s, with sixty-seven such instances according to the research underlying this study.[137] What is more, the court of highest review of every state except Alaska, Hawai'i, and Rhode Island utilized economic substantive due process to protect economic liberties during the period from 1940-1969. Even these three omissions are misleading because Alaska and Hawai'i only gained statehood in 1959, and 1960, respectively,[138] and Rhode Island, although it has refused to interpret its due process clause to provide substantive protections,[139] invalidated a state statute, on at least one occasion, through the Fourteenth Amendment's Due Process Clause.[140]

Although no study before this one has attempted a comprehensive review of all economic substantive due process cases during the 1940s, 1950s, and 1960s,[141] prior studies have provided extensive analysis of this period and of why the state courts hung onto economic substantive due process for such a time.[142] The excellence of those studies notwithstanding, no study that has come to the Author's attention has analyzed in any detail the decades after 1970 as a distinct time period. More specifically, no study has revealed the immense drop in state supreme courts actively using economic substantive due process review after 1970.

And drop the numbers did. Whether the history of the 1940s, 1950s, and 1960s be labeled "judicial activism" or "protecting the rights of the individual," it was not to last. During the 1970s state supreme courts applied economic substantive due process in protecting economic liberties on forty-eight occasions.[143] Admittedly, this is not a drastic departure from

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[136] For what is meant by "economic substantive due process" please see *supra* Part II.
[137] *See infra* Appendix B.
[138] Alaska Statehood Act, Pub. L. 85-508 (1959); Hawaii Admission Act 86-3 (1959).
[139] *See supra* note 41.
[140] Haigh v. State Board of Hairdressing, 72 A.2d 674, 677-79 (R. I. 1952).
[141] One study alluded to research made of how many times a state court of highest review struck down economic regulations through economic substantive due process, but the article did not include the specific cases from each state, and included a different time-period from that analyzed here. *See* Gary M. Anderson et al., *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J.L. & ECON. 215 (1989).
[142] *See supra* note 15.
[143] *See infra* Appendix B.

past practices, but was a significant drop from the sixty-seven of the 1960s. The bottom really fell out of the market in the 1980s, with a mere eleven instances.[144] In the 1990s the numbers fell even further, to eight. So far during the 2000s, this research has uncovered a paltry three occasions where state supreme courts have protected economic liberties through applying economic substantive due process.[145] In addition, unsurprisingly, fewer and fewer states have continued the past application of the doctrine. Since 1980 only thirteen state supreme courts have added to this study's case law.[146]

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

A. States That Were Active in Applying Economic Substantive Due Process After 1940, and Have Continued to Since 1980

1. Florida! Florida! Florida![147]

Heads-and-shoulders above the rest, the Florida Supreme Court has continuously protected economic liberty through the application of economic substantive due process. Since 1940 it has done so twenty-nine times.[148] The nearest to this is Illinois, at sixteen.[149] Most of the court's

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[144] *See infra* Appendix B.

[145] Please remember that this does not include the use of economic substantive due process in land use zoning cases. *See supra*, Part II.B.2.

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

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

[148] *See infra* Appendix B.

[149] *See infra* Appendix B. This number does not include a large number of Illinois land use zoning cases that are excluded for reasons stated in Part I.B, *supra*. *See, e.g.*, City of Loves Park v. Woodward Governor Co., 153 N.E.2d 560, 563 (Ill. 1958) (concluding that zoning of lot for residential purposes, adjacent to automobile plant, beyond legitimate use of the police power); Mack v. County of Cook, 142 N.E.2d 785, 789 (Ill. 1957) (holding that

economic substantive due process holdings were in the 1950s and 1960s, but even the 1980s saw three instances, the most of any state supreme court in the nation.[150] The most recent, *Chicago Title Insurance Co. v. Butler*, was a classic economic substantive due process opinion, where the court invalidated a statute limiting the rebates that insurance agents may receive.[151] The court's history includes many of the "usual suspects" discussed earlier in this Article,[152] including price controls,[153] advertising restrictions,[154] Sunday closing laws,[155] different incarnations of the state's Fair Trade Act,[156] and occupational licensing laws.[157] Furthermore, the court has innovated to some extent, including two race track related tax cases,[158] and striking down a ban on the possession of embossing machines.[159]

The reasons for the Florida Supreme Court's extraordinary use of economic substantive due process, including the motivations behind the

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classification of property as non-commercial was not a proper use of the police power); Hannifin Corp. v. City of Berwyn, 115 N.E.2d 315, 319 (Ill. 1953) (zoning of land in mostly industrial area as "residential" is "manifestly unreasonable, arbitrary and capricious").

[150] *See infra* Appendix B.

[151] 770 So.2d 1210, 1220 (Fla. 2000).

[152] *See supra*, Part I.B.2.

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

[154] *See, e.g.* Eskind v. City of Vero Beach, 159 So.2d 209, 212-13 (Fla. 1963) (invalidating ordinance banning outdoor advertising of lodging accommodations); Miami Springs v. Scoville, 81 So.2d 188, 192-93 (Fla. 1955) (determining that ordinance regulating the size of gas station signs exceeds the police power).

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

[156] Miles Labs., Inc. v. Eckerd, 73 So.2d 680, 682 (Fla. 1954) (invaliding nonsigner clause of state Fair Trade Act); Liquor Store v. Cont'l Distilling Corp., 40 So.2d 371, 385 (Fla. 1949) (invalidating Fair Trade Act as "arbitrary and unreasonable").

[157] *See, e.g.*, Snedeker v. Vernmar, Ltd., 151 So.2d 439, 442 (Fla. 1963) (concluding education requirement for masseurs an invalid use of the police power); Sullivan v. DeCerb, 23 So.2d 571, 572 (Fla. 1945) (holding that photography licensing scheme beyond the proper exercise of the police power).

[158] Horsemen's Benevolent & Protective Ass'n v. Div. of Pari-Mutuel Wagering, 397 So.2d 692, 695 (Fla. 1981) (holding that permit scheme deducting one percent of race winnings and transferring funds to private associations is an invalid exercise of the state police power); Hilaleah Race Course, Inc. v. Gulfstream Park Racing Ass'n, 245 So. 2d 625, 628-29 (Fla. 1971) (striking down as violating substantive due process statute regulating race track operating days according to the amount of tax revenue the track produced in the preceding year).

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

state's individual justices, local history outside of the court's case law, or unusual machinations in the state's legislature[160] are beyond the scope of this study. Although this Article briefly explores what has led to the recent nation-wide decline in the use of economic substantive due process under state constitutional law,[161] speculations on individual states, even in the case of mighty Florida, rely on too few data points to be of much value. What may briefly be said is that the Florida Supreme Court has interpreted a "due process clause" nearly identical to that of the United States Supreme Court in striking down economic regulations.[162] In short, the Florida opinions listed in Appendix A by-and-large textually rest on nothing more than a "generic" due process clause and the extra-textual bases of exceeding the police power or lacking a rational basis. Nevertheless, with as much a textual commitment to economic liberty as the Fourteenth Amendment, the Florida Supreme Court has interpreted the Florida Constitution to protect economic liberty through economic substantive due process more than any other state court of highest review since 1940. Perhaps the lesson to be taken from this is that it is not the text of the constitution that matters in whether a court protects an economic liberty. Instead, the reasons may be non-textual, or even non-legal, considerations.

2. Illinois

A very distant second to Florida, the Illinois Supreme Court has struck down economic regulations under economic substantive due process on sixteen occasions. This has run the gamut of different areas of economic

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

[161] *See infra* Part IV.

[162] *Compare* Fl. Const. Art. I, § 9 ("No person shall be deprived of life, liberty or property without due process of law . . . ."); *with* U.S. Const. amend. 14 § 1 ("nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."). The Florida Constitution does include language that directly protects economic liberties, but the state supreme court has not been active in relying upon it. *See* Fla. Const. art. I § 2 ("All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property . . . .").

regulation, from keeping auto records,[163] to mandating that employers pay their employees while they leave to vote.[164] Occupational licensing has taken many a hit from the court, with it striking-down four plumbing licensing schemes alone.[165] Other anti-licensing opinions include the invalidation of the requirement that a funeral director obtain an embalmer's license,[166] and a case from as recently as 1995 invalidating a scheme licensing private alarm contractors.[167]

Illinois stands an interesting exception when viewing its supreme court's performance against the nation-wide trend of economic substantive due process cases. With the exception of the roaring 1950s,[168] when the Illinois Supreme Court utilized the doctrine in non-land use zoning cases seven times, in no decade since 1940 has the court issued more than three opinions striking down an economic regulation on substantive due process grounds.[169] Yet, the court has issued at least one such opinion in every decade, including the 2000s, except for the 1980s. This long, but measured, tail stretching out from the days of the *Lochner* court illustrates how a court can create a tempered, yet alive, jurisprudence of economic liberty.[170]

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

[164] Heimgaertner v. Benjamin Elec. Mfg. Co., 128 N.E.2d 691, 697 (Ill. 1955) (determining a "pay-while-voting" statute "has no real or substantial relation to the object of public welfare" and therefore is an unconstitutional use of the police power). The Kentucky Court of Appeals struck down a similar statute. Illinois Cent. R. Co. v. Commonwealth, 204 S.W.2d 973, 975 (Ky. 1947).

[165] People v. Johnson, 369 N.E.2d 898, 903 (Ill. 1977) (holding that plumbing licensing scheme, as implemented, created an unconstitutional monopoly power in the hands of already licensed plumbers); People v. Masters, 274 N.E.2d 12, 14 (Ill. 1971) (striking down plumbing licensing law); Schroeder v. Binks, 113 N.E.2d 169, 170-73 (Ill. 1953) (striking down pluming licensing law as not a proper exercise of the police power); People v. Brown, 95 N.E.2d 888, 899 (Ill. 1950) (striking down various arduous plumbing licensing restrictions as violating substantive due process).

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

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

[168] *See infra* Appendix B.

[169] *See infra* Appendix B. See Part I.B for why land use zoning cases are excluded from consideration.

[170] For an argument that the United States Supreme Court should apply a level of rational-basis scrutiny to economic regulations, yet a stricter level of rational-basis than that currently applied, see the comments of President Clinton's former Acting Solicitor General Walter Dellinger. *See* Walter Dellinger, *The Indivisibility of Economic Rights & Personal Liberty*, 2004 CATO SUP. CT. REV. 9, 14-16 (2004).

3. Georgia

This Section closes with a relatively recent opinion from the Georgia Supreme Court. It is one of the most recent examples of a state supreme court explicitly rejecting the federal courts' non-use of economic substantive due process.[171] In 1987, while striking down a ban on sales below cost, the court had the following to say about its constitutional jurisprudence:

> This court has repeatedly declared "that '[t]he right to contract, and for the seller and purchaser to agree upon a price, is a property right protected by the due-process clause of our Constitution, and unless it is a business "*affected with a public interest*," the General Assembly is without authority to abridge that right,'" no matter what other states or the Supreme Court of the United States "may or may not have decided."[172]

The Georgia Supreme Court's insistence on continuing to apply the "affected with a public interest" test is a throw-back to the pre-*Nebbia* period of the *Lochner* era.[173] In *Strickland* the court affirmed its earlier determination[174] that the petroleum industry is not affected with a public interest.[175] Because it was not, the legislature therefore lacked the power to regulate its prices.[176]

The court's statement that the Georgia General Assembly has no authority to abridge the right to contract "no matter what other states or the Supreme Court of the United States" may at first sound like a bit of libertarian bravado, but is actually little different from statements state courts routinely make regarding the United States Supreme Court in matters of criminal law and privacy.[177] The statement's spirit is consonant with Justice Brennan's battle cry to the states discussed in the Introduction.[178]

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[171] For an older example from a different state, see the discussion of the Indiana Supreme Court, *infra* notes 180-184 and accompanying text.
[172] Strickland v. Ports Petroleum Co., Inc., 353 S.E.2d 17, 18 (Ga. 1987) (citations omitted) (emphasis added).
[173] *See supra* notes 69-73 and accompanying text.
[174] The court had earlier done so in Batton-Jackson Oil Co., Inc. v. Reeves, 340 S.E.2d 16, 18-19 (Ga. 1986) ("As it cannot be said that the gasoline industry is devoted to the citizens of this state and its use granted to the public, we conclude that the gasoline industry is not affected with a public interest . . . .").
[175] *See Strickland*, 353 S.E.2d at 18.
[176] *See id.*
[177] *See supra* note 2.
[178] *See supra* notes 1-9 and accompanying text.

The court's refusal to accept the conventional wisdom on the right to contract illustrates that in the State of Georgia, at least as of 1987, the "New Judicial Federalism" is alive and well in its attempt to preserve the legacy of the *Lochner* era.[179]

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

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

1. Indiana

After four holdings enforcing economic substantive due process in the 1940s, in 1952 the Indiana Supreme Court drew the following line in the sand between itself and the contemporary trend of constitutional law: "This court has in the past consistently refused to follow the 'pattern' or 'drift' apparent in the decisions of other courts which approve mere legislative price fixing."[180] The court struck down a price restriction on automobile dealers because they were not reasonably related to the legislative purpose.[181] In doing so it proudly cited a *Lochner*-era case, *Liggett Co. v. Baldridge*,[182] which struck down licensing restrictions on pharmacists.[183] In contrast, the United States Supreme Court subsequently overruled *Liggett*, labeling it "a derelict in the stream of the law."[184]

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[179] The Georgia Supreme Court has a long history of pining for the *Lochner* era. In 1951 the court complained at length regarding the plight of economic liberties in the face of cases such as *Nebbia v. New York*. Harris v. Duncan, 67 S.E.2d 692, 696 (Ga. 1951). Arguing that, in the face of a world-wide war against communism, it would not be right to turn over to the legislature all decisions regarding economic regulation, and that "[b]y such conduct the legislature, aided and abetted by the judiciary, could ultimately convert Georgia into a socialist state despite the plain provisions of the Constitution which forbid such." Harris v. Duncan, 67 S.E.2d 692, 696 (1951). Regarding such an attitude, one commentator mildly noted, "The Georgia Supreme Court . . . found the self restraint philosophy distasteful." Note, *supra* note 15, at 317.

[180] Dep't of Fin. Insts. v. Holt, 108 N.E.2d 629, 635 (Ind. 1952).

[181] *See id.*

[182] 278 U.S. 105, 113-14 (1928).

[183] *See* Holt, 108 N.E.2d at 635 (citing *Ligett*).

[184] N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 167 (1973).

Four years later the Indiana Supreme Court utilized the doctrine again, striking down a restriction on automobile dealers.[185] After that, however, it left the field. Since 1956 the court has refused to invalidate an economic regulation on economic substantive due process grounds.[186] Such a "switch in time" is not, of course, unusual,[187] but it is quite a contrast to the practice of other states that continued to fight the "drift" in constitutional law for decades more.[188]

2. Massachusetts

The now "liberal" Supreme Judicial Court of Massachusetts[189] extended its respect for liberty into the economic sphere in the 1940s, 1950s, 1960s, and even 1970s.[190] This included two cases striking down compulsory auto insurance mandates,[191] as well as occupational licensing

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

[186] *See infra* Appendix B. The court has, however, invalidated land use zoning restrictions on economic substantive due process since *Motor Insurance Corp*. *See* Metro. Bd. of Zoning Appeals of Marion County v. Gateway Corp., 268 N.E.2d 736, 742 (Ind. 1971): Bd. of Zoning Appeals of City of New Albany v. Koehler, 194 N.E.2d 49, 55 (Ind. 1963).

[187] This, of course, refers to the switch in voting practices by Chief Justice Hughes between 1936 and 1937. *See* Micael Comiskey, *Can a President Pack—Or Draft—The Supreme Court? FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043, 1046 (1994).

[188] *See supra* III.B. The Oregon Supreme Court made a similar defiant comment to that in *Holt* in 1952:

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

Christian v. La Forge, 242 P.2d 797, 805 (Or. 1952). This sentiment had little long term effect. The court has not enforced economic substantive due process, broadly understood, since the 1960s. *See infra* Appendix B. "Broadly understood" is worth emphasizing because the Oregon Constitution lacks either a "due process clause" or a "law of the land" clause. *See* Or. Const. *passim*.

[189] *See, e.g.*, Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 969-970 (2003) (declaring that denying same-sex marriage violates equal protection under the state's constitution).

[190] *See infra* Appendix B.

[191] Traveler's Indem. Co. v. Comm'r of Ins., 265 N.E.2d 90, 92 (Mass. 1970) (holding that maximum rates set for compulsory auto insurance were unconstitutionally low as they were confiscatory); Aetna Cas. & Sur. Co. v. Commissioner of Ins., 263 N.E.2d 698, 703 (Mass. 1970) (similar holding).

rulings.[192] The original opening to the state's constitution reflected a deep commitment to economic liberty, proclaiming, "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."[193] This commitment contributed to the court's opinion in *Coffee-Rich, Inc. v. Commissioner of Public Health* in 1965.[194]

In *Coffee-Rich* the court reasoned that the consumer-protection regulation at issue was unconstitutional because it demeaned the intelligence of the consumer. The case concerned a law prohibiting the sale of a dairy substitute product.[195] Assessing the argument that the bar was necessary to prevent fraud, the court bluntly, and repeatedly, stated that members of the public must be given some credit in determining for themselves what a product actually is:

> We think that average consumers are aware that milk and cream are not 'vegetable product[s].' Similarly, advertising matter displayed on the frozen food counters from which Coffee-Rich is purveyed clearly and conspicuously states that Coffee-Rich is a 'frozen non-dairy' product. Again, we think that average consumers are aware that milk and cream are dairy products. . . . We do not believe that an average consumer would buy this product under the mistaken impression that it is milk or cream.[196]

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[192] In re Opinion of the Justices, 151 N.E.2d 631, 632 (Mass. 1958) (stating that a proposed regulation on the hours barbers may keep would violate economic liberties); Mansfield Beauty Acad'y, Inc. v. Bd. of Registration of Hairdressers, 96 N.E.2d 145, 147 (Mass. 1951) (striking down bar on beauty schools accepting payment for hairdressing students rendering services); Opinion of the Justices, 79 N.E.2d 883, 888 (Mass. 1948) (stating that proposed bill barring cemetery owners and operators from selling cemetery monuments would be an invalid exercise of the police power).

[193] Mass. Const. Pt. 1, Art. 1 (annulled, but quoted language readopted in Article CVI).

[194] 204 N.E.2d 281, 289 (Mass. 1965).

[195] *See Coffee-Rich*, 204 N.E.2d at 283. Other cases have found state supreme courts striking down restrictions on the sale of alternative dairy products. *See* People ex rel. Orcutt v. Instantwhip Denver, Inc., 490 P.2d 940, 945 (Colo. 1971) (ruling Filled Dairy Products Act, outlawing vegetable substitute for sour crème, to violate substantive due process); Sun Ray Drive-In Dairy, Inc. v. Trenhaile, 486 P.2d 1021, 1024 (Idaho 1971) (striking down statute banning "filled milk" under substantive due process); Brackman v. Kruse, 199 P.2d 971, 978 (Mont. 1948) (declaring prohibitive oleomargarine licensing fees unconstitutional as "excessive, confiscatory and prohibitive"); Flynn v. Horst, 51 A.2d 54, 60 (Pa. 1947) (determining act licensing the sale of oleomargarine violated substantive due process).

[196] Coffee-Rich, Inc. v. Commissioner of Public Health, 204 N.E.2d 281, 288-89 (Mass. 1965). The court also noted, "It seems to us that the defendants' reasons for attempting to

Because the public could be assumed to read the labels of Coffee-Rich products, the court concluded that the consumer-protection justification for the law was illusory. Such an inquiry, however, was not to stay in the state's jurisprudence for long. Eight years later the court stated that it employed the equivalent of the federal rational-basis test in reviewing economic regulation, asserting that "any rational basis of fact that reasonably can be conceived" will prevent a challenge to economic regulation.[197] Since then the court has not employed economic substantive due process to strike down a restriction on economic liberty.[198]

3. South Carolina

South Carolina is an example of a state that used economic substantive due process to protect economic liberty in the decades after the close of the *Lochner* era, did not enforce the doctrine for many years, and then whole-heartedly repudiated its use. In the 1960s the state's supreme court repeatedly struck-down the regulation of milk prices.[199] In the *Gwynette* case the court examined the various opinions in *Nebbia* and explicitly adopted the reasoning from Justice McReynolds' dissent.[200] McReynolds had stated that "fixation of the price at which A, engaged in an ordinary business, may sell, in order to enable B, a producer, to improve his condition, has not been regarded as within legislative power."[201] He reasoned that if the courts deferred to the legislature in its determination of when a price regulation was necessary for the public interest, then the

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prohibit the sale of Coffee-Rich are more fanciful than real." *Id.* at 288 (citing Opinion of the Justices, 79 N.E.2d 883, 888 (Mass. 1948)).

[197] Corning Glass Works v. Ann & Hope, Inc., 294 N.E.2d 354, 358 (Mass. 1973); *see also* Howard, *supra* note 15, at 882-83 (stating that Massachusetts' highest court, and those of some other states, "defer to legislative judgments in terms similar to those used by the United States Supreme Court").

[198] *See infra* Appendix B. *But see* Zuckerman v. Town of Hadley, 813 N.E.2d 843, 845 (Mass. 2004) (zoning case).

[199] *See* Richbourg's Shoppers Fair, Inc. v. Stone, 153 S.E.2d 895, 899 (S.C. 1967) (holding milk price-control law to be unconstitutional); Stone v. Salley, 137 S.E.2d 788, 793 (S.C. 1964) (holding milk price-control law to violate substantive due process); Gwynette v. Myers, 115 S.E.2d 673, 680 (S.C. 1960) (declaring that a milk price-control law is an illegitimate exercise of the police power).

[200] *Gwynette*, 115 S.E.2d at 679 (citing Nebbia v. New York, 291 U.S. 502 (1934) (McReynolds, J., dissenting)). About *Nebbia* the *Gwynette* court stated, "The majority opinion in that case, however conclusive as to applicable provisions of the Federal Constitution, does not control us in the interpretation of the Constitution of this state, under which the issue here arises." *Id.*

[201] *Nebbia*, 291 U.S. at 554 (McReynolds, J., dissenting).

legislature could always evade judicial review of such enactments and that "such a view, of course, would put an end to liberty under the Constitution."[202] Relying on this, the South Carolina court struck down the price control as an illegitimate exercise of the police power.[203]

Years passed by, and then in 2000 the court overruled all of these milk price control cases. Asserting that only it and the Georgia Supreme Court still engaged in the "affected with a public interest" inquiry, it handed the legislature much broader powers in its ability to regulate the milk industry.[204] As seen throughout this Article, such a statement regarding South Carolina and Georgia is misleading when taking into account the existence of recent cases in other states utilizing economic substantive due process.[205] Furthermore, although courts might refuse to enforce some of them, almost all of the cases listed in Appendix A have not been explicitly overruled.[206] South Carolina, in that way, stands as an exception.

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

Although economic substantive due process still functions in the state courts, it is nothing like what it was only thirty years ago.[207] What explains this drop? What explains it especially after the relatively prolific use of the doctrine by state courts in the 1940s, 1950s, and 1960s? Commentators have proposed various ideas why state courts hung onto the doctrine in those decades immediately following the close of the *Lochner* era, but because this Article is the first to recognize the more recent drop in the use of the doctrine, no studies have so far suggested a reason for it. This Part will introduce some possible answers. One is that state judges who were legally trained during the *Lochner* era had a hard time coming to grips

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[202] *Id.* at 555 (McReynolds, J., dissenting).
[203] *Se Gwynette*,, 115 S.E.2d at 679.
[204] R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 527 S.E.2d 763, 765 (S.C. 2000).
[205] *See generally infra* cases listed in Appendix A. It may have been true that, strictly speaking, only South Carolina and Georgia used the "affected with a public interest" test, but, as has been repeatedly mentioned, other states invalidated economic regulations through other manifestations of economic substantive due process.
[206] In addition to South Carolina, the West Virginia Supreme Court has overruled some of its post-1940 economic substantive due process opinions. State v. Wender, 141 S.E.2d 359, 363 (W.Va. 1965) (striking down cigarette minimum price law as violating substantive due process), *overruled by* Hartsock-Flsher Candy Co. v. Wheeling Wholesale Grocery Co., 328 S.E.2d 144, 150 (W.Va. 1984); State v. Mem'l Gardens Dev. Corp., 101 S.E.2d 425, (W.Va. 1957) (deciding that regulation of pre-need sales of funeral items violates substantive due process), *overruled by* Whitener v. West Va. Bd. of Embalmers & Funeral Dirs., 288 S.E.2d 543, 545 (W.Va. 1982).
[207] *See infra* Appendix B.

with the revolution of the New Deal, and clung onto the doctrine until they began retiring en mass in the 1970s. Another is that state justices experimented for a time with economic substantive due process under a "New Judicial Federalism" approach, and then, for whatever reason, backed-off out the experiment in the 1970s and 1980s. A more controversial hypothesis, and that advocated here, is that abhorrence by conservatives of the result in *Roe v. Wade*, and of the case's substantive due process analysis, turned many traditional advocates of economic substantive due process into critics of substantive due process review generally. In the process, economic substantive due process under state constitutional law was not eviscerated, but injured severely.

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

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

> Old habits die hard, and it is not surprising that state court judges in the 1950's were still thinking in substantive due process terms. That generation of judges had completed their legal education well before even the Supreme Court had begun to reject the premises of the cases decided early in the twentieth century. Once might expect, however, that by the 1970's, with the Supreme Court's renunciation of substantive due process in economic cases so clear and so widely known, state courts would have fallen in line, and limited their own review of legislative judgments touching social and economic questions.
>
> A look at state court decisions since the 1960's and 1970's shows that this has not happened.[208]

As this Article has illustrated, it did happen. Was Professor Howard merely wrong about the data and not about the judges? As more and more law students graduated after studying *West Coast Hotel* instead of *Lochner v. New York*, perhaps the tipping point finally came in the 1970s, and by the 1980s and 1990s these new judges were firmly in command of the nation's state supreme courts, ready to avoid the ghosts of *Lochner* that had haunted their chambers since the 1930s.

[208] Howard, *supra* note 15, at 882.

This proposal could possibly be the correct explanation. However, it does not satisfactorily explain the *rise* in economic substantive due process opinions from the 1940s to the 1950s. The rise was considerable—from sixty-eight to ninety-six. Was this a "last gasp" of the old guard of "*Lochnarians*" striking back against the forces of the New Deal?[209] Perhaps. Yet, at the same time, this explanation sounds a bit too conspiratorial for fifty sets of jurists. Perhaps instead, the judges of the 1950s collectively tried to experiment with economic substantive due process under their own constitutions, and later assessed the experiment a failure.[210]

As has been argued elsewhere—in normative evaluations of state economic substantive due process—there are valid reasons for rejecting such review at the federal level, but keeping it in state courts. For one thing, state judges are often elected, so if the voters feel that a judge is interjecting too many of her own socioeconomic views into her opinions they can remove her.[211] Furthermore, state constitutions are generally much easier to amend than the United States Constitution.[212] If the people or the legislature disagrees with a state supreme court's decision to protect economic liberty through the state constitution's due process clause, they can amend the constitution to preclude such an interpretation.[213] In addition, state courts "may better adapt their decisions to local economic conditions and needs" because their decisions concern only one state economy out of fifty.[214] It may be that a regulation that is unreasonable in one market is a legitimate exercise of the police power in another.[215] Another suggestion is that state legislatures, not to mention town councils, are much more susceptible to direct and one-sided special interest lobbying

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[209] See, for example, the discussion of the Indiana Supreme Court's opinion in *Department of Financial Institutions v. Holt*, 108 N.E.2d 629, 637 (Ind. 1952), *supra* notes 180-184 and accompanying text.

[210] And often under the Fourteenth Amendment as well. *See supra* notes 84-94 and accompanying text (discussing the tactic often used by state courts of highest review in striking down an economic regulation on both state and federal grounds, thus insulating it from review by the United States Supreme Court).

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

[212] *See id.* at 267 (pointing out that many states allow for amending the constitution through a referendum or initiative).

[213] The United States Constitution, in fact, possesses several amendments that sought to rectify a past Supreme Court interpretation. For instance, the Eleventh Amendment was a direct response to *Chisholm v. Geogria*. 2 U.S. (2 Dall.) 419 (1793); *see also* Tribe, *supra* note 63, at 64-65 & n.10 (noting "four (or perhaps five)" occasions).

[214] Hetherington, *supra* note 15, at 250

[215] *See id.* (comparing hypothetical review of theater anti-scalping laws in Indiana and New York, taking into account the different theater markets).

than is Congress.[216] State justices are perhaps better attuned to local political forces and motivations, and can use review of new regulations to ferret-out local protectionist legislation.

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

B. The Convergence Hypothesis

A different view is that something other than attrition, and something specific, caused the heavy drop in cases from the 1960s to the 1970s, and especially from the 1970s to the 1980s. The 1970s, in fact, saw less of a drop, percentage-wise, from the previous decade (forty-eight following sixty-seven), than the 1960s did from its predecessor (sixty-seven following ninety-six). However, the drop from the 1970s to its successor was over four-fold (eleven following forty-eight). Such a huge drop after the much more gradual decline of the previous two decades does not square all that well with either the aging of old fashioned jurists or the abandonment of an experimental "new" state approach to economic substantive due process. It would explain the change of one court, such as what happened to the United States Supreme Court in the 1930s, but a waive of retirements, or a waive of experiments taking less than ten years does not satisfactorily account for such a sudden change when those retirements and experiments are spread across fifty different jurisdictions. This is not to say that these trends could not have caused the four-fold drop in cases, it is just to say that a specific event, or events, peculiar to the time better fits the data.

If anything "big" happened to cause the four-fold drop it very likely took place in the 1970s.[217] What in the field of economic substantive due process took place in the 1970s? Other than what has been mention up until now in this Article, not very much. Leave off the word "economic," however, and something seismic occurred.

In 1973 the United States Supreme Court decided that a woman has the constitutional right to terminate her pregnancy.[218] Presaged by

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[216] This applies in other fields of legislation as well. *See* W. David Slawson, *The Right to Protection From Air Pollution*, 59 S. CAL. L. REV. 667, 767-78 (1986) ("Special interest legislation is of special concern to states because state legislatures are more susceptible to pressures from special interests that is Congress.").

[217] Of course the event, or events, could have taken place in the 1960s or before, but then this sounds more like a long-term cause, such as the attrition of judges.

[218] Roe v. Wade, 410 U.S. 113, 153 (1973).

Griswold v. Connecticut in 1965,[219] *Roe* partly relied upon the substantive component of the Fourteenth Amendment's Due Process Clause in recognizing a woman's "right to privacy."[220] Although it draw largely on the recent precedent establishing the "right to privacy," *Roe* was familiar to students of the *Lochner* court.[221] The Court identified an unenumerated right and then weighed that right against the state's interest to act through the police power in protecting public health and safety.[222] The most pertinent difference, of course, was that in this case the right was non-economic.

As students of recent American politics know, the reaction of many conservatives to *Roe* was vicious, ongoing, and relentless. Much of this reaction pertained to the Court "making up rights" and "finding rights in the Constitution that are not there."[223] Critics have repeatedly tied *Roe* to cases of the *Lochner* era. Comparisons with *Lochner* were inevitable because each case did essentially the same thing—protect unenumerated and (at least arguably) Lockean rights through a substantive interpretation of the Due Process Clause.[224] Conservative jurist Robert Bork has compared both

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

[220] Roe v. Wade, 410 U.S. 113, 154 (1973).

[221] The underpinnings of the "right to privacy" originated, to some degree, in the *Lochner* era. Says Professor David Bernstein:

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

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

[222] For instance, the opinion stated, "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." Roe v. Wade, 410 U.S. 113, 153-54 (1973).

[223] *See, e.g.*, Michael S. Greve, *A Conservative View of the Court: Getting Beyond "Activism" and "Restraint"*, NAT'L REV. (June 16, 2003) (arguing that "Brennan-era precedents" involved "the assertion of invented constitutional rights").

[224] *See supra* note 221. A strong case can be made that *Lochner* was founded on a traditional understanding of the "substantive" component of due process, while *Roe* was a more flimsy attempt at finding a "right to privacy" in the Due Process Clause and other provisions of the Constitution. What is important for the current thesis, however, is that

of these cases to the infamous *Dred Scott* decision.[225] Although he admits that, in terms of economic policy, he is predisposed to agree with the *result* in a case protecting economic liberties,[226] he adamantly contends that it is not the judiciary's place to protect "rights," such as the right to contract, that are not explicitly provided for in the Constitution.

After contending that *Dred Scott* was "perhaps the first application of substantive due process in the Supreme Court,"[227] Bork states, "*Lochner* employed substantive due process to strike down a state law limiting the hours of work by bakery employees. *Roe* used substantive due process to create a constitutional right to abortion. *Lochner* and *Roe* have, therefore, a very ugly common ancestor."[228] Bork employees the tactic of repeatedly referring to "*Dred Scott*, *Lochner*, and *Roe*" collectively, as though they form an unbroken line of cases.[229] Perhaps Bork himself would have denounced *Lochner* era decisions whether or not *Roe* and its fellow privacy cases had come to fruition. Even so, Bork's strict constructivism is highly attractive to a jurist who admires the free market, yet is adamantly opposed to the liberalization of abortion laws through judicial action. In similar abhorrence of judicial power, conservative legal scholar Graglia has compared the methods of *Roe* and *Lochner* and argued that both are wrong because each turns a procedural limitation on government into a substantive one: "The due process clause . . . has absolutely nothing to do with, for example, the power of New York State to limit the working hours of bakers or of Texas to restrict the availability of abortion."[230]

These sentiments illustrate a recognition of the similarity between *Roe* and cases invoking economic substantive due process. Once *Roe* was out those who vigorously disagreed with the legalization of abortion had to find fault with the case in order to have any hope of overturning it. The easiest way to do so was to discredit substantive due process itself. This would assist in overturning *Roe*, but would also discredit the use of "due process" clauses in protecting economic liberty.[231]

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both protected what might be characterized as Lockean rights through unenumerated constitutional protections.

[225] ROBERT H. BORK, THE TEMPTING OF AMERICA 32 (1990) (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)).

[226] *See id.* at 225 ("I too . . . accept the correctness of laissez-faire, as so defined.").

[227] *Id.* at 32 (citing D. CURRIER, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888 271 (1985)).

[228] Robert H. Bork, The Tempting of America 32 (1990).

[229] *See* Robert H. Bork, The Tempting of America 32, 131, 193, 209 (1990) (invoking *Dred Scott*, *Lochner*, and *Roe* together for the same proposition).

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

[231] This is not to say Bork and Graglia changed their views in order to find fault with *Roe*. It is to say that a jurist who valued economic substantive due process, yet was aghast at the

The conservative criticism of "the right to privacy" was not the first time substantive due process had been denounced as a form of legislating from the bench .[232] That began at least as long ago as the dawn of the *Lochner* era, with Professor Thayer's seminal article, *The Origin and Scope of the American Doctrine of Constitutional Law* in 1893.[233] Thayer argued for a deferential form of judicial review where a court should uphold a statute as constitutional as long as there exists some reasonable interpretation that would allow it to do so.[234] His thesis was repeated in various forums, from Justice Holmes' dissent in *Lochner* itself,[235] to the arguments by progressive-era intellectuals that the individual's economic liberties must make way for the government's power to alleviate the suffering of capitalist society.[236] As seen above,[237] the United States Supreme Court finally made way for this new progressive jurisprudence with *Nebbia* and *West Coast Hotel*.[238]

Why did this distaste not reach the state courts? An easy explanation, and a corollary to Professor Howard's hypothesis regarding judicial attrition,[239] is that the Justices of the United States Supreme Court in the years immediately following *West Coast Hotel* were progressive scholars and politicians nominated by President Franklin Delano Roosevelt.[240] Mathematically speaking, it is easy to make a few substitutions in a body of nine people, where a mere five will suffice, in order to change the body's views. However, it is much harder to change the minds of the justices of the several state courts of highest review, supreme in their interpretation of their own constitutions. Therefore, it is not surprising that state justices stuck, to some degree, to the methodology of

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result of *Roe*, might think about the former differently once faced with the existence of the later.

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

[233] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

[234] *Id.*

[235] Lochner v. New York, 198 U.S. 45, 75 (Holmes, J., dissenting).

[236] *See, e.g.*, Edward S. Corwin, *The Supreme Court & the Fourteenth Amendment*, 7 Mich. L. Rev. 643 (1909); Roscoe Pound, *Liberty of Contract*, 18 Yale L. J. 454, 487 (1909)

[237] *See supra* notes 74-81 and accompanying text (outlining the fall of economic substantive due process under federal constitutional law).

[238] *See supra* notes 74-76 and accompanying text.

[239] *See supra* note 208 and accompanying text.

[240] Ultimately, seven of the sitting justices were Roosevelt picks. *See* Comiskey, *supra* 187, at 1046.

the *Lochner* era and ignored the vicissitudes of a small body of favorites of a Democratic president.

What *is* surprising, but only from today's post-*Roe* perspective, is that state justices who embraced "substantive due process" in the face of the Supreme Court's hostility were "conservative." One need only look to articles of the 1950s on the preservation of economic substantive due process in the state courts to understand that the guardians of the doctrine were understood to be "conservative."[241] In 1950 Professor Monrad G. Paulsen stated that, regarding the *Lochner* court, "It has been charged that the doctrine of substantive due process has been the means whereby *conservative* judges have read classical economic theory into the Constitution."[242] In 1957 an article commented on the persistence of economic substantive due process under state constitution law by stating that "in . . . states where more *conservative* social and economic theories still hold sway, the courts have refused to follow the federal due process doctrine and have clung to the older concept of substantive due process."[243]

Yet today, "conservative" jurists often assail substantive due process, whether of the economic or non-economic flavor, as alien to their jurisprudence. While he sat on the bench of the Alabama Supreme Court, Chief Justice Roy Moore was unarguably one of the most conservative jurists in the county.[244] When concurring in a parental-notification case, the Chief Justice reflected on the doctrine's use in *Roe*, rhetorically asking, "Substantive due process? The very phrase teeters on the edge of textual self-contradiction."[245] Chief Justice Moore did not mention *Lochner* and its ilk, but with such a denunciation of "substantive due process" as a whole, one would expect a similar rebuke of its economic subset. Furthermore,

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

[242] Paulsen, *supra* note 15, at 92 (emphasis added) (citing Lochner v. New York, 198 U.S. 45, 75 (Holmes, J., dissenting)).

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

[244] Chief Justice Moore became nationally famous for refusing to remove a replica of the Ten Commandments from the Alabama Supreme Court grounds in the face of a court order. *See* Mauel Roig-Franzia, *Alabama Court Ousts "Ten Commandments Judge"*, WASH. POST., Nov. 16, 2003, at A3.

[245] *Ex parte Anonymous*, 803 So.2d 542, 550 (2001) (Moore, C.J., concurring).

Justice Scalia, no friend of progressive intellectuals, has proclaimed his contempt for substantive due process as expressed in *Lochner*. In a punitive damages case where the question of substantive limitations on damages awards arose, he opined, "I do not accept the proposition that [the Due Process Clause of the Fourteenth Amendment] is the secret repository of all sorts of . . . unenumerated, substantive rights—however fashionable that proposition may have been (even as to economic rights of the sort involved here) at the time of the *Lochner*-era cases . . . ."[246]

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

This about-face in "conservative" views on substantive due process under state constitutional law was merely part of the broader, and well-recognized, conservative retreat from the doctrine in the wake of *Roe v. Wade* discussed earlier.[247] It is also a gross oversimplification of current attitudes to judicial review amongst those often labeled "conservative." Legal scholars and jurists who are *politically* conservative often fall into two separate categories when it comes to judicial review: *judicial* conservatives on one side and a more countermajoritarian school of thought, sometimes called "liberal originalist,"[248] on the other. Therefore, "conservative" legal scholars may be conservative on abortion, but still advocate heightened judicial review when it comes to economic regulation and economic substantive due process.[249] This is to say nothing of

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[246] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 470 (1993) (Scalia, J., concurring).

[247] *See supra* notes 218-220 and accompanying text.

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

[249] Professor Douglas Kmiec is one example. *See* Douglas W. Kmiec, 13 ST. LOUIS U. PUB. L. REV. 183, 191-92 (1993) (distinguishing rights derived from natural law from "new" rights, such as the right to an abortion).

libertarian legal scholars, such as Randy Barnett, who would like to see heightened judicial review across the board.[250]

The above disclaimer aside, however, nuances among legal scholars are not what is at issue when explaining a long-term trend spread across fifty different jurisdictions. The over-all effect of *Roe v. Wade* among conservative scholars has undeniably increased distaste for "*Lochner*ism." The effect of *Roe*, if it did cause the drop in economic substantive due process cases in the 1970s and 1980s, did not occur immediately. It is not as though all of the forty-eight cases of the 1970s were issued before the date of *Roe*'s publication.[251] However, doctrines do not suffer such drops overnight when spread across fifty courts with total discretion in the interpretation of their own constitutions. However, the drop, whatever its cause, was huge, and the accompanying conservative rejection of heightened judicial review under the Fourteenth Amendment's Due Process Clause cannot be discounted as a meme that may have spread across the "conservative" state justices of the land.

CONCLUSION

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

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[250] *See* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 35-36 (2003) (praising the Supreme Court for applying a "presumption of liberty" analysis in its opinion in *Lawrence v. Texas*).

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

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

APPENDIX A

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

Alabama
City of Russellville v. Vulcan Materials Co., 382 So.2d 525, 527 (Ala. 1980).
White v. Associated Indus. of Ala., Inc., 373 So.2d 616, 620 (Ala. 1979).
Estell v. City of Birmingham, 286 So.2d 872, 876 (Ala. 1973).
Bulova Watch Co. v. Zale Jewelry Co., 147 So.2d 797, 799 (Ala. 1962).
Ala. Indep't Serv. Stations Ass'n v. Hunter, 31 So. 2d 571, 574 (Ala. 1947).
Lisenba v. Griffin, 8 So.2d 175, 117 (Ala. 1942).
Ala. Indep't Serv. Station Ass'n v. McDowell, 6 So.2d 502, 507 (Ala. 1942).
Alaska
None.
Arizona
Visco v. State ex rel. Pickrell, 388 P.2d 155, 165 (1963).
Killingsworth v. W. Way Motors, Inc., 347 P.2d 1098, 1101 (Ariz. 1959).
State v. A. J. Bayless Mkts., Inc., 342 P.2d 1088, 1090 (Ariz. 1959).
Findley v. Bd of Supervisors of Mohave County, 230 P.2d 526, 531 (Ariz. 1951).

Edwards v. State Bd. of Barber Exam'rs, 231 P.2d 450, 453-54 (Ariz. 1951).
Buehman v. Bechtel, 114 P.2d 227, 232 (Ariz. 1941).
Arkansas
Ports Petroleum Co., Inc. of Ohio v. Tucker, 916 S.W.2d 749, 751 (Ark.1996).
Handy Dan Imp. Center, Inc. v. Adams, 633 S.W.2d 699, 703 (Ark. 1982).
Hand v. H & R Block, Inc., 528 S.W.2d 916, 923 (Ark. 1975).
City of Blytheville v. Thompson, 491 S.W.2d 769, 773 (Ark. 1973).
McCastlain v. R. & B. Tobacco Co., 411 S.W.2d 882, 885 (Ark. 1967).
Bachman v. State, 359 S.W.2d 815, 818 (Ark. 1962).
Union Carbide & Carbon Corp. v. White River Distribs., 275 S.W.2d 455, 461 (Ark. 1955).
Wilkins v. City of Harrison, 236 S.W.2d 82, 84 (Ark. 1951).
North Little Rock Transp. Co. v. City of N. Little Rock, 184 S.W.2d 52, 54 (Ark. 1944).
Noble v. Davis, 161 S.W.2d 189, 191 (Ark. 1942).
California
Hale v. Morgan, 584 P.2d 512, 521 (Cal. 1978).
Walsh v. Kirby, 105, 529 P.2d 33, 42 (Cal. 1974).
State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, 254 P.2d 29, 36 (Cal. 1953).
Colorado
City and County of Denver v. Nielson, 572 P.2d 484, 486 (Colo. 1977).
People ex rel. Orcutt v. Instantwhip Denver, Inc., 490 P.2d 940, 945 (Colo. 1971).
City of Colo. Springs v. Grueskin, 422 P.2d 384, 387-88 (Colo. 1966).
Abdoo v. City and County of Denver, 397 P.2d 222, 223 (Colo. 1964).
Cleere v. Bullock, 361 P.2d 616, 621 (Colo. 1961).
Olin Mathieson Chemical Corp. v. Francis, 301 P.2d 139, 152 (Colo. 1956).
Battaglia v. Moore, 261 P.2d 1017, 1020 (Colo. 1953).
City and County of Denver v. Thrailkill, 244 P.2d 1074, 1080 (Colo. 1952).
Connecticut
Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey, 640 A.2d 101, 107-08 (Conn. 1994).
Caldor's, Inc. v. Bedding Barn, Inc., 417 A.2d 343, 354 (Conn. 1979).
Mott's Super Mkts., Inc. v. Frassinelli, 172 A.2d 381, 386 (Conn. 1961).
United Interchange, Inc. v. Spellacy, 136 A.2d 801, 806 (Conn. 1957).
Amsel v. Brooks, 106 A.2d 152, 158 (Conn. 1954).
Gibson v. Board of Exam'rs of Embalmers, 26 A.2d 783, 784 (Conn. 1942).
Hart v. Bd. of Exam'rs of Embalmers, 26 A.2d 780, 782 (Conn. 1942).
State v. Miller, 12 A.2d 192, ___ (Conn. 1940).

Delaware
Green v. Mid-Penn Nat. Mortg. Co., 268 A.2d 876, 877 (Del. 1970).
Rogers v. State, 199 A.2d 895, 897 (Del. 1964).
State v. Hobson, 83 A.2d 846, 858-59 (Del. 1951).
Florida
Chicago Title Ins. Co. v. Butler, 770 So.2d 1210, 1220 (Fla. 2000).
In re Forfeiture of 1969 Piper Navajo, 592 So.2d 233, 236 (Fla. 1992).
Dep't of Ins. v. Dade County Consumer Advocate's Office, 492 So.2d 1032, 1035 (Fla. 1986).
State v. Saiez, 489 So.2d 1125, 1129 (Fla. 1986).
Horsemen's Benevolent & Protective Ass'n v. Div. of Pari-Mutuel Wagering, 397 So.2d 692, 695 (Fla. 1981).
Bass v. General Dev. Corp., 374 So.2d 479, 484-85 (Fla. 1979).
United Gas Pipe Line Co. v. Bevis, 336 So.2d 560, 563-64 (Fla. 1976).
Castlewood Intern. Corp. v. Wynne, 294 So.2d 321, 324 (Fla. 1974).
Hilaleah Race Course, Inc. v. Gulfstream Park Racing Ass'n, 245 So. 2d 625, 628-29 (Fla. 1971).
Fla. Bd. of Pharmacy v. Webb's City, Inc., 219 So. 2d 681, 681-82 (Fla. 1969).
Rabin v. Conner, 174 So.2d 721, 726 (Fla. 1965).
Eskind v. City of Vero Beach, 159 So.2d 209, 212-13 (Fla. 1963).
Delmonico v. State, 155 So.2d 368, 370 (Fla. 1963).
Snedeker v. Vernmar, Ltd., 151 So.2d 439, 442 (Fla. 1963).
Stadnik v. Shell's City, Inc., 140 So. 2d 871, 875 (Fla. 1962).
Moore v. Thompson, 126 So.2d 543, 551 (Fla. 1961).
State v. Leone, 118 So.2d 781, 783 (Fla. 1960).
Larson v. Lesser, 106 So. 2d 188, 192 (Fla. 1958).
State *ex rel.* Walters v. Blackburn, 104 So.2d 19, 20-21 (Fla. 1958).
Fla. Accountants Ass'n v. Dandelake, 98 So.2d 323, 328 (Fla. 1957).
Miami Springs v. Scoville, 81 So.2d 188, 192-93 (Fla. 1955).
Miles Labs., Inc. v. Eckerd, 73 So.2d 680, 682 (Fla. 1954).
Lee v. Shobe, 66 So.2d 256, 256 (Fla. 1953).
Lee v. Delmar, 66 So.2d 252, 255 (Fla. 1953).
Town of Bay Harbor Islands v. Schlapik, 57 So.2d 855, 857 (Fla. 1952).
City of Miami v. Shell's Super Store, 50 So.2d 883, 884 (Fla. 1951).
Liquor Store v. Cont'l Distilling Corp., 40 So.2d 371, 385 (Fla. 1949).
Sullivan v. DeCerb, 23 So.2d 571, 572 (Fla. 1945).
Scarborough v. Webb's Cut Rate Drug Co., Inc., 8 So.2d 913, 922 (Fla. 1942).
Georgia
Strickland v. Ports Petroleum Co., Inc., 353 S.E.2d 17, 18 (Ga. 1987).
Batton-Jackson Oil Co., Inc. v. Reeves, 340 S.E.2d 16, 18-19 (Ga. 1986).

Strickland v. Rio Stores, Inc., 255 S.E.2d 714, 716 (Ga. 1979).
Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc., 262 S.E.2d 106, 108 (1979).
Ward v. Big Apple Super Mkts., 158 S.E.2d 396, 398 (Ga. 1967).
Williams v. Hirsch, 87S.E.2d 70 (Ga. 1955).
Cox v. Gen. Elec. Co., 85 S.E.2d 514, 519 (Ga. 1955).
Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 75 S.E.2d 161, 165 (Ga. 1953).
Harris v. Duncan, 67 S.E.2d 692, 694-95 (Ga. 1951).
Hawai'i
None.
Idaho
Sun Ray Drive-In Dairy, Inc. v. Trenhaile, 486 P.2d 1021, 1024 (Idaho 1971).
Winther v. Village of Weippe, 430 P.2d 689, 695 (Idaho 1967).
Berry v. Summers, 283 P.2d 1093, 1096 (Idaho 1955).
O'Connor v. City of Moscow, 202 P.2d 401, 404 (Idaho 1949).
Illinois
People v. Wright, 740 N.E.2d 755, 768-69 (Ill. 2000).
Church v. State, 646 N.E.2d 572, 580, (Ill. 1995).
People v. Hamm, 595 N.E.2d 540, 547 (Ill. 1992).
People v. Johnson, 369 N.E.2d 898, 903 (Ill. 1977).
Cook County v. Priester, 342 N.E.2d 41, 48 (Ill. 1976).
People v. Masters, 274 N.E.2d 12, 14 (Ill. 1971).
Shoot v. Ill. Liquor Control Comm'n, 198 N.E.2d 497, 500 (Ill. 1964).
City Sav. Ass'n v. Int'l Guar. & Ins. Co., 162 N.E.2d 345, 347 (Ill. 1959).
Gholson v. Engle, 138 N.E.2d 508, 512 (Ill. 1956).
Wolford v. City of Chicago, 138 N.E.2d 502, 503 (Ill. 1956).
Heimgaertner v. Benjamin Elec. Mfg. Co., 128 N.E.2d 691, 697 (Ill. 1955).
Figura v. Cummins, 122 N.E.2d 162, 166 (Ill. 1954).
Schroeder v. Binks, 113 N.E.2d 169, 170-73 (Ill. 1953).
People v. Brown, 95 N.E.2d 888, 899 (Ill. 1950).
N. Ill. Coal Corp. v. Medill, 72 N.E.2d 844, 847 (Ill. 1947).
Metro. Trust Co. v. Jones, 51 N.E.2d 256, 260 (Ill. 1943).
Indiana
Dep't of Ins. v. Motors Ins. Corp., 138 N.E.2d 157, 165 (Ind. 1956).
Dep't of Fin. Insts. v. Holt, 108 N.E.2d 629, 637 (Ind. 1952).
Kirtley v. State, 84 N.E.2d 712, 715 (Ind. 1949).
Dep't of Ins. v. Schoonover, 72 N.E.2d 747, 750 (Ind. 1947).
State Bd. of Barber Exam'rs v. Cloud, 44 N.E.2d 972, 979 (Ind. 1942).
Needham v. Proffit, 41 N.E.2d 606, 607 (Ind. 1942).

Iowa
Pierce v. Inc. Town of La Porte City, 146 N.W.2d 907, 910 (Iowa 1966).
Central States Theatre Corp. v. Sar, 66 N.W.2d 450, 454 (Iowa 1954).
Sperry & Hutchinson Co. v. Hoegh, 65 N.W.2d 410, 419 (Iowa 1954).
City of Osceola v. Blair, 2 N.W.2d 83, 85 (Iowa 1942).
Kansas
City of Baxter Springs v. Bryant, 598 P.2d 1051, 1061 (Kan. 1979).
Delight Wholesale Co. v. City of Prairie Village, 491 P.2d 910, 913 (Kan. 1971).
Delight Wholesale Co. v. City of Overland Park, 453 P.2d 82, 87 (Kan. 1969).
Sunflower Tip Top Dairies Co. v. City of Russell, 362 P.2d 76, 80 (Kan. 1961).
Gilbert v. Mathews, 352 P.2d 58, 69 (Kan. 1960).
State *ex rel.* Anderson v. Fleming Co., 339 P.2d 12, 18 (Kan. 1959).
Kentucky
Remote Services, Inc. v. FDR Corp., 764 S.W.2d 80, 83 (Ky. 1989).
Kentucky Milk Marketing and Antimonopoly Comm'n v. Kroger Co., 691 S.W.2d 893, 900-01 (Ky. 1985).
U.S. Mining & Exploration Natural Resources Co. v. City of Beattyville, 548 S.W.2d 833, 835 (Ky. 1977).
Johnson v. City of Paducah, 512 S.W.2d 514, 516 (Ky. 1974).
Adams, Inc. v. Louisville and Jefferson County Bd. of Health, 439 S.W.2d 586, 592 (Ky. 1969).
Roe v. Commonwealth, 405 S.W.2d 25, 28 (Ky. 1966).
Bruner v. City of Danville, 394 S.W.2d 939, 943-44 (Ky. 1965).
Gen. Elec. Co. v. Am. Buyers Corp., 316 S.W.2d 354, 361 (Ky. 1958).
Marshall v. City of Louisville, Ky., 244 S.W.2d 755, 757 (Ky. 1951).
Int'l Shoe Co. v. Commonwealth, 204 S.W.2d 976, 976, (Ky. 1947).
Ill. Cent. Ry. Co. v. Commonwealth, 204 S.W.2d 973, 975 (Ky. 1947).
Kenton & Campbell Burial Ass'n v. Goodpaster, 200 S.W.2d 120, 124 (Ky. 1946).
City of Jackson v. Murray-Reed-Slone & Co., 178 S.W.2d 847, 848 (Ky. 1944).
City of Mount Sterling v. Donaldson Baking Co., 155 S.W.2d 237, 239 (Ky. 1941).
City of Louisville v. Kuhn, 145 S.W.2d 851, 856 (Ky. 1940).
Louisiana
City of Shreveport v. Restivo, 491 So.2d 377, 380 (La. 1986).
City of Shreveport v. Curry, 357 So. 2d 1078, 1083 (La. 1978).
City of Crowley Firemen v. City of Crowley, 280 So. 2d 897, 902 (La. 1973).

West v. Town of Winnsboro, 211 So.2d 665, 672, (La. 1967).
City of Lafayette v. Justus, 161 So.2d 747, 749 (La. 1964).
Sears, Roebuck and Company v. City of New Orleans, 117 So.2d 64, 66 (La. 1960).
City of Lake Charles v. Hasha, 116 So.2d 277, 280-81 (La. 1959).
Schwegmann Bros. v. La. Bd. of Alcoholic Beverage Control, 43 So.2d 248, 260 (La. 1949).
Maine
State v. Johnson, 265 A.2d 711, 716 (Me. 1970).
United Interchange, Inc. of Mass. v. Harding, 145 A.2d 94, 97 (Me. 1958).
Opinion of the Justices, 132 A.2d 47, 49 (Me. 1957).
State v. Union Oil co., 120 A.2d 708, 713 (Me. 1956).
Wiley v. Sampson-Ripley Co., 120 A.2d 289, 291 (Me. 1956).
Maryland
Md. Bd. of Pharmacy v. Sav-A-Lot, Inc., 311 A.2d 242, 252 (Md. 1973).
Md. State Bd. of Barber Exam'rs v. Kuhn, 312 A.2d 216, 225 (Md. 1973).
Bruce v. Dir., Dep't of Chesapeake Bay Affairs, 276 A.2d 200, 209 (Md. 1971).
City of Baltimore v. Charles Center Parking, Inc., 271 A.2d 144, 147-48 (Md. 1970).
Loughran v. Lord Baltimore Candy & Tobacco Co., 12 A.2d 201, 207 (Md. 1940).
Middleman v. Davis, 12 A.2d 208, 208 (Md. 1940).
Massachusetts
Traveler's Indem. Co. v. Comm'r of Ins., 265 N.E.2d 90, 92 (Mass. 1970).
Aetna Cas. & Sur. Co. v. Comm'r of Ins., 263 N.E.2d 698, 703 (Mass. 1970).
Coffee-Rich, Inc. v. Comm'r of Pub. Health, 204 N.E.2d 281, 289 (Mass. 1965).
In re Opinion of the Justices, 151 N.E.2d 631, 632 (Mass. 1958).
Mansfield Beauty Acad., Inc. v. Bd. of Registration of Hairdressers, 96 N.E.2d 145, 147 (Mass. 1951).
Opinion of the Justices, 79 N.E.2d 883, 888 (Mass. 1948).
Sperry & Hutchinson Co. v. McBride, 30 N.E.2d 269, 276 (Mass. 1940).
Michigan
Grocers Dairy Co. v. McIntyre, 138 N.W.2d 767, 771 (Mich. 1966).
Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 54 N.W.2d 268, 269-70 (Mich. 1952).
Levy v. Pontiac, 49 N.W.2d 80, 82-83 (Mich. 1951).
Minnesota
Fairmont Foods Co. v. City of Duluth, 110 N.W.2d 155, 159 (Minn. 1961).

Mississippi
Goodin v. City of Philadelphia, 75 So.2d 279, 280 (Miss. 1954).
Stone v. Reichman-Crosby Co., 43 So.2d 184, 190-91 (Miss. 1949).
King v. City of Louisville, 42 So.2d 813, 816 (Miss. 1949).
Moore v. Grillis, 39 So.2d 505, 509, 512 (Miss. 1949).
Town of McCool v. Blaine, 11 So.2d 801, 802 (Miss. 1943).
Saucier v. Life & Cas. Ins. Co. of Tenn., 198 So. 625, 629 (Miss. 1940).
Missouri
Blue Inv. Co. v. City of Raytown, 478 S.W.2d 361 (Mo. 1972).
State on Inf. of Taylor v. Currency Servs., Inc., 218 S.W.2d 600, 604 (Mo. 1949).
Heil v. Kauffman, 189 S.W.2d 276, 278 (Mo. 1945).
State v. Taylor, 173 S.W.2d 902, 906 (Mo. 1943).
Montana
Wadsworth v. State, 911 P.2d 1165, 1174 (Mont. 1996).
State ex rel. Schultz-Lindsay Const. Co. v. State Bd. of Equalization, 403 P.2d 635, 646 (Mont. 1965).
Garden Spot Mkt., Inc. v. Byrne, 378 P.2d 220, 231 (Mont. 1963).
Union Carbide & Carbon Corp. v. Skaggs Drug Center, Inc., 359 P.2d 644, 654 (Mont. 1961).
State v. Canfield, 277 P.2d 534, 534 (Mont. 1954).
State v. Gleason, 277 P.2d 530,533-34 (Mont. 1954).
Brackman v. Kruse, 199 P.2d 971, 978 (Mont. 1948).
Nebraska
Gillette Dairy, Inc. v. Neb. Dairy Prods. Bd., 219 N.W.2d 214, 221 (Neb. 1974).
United States Brewers' Ass'n, Inc. v. State, 220 N.W.2d 544, 549 (Neb. 1974).
Plucknett v. Morrison, 133 N.W.2d 18, 19 (Neb. 1965).
Skag-Way, Inc. v. Douglas, 133 N.W.2d 12, 13 (Neb. 1965).
Terry Carpenter, Inc. v. Wood, 129 N.W.2d 475, 481 (Neb. 1964).
Skag-Way Dept. Stores, Inc. v. City of Grand Island, 125 N.W.2d 529, 541 (Neb. 1964).
Lincoln Dairy Co. v. Finigan, 104 N.W.2d 227, 234-35 (Neb. 1960).
Gen. Elec. Co. v. J. L. Brandeis & Sons, 68 N.W.2d 620, 621 (Neb. 1955).
McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 721-22, 68 N.W.2d 608, 618 (Neb. 1955).
City of Scottsbluff v. Winters Creek Canal Co., 53 N.W.2d 543, 550 (Neb. 1952).
Boomer v. Olsen, 10 N.W.2d 507, 511 (Neb. 1943).
Webber v. City of Scottsbluff, 3 N.W.2d 635, 638-39 (Neb. 1942).
Golden v. Bartholomew, 299 N.W. 356, 362 (Neb. 1941).

Jewel Tea Co. v. City of Geneva, 291 N.W. 664, 670 (Neb. 1940).
Nevada
In re Martin, 504 P.2d 14, 16 (Nev. 1972).
Zale-Las Vegas, Inc. v. Bulova Watch Co., 396 P.2d 683, 693 (Nev. 1964).
State v. Redman Petroleum Corp., 360 P.2d 842, 845, 846 (Nev. 1961).
New Hampshire
State v. Moore, 13 A.2d 143, 148 (N.H. 1940).
New Jersey
State v. Boston Juvenile Shoes, 288 A.2d 7, 11 (N.J. 1972).
John Moyant, Jr. v. Borough of Paramus, 154 A.2d 9, 21 (N.J. 1959).
Gilbert v. Town of Irvington, 120 A.2d 114, 118 (N.J. 1956).
Lane Distribs. v. Tilton, 81 A.2d 786, 796 (N.J. 1951).
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In re Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729 (N.C. 1973).
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Pennsylvania
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In re Borsch Estate, 67 A.2d 119, 123 (Pa. 1949).
Hertz Drivurself Stations v. Siggins, 58 A.2d 464, 475 (Pa. 1948).
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Flynn v. Horst, 51 A.2d 54, 60 (Pa. 1947).
Commonwealth v. Zasloff, 13 A.2d 67, 72 (Pa. 1940).
Rhode Island
None.
South Carolina
Richbourg's Shoppers Fair, Inc. v. Stone, 153 S.E.2d 895, 899 (S.C. 1967), *overruled by* R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc., 527 S.E.2d 763, 765 (S.C. 2000).
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Tennessee
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Utah
Leetham v. McGinn, 524 P.2d 323, 325 (Utah 1974).

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Salt Lake City v. Revene, 124 P.2d 537, 511 (Utah 1942).
Vermont
Vermont Salvage Corp. v. St. Johnsbury, 34 A.2d 188, 197 (Vt. 1943).
Virginia
Alford v. City of Newport News, 260 S.E.2d 241, 243 (Va. 1979).
Joyner v. Centre Motor Co., 66 S.E.2d 469, 474 (Va. 1951).
Moore v. Sutton, 39 S.E.2d 348, 351-52 (Va. 1946).
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County of Spokane v. Valu-Mart, Inc., 419 P.2d 993, 999 (Wa. 1966).
Lenci v. Seattle, 388 P.2d 926, 935-36 (Wa. 1964).
Remington Arms Co. v. Skaggs, 345 P.2d 1085, 1090-91 (Wa. 1959).
West Virginia
Thorne v. Roush, 261 S.E.2d 72, 75 (W.Va. 1979).
State v. Wender, 141 S.E.2d 359, 363 (W.Va. 1965), *overruled by* Hartsock-Flsher Candy Co. v. Wheeling Wholesale Grocery Co., 328 S.E.2d 144, 150 (W.Va. 1984).
General Elec. Co. v. Dandy Appliance Co., 103 S.E.2d 310, 313 (W.Va. 1958).
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Wyoming
Nation v. Giant Drug Co., 396 P.2d 431, 437 (Wyo.1964).
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APPENDIX B

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

State	1940s	1950s	1960s	1970s	1980s	1990s	2000s	TOTAL
Alabama	3	0	1	2	1	0	0	7
Alaska	N/A	N/A	0	0	0	0	0	0

Arizona	1	4	1	0	0	0	0	6
Arkansas	2	2	2	2	1	1	0	10
California	0	1	0	2	0	0	0	3
Colorado	0	3	3	2	0	0	0	8
Connecticut	3	2	1	1	0	1	0	8
Delaware	0	1	1	1	0	0	0	3
Florida	3	9	8	4	3	1	1	29
Georgia	0	4	1	2	2	0	0	9
Hawai'i	N/A	N/A	0	0	0	0	0	0
Idaho	1	1	1	1	0	0	0	4
Illinois	2	7	1	3	0	2	1	16
Indiana	4	2	0	0	0	0	0	6
Iowa	1	2	1	0	0	0	0	4
Kansas	0	1	3	2	0	0	0	6
Kentucky	6	2	3	2	2	0	0	15
Louisiana	1	1	3	2	1	0	0	8
Maine	0	4	0	1	0	0	0	5
Maryland	2	0	0	4	0	0	0	6
Massachusetts	2	2	1	2	0	0	0	7
Michigan	0	2	1	0	0	0	0	3
Minnesota	0	0	1	0	0	0	0	1
Mississippi	5	1	0	0	0	0	0	6
Missouri	3	0	0	1	0	0	0	4
Montana	1	2	3	0	0	1	0	7
Nebraska	4	3	5	2	0	0	0	14
Nevada	0	0	2	1	0	0	0	3
New Hampshire	1	0	0	0	0	0	0	1
New Jersey	3	3	0	1	0	0	0	7
New Mexico	0	1	1	0	0	0	0	2
New York	1	2	1	0	0	0	0	4
North Carolina	2	3	4	3	1	0	0	13
North Dakota	1	1	0	0	0	0	0	2
Ohio	4	4	0	0	0	1	0	9
Oklahoma	1	3	1	2	0	0	0	7
Oregon	0	2	1	0	0	0	0	3
Pennsylvania	5	8	1	1	0	0	1	15
Rhode Island	0	0	0	0	0	0	0	0
South Carolina	2	2	3	0	0	0	0	8

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