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To Pursue and Obtain Happiness and Safety

Timothy Sandefur
In 1776, the English speaking world declared its independence from Mercantilism. It did so in the form of a book by Adam Smith who set out to discover the nature and causes of wealth. Smith rightly saw that poverty is man’s natural state; like other moral philosophers of his era, Smith began his analysis by imagining life in a state of nature. And ever since the fall from Eden, it has been up to him to learn how to survive, to make the tools and the clothing and the fire and the shelter he needs. Moreover, Smith understood that it is those kinds of things that we mean when we use the word “wealth.” The Mercantilist theory measured wealth in terms of specie—in terms of how much gold was kept on hand. But Smith understood that we work not to get gold but to get the things we can buy with gold. “Consumption,” he wrote, “is the sole end and purpose of production.”

Notice how this argument echoes the social compact theories of Smith’s age. It strips away all the implications of mere convention and pictures man in confrontation with nature. Man is a reasoning, though imperfect being who must figure out how to live his life in the face of hostile world. He survives by creating wealth which he can use—that is, consume—and it is as much his right to do this as it is for him to breathe, to sleep, or to talk. It is man’s method of survival.

* Senior Staff Attorney, Pacific Legal Foundation. J.D. 2002, Chapman University School of Law; B.A. 1998, Hillsdale College. This paper was presented at the Smith Center for Private Enterprise Studies seminar, November 5, 2008.

In the state of nature, all men are created equal: none is born with the distinction of being the natural ruler of his neighbor. Nevertheless, this equality is sometimes overthrown by those who would use physical violence to control the actions of their fellows, or to take from them the wealth that they have created through their work. This happens also in political society, when individuals or groups use political advantages to gain favors for themselves at others’ expense. Smith’s book is largely a catalogue of the many complicated ways that economic interest groups use the power of the state to gain forcible advantages over their fellow citizens, and thereby to seize the wealth that others have created.

How do they do this? By establishing wasteful, make-work tasks for which there is no demand, but which taxpayers are nevertheless forced to subsidize. By prohibiting less expensive methods of production; by restrictions on competition which encourage waste and prevent innovation; by forbidding farmers from selling their product to those who are willing to pay more; by imposing needless training requirements before a person may enter a trade. In a thousand ways, existing business interests use the state to block competition, increase their own prices, and enrich themselves at the expense both of consumers who are forced to pay more, and entrepreneurs who are barred from earning a living. Thus although consumption is the end and purpose of production, the Mercantilist system constantly sacrifices everybody else to the interest of the producer, “and it seems to consider production, and not consumption, as the ultimate end.”² Businesses are protected from competition even though consumers would rather shop elsewhere, and they are subsidized even though consumers would rather not buy their products or services.

² Id.
Smith’s attack on these protectionist institutions is not rooted in issues of efficiency, although he understood such things well. His criticism is that these arbitrary favors do not advance the general public good, but pervert the state to private ends, and violate the principle of equality. Smith explains that “the property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable.”\(^3\) When government uses its power to forbid competition and increase the wages or profits of those businesses whom the government prefers, it “break[s] down that natural equality which would otherwise take place in the commerce which is carried on between them.”\(^4\) This, Smith concludes, is an injustice. “To hurt in any degree the interest of any one order of citizens, for no other purpose but to promote that of some other, is evidently contrary to that justice and equality of treatment which the sovereign owes to all the different orders of his subjects.”\(^5\)

What do we immediately notice from this review of the father of modern economics? The most striking thing: it is not an economic argument at all, not by today’s standards. This is a moral argument—an argument rooted in the proposition that all men are created equal, and as such that no other person has the right to control our actions or take our earnings without our consent. This was not surprising, of course, to Smith’s contemporaries. He was, after all, a professor of Moral Philosophy, and *Wealth of Nations* was planned as part two of an uncompleted three part work of which the first part had been *The Theory of Moral Sentiments*. The unfinished work was to have been on jurisprudence, and it is a shame it was not finished, for they would have made a precise parallel with the classic Lockean list, of “life, liberty and property.”

\(^3\) 1 id. at 138.  
\(^4\) 1d. at 142.  
\(^5\) 2 id. at 654.
Of course, in today’s world we think ourselves more sophisticated than this: we think of economics as more “scientific”—as a “value free” study of disembodied numerical values, into which beliefs about wrong and wrong may arbitrarily be added or subtracted to produce different results. Morality, we’re told, is itself a basically arbitrary matter of personal taste, and cannot therefore be studied with the kind of discipline we would apply to researching the inflation in Weimar Germany or the shortages of food caused by Soviet attempts at central planning.

But this is not true. Economics is not the study of supply and demand, it is the study of human choices, and those choices are necessarily bound up, as all human actions are, with questions of right and wrong. These alternatives are written for us in the fundamental alternative of life and death, of flourishing or privation, and we cannot make any sense of an economic theory that does not at least assume that it is better to have something than nothing. All economics, even when practitioners expressly disavow moral matters, takes for granted that human life is good, and that choices that benefit life are to be preferred to those that close it off. Man must create in order to survive, or he must trade with those who do create. And questions of justice and injustice, of right and wrong, cannot be divorced from that necessity. Smith’s critique of the political preferences at the heart of Mercantilism was and had to be a *moral* critique.
Two months after *The Wealth of Nations* was published, the revolutionaries of Virginia published a Declaration of Rights. Drafted by George Mason in consultation with the 25 year old prodigy James Madison, the Declaration began with ringing phrases:

all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.\(^6\)

Like Smith, Mason and Madison hold that mankind must use his liberty to acquire and possess property if he is to obtain happiness and safety. These rights are not mere matters of convention but are necessities of our existence, they are natural rights. Mason and Madison did not get this idea from Smith, of course, but from two sources with which Smith was also familiar. The first, was of course the Lockean tradition of English Whigs.\(^7\) For Locke, the purpose of political society is to preserve individual freedom and through that, “public happiness.” But Mason and Madison had also studied law, and although neither of them became lawyers, they had both read the work of Sir Edward Coke, whose *Institutes* were at the time the primary textbook for all aspiring lawyers.

Coke had been attorney general under Queen Elizabeth I, and was elevated to the post of Chief Justice when James became king after her death. He soon clashed with James, and was removed from the bench for his opposition to the king’s claims of divine right. He became one of the leaders of the opposition in Parliament, and shortly before

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\(^{6}\) Virginia Declaration of Rights ¶ 1 (1776).

his death helped author the Petition of Right presented to Charles I. Coke was a brilliant scholar, formal, devious, brutal when serving as a prosecutor. (He prosecuted Guy Fawkes, in fact.) He collected all of the antique written legal opinions he could get his hands on, seeking in them for timeless legal principles to be employed in future decisions—thereby in large part creating the very idea of English common law. “Reason is the life of the law,” he said. The judges found in the law those permanent principles of political society that a later generation would call natural law.

Coke believed that the Magna Charta protected every Englishman’s right to earn a living for himself and his family. The Magna Charta promised that no freeman would be deprived of liberty except by “the law of the land,” but an arbitrary command by the king did not qualify as the law of the land, because law is by definition general—law is the use of force in the service of the public good. But a legal preference which merely benefited a particular group or individual was not general. “Protectors,” said Coke, like men rowing a boat “look one way, and row another: they pretend public profit, intend private.” As a judge he and his colleagues issued a long series of decisions protecting that right. The most famous was the 1603 Case of the Monopolies, which was actually not decided by Coke, but was reported by him. In that case, a man holding a royal monopoly on the making and selling of playing cards sued another man who had dared to make and sell playing cards of his own. The court dismissed the suit, holding the monopoly illegal, as a violation of the common law. Relying on that decision, Coke

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decided cases such as the *City of London’s Case*,\(^{11}\) *Case of the Bricklayers and Tilers*,\(^{12}\) and my own favorite, *Allen v. Tooley*,\(^{13}\) in which the Worshipful Company of Upholders tried to use burdensome training requirements to prevent a person from entering the trade of upholstery. The upholsterers claimed, as such cartels always do, that the training requirement was necessary to protect the public. That is what Mercantilists always did: put the interest of producers above the interests of consumers—as today’s cartels claim that their own make-work projects and restrictions on competition will “create jobs.” But Coke scoffed at this excuse. “No skill there is in this,” he wrote, “for he may well learn this in seven hours.” A man had a right to try his hand at the upholstery business, and if he turned out to be no good, “unskillfulness is sufficient punishment for him.”

Here, as in *Wealth of Nations*, we find not an economic but a moral view: it is *wrong* for the state to take away a man’s livelihood to benefit those whose skill lies in political intrigue, instead of actual productivity. “At the common law, no man could be prohibited from working in any lawful trade,” Coke wrote in the *Tailors’ Case*, “for the law abhors idleness, the mother of all evil…and especially in young men, who ought in their youth, (which is their seed time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade.”\(^{14}\)

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\(^{14}\) 77 Eng. Rep. at 1219.
Coke’s views were certainly rooted in the Bible, and he believed strongly that Adam’s curse—“in the sweat of thy face shalt thou eat bread”\(^{15}\)—applied to every man. We may not use the state to escape that duty and to make a living by prohibiting competition so as to drive up our own prices, and impoverish another man who might otherwise have earned a living and contributed something worthy to the commonwealth. The monopolizer, said Coke, engrosses to himself what should be free to all men:\(^{16}\) namely, the freedom to pursue a trade in peace, and to keep the fruits of his labor.

And Coke and his generation knew of another story from the Bible. They recalled that the Pharisees used monopoly power to keep the Israelites in bondage, forbidding the Jews from sharpening their own swords and cutlery. “There was no smith found throughout all the land of Israel; for the Philistines said, ‘Lest the Hebrews make them swords or spears,’ but all the Israelites went down to the Philistines, to sharpen every man his plowshare, mattock, axe, and sickle.”\(^{17}\) The Stuart monarchy that so gleefully handed out monopolies looked an awful lot like the Philistines to Coke and his Whig brethren.

Coke’s great contemporary John Milton—who once wrote a sonnet in praise of Coke—took this thought still further. Just as the guilds deprived the people of the right to commercial trade, so as to enrich themselves and gain power over others, so censorship allowed the licensing bodies to block the free trade in ideas. In *Areopagitica*, to this day the most beautiful thing ever written on the freedom of the press, Milton objected that “truth and understanding are not such wares as to be monopolized.... We must not think

\(^{15}\) Genesis 3:19.
\(^{17}\) 1 Samuel 13:19-21
to make a staple commodity of all the knowledge in the land, to mark and license it like our broad cloth and our woolpacks. What is it but a servitude like that imposed by the Philistines, not to be allowed the sharpening of our own axes and coulters, but we must repair from all quarters to twenty licensing forges?“\(^\text{18}\)

This was one of the great insights of the day: that the state exists to serve all men equally. As Milton wrote in *Paradise Lost*,

O execrable Son so to aspire
Above his Brethren, to himself assuming
Authoritie usurpt, from God not giv’n:
He gave us onely over Beast, Fish, Fowl
Dominion absolute; that right we hold
By his donation; but Man over men
He made not Lord; such title to himself
Reserving, human left from human free.\(^\text{19}\)

And the Whig antimonopoly tradition that was born at this time had many important implications. The most essential was that the right to use our liberty, either for commercial exchange or for the discussion of ideas or for the worship of God, is not a permission or leave granted to us by the state, but belongs to every person by right simply because he, equally with every man, must pursue his life and his happiness through the exertion of his own effort, and when others take from him what he has earned, they put themselves over him as a master over a slave. When the government forbids the consumer from buying cotton so as to enrich the producer of wool, it deprives the consumer of his choice and of his money, and it deprives the cotton merchant of his freedom and his livelihood—all to benefit the philistine whom the government prefers. This was not an abstract theory of economics to the people of seventeenth century


\(^{19}\) John Milton, *Paradise Lost* Bk. 12, ll. 64-71.
England, it was a brutal daily matter of taxation and exploitation. When Charles I came to
the throne, he established a monopoly on soap-making, for which the licensed soap-
makers paid him £10,000, and another in starch-making, for which they paid him
£3,500. Elizabeth herself had forbidden the export of sheep, and prescribed for the first
offense that the seller have his hand cut off and nailed in the town square. Although this
penalty was reduced in later years, the exporting of sheep remained illegal in Adam
Smith’s day, all to benefit the wool producers at the expense of consumers.

Monopoly became a central complaint in the seventeenth century conflict between
Parliament and the crown that ended with the English Civil War. Coke died before the
revolutionaries killed king Charles, but he had overseen the passage in 1623 of his Statute
of Monopolies, which was meant to ban the crown from creating monopolies on behalf of
guilds. This law, wrote Chancellor Kent two centuries later, was “the Magna Charta for
British industry.” Why? Not because it advanced an enlightened view of the proper
relationship of supply to demand, but because it “contained a noble principle, and secured
to every subject unlimited freedom of action, provided he did no injury to others, nor
violated statute law.”

What the seventeenth century rebellions taught America’s founders was not just
the economic consequences of freedom of trade, but the injustice of depriving people of
their right to gain and earn a living through their own effort and ingenuity. America’s
founders, like their Whig predecessors, believed in economic freedom as a moral
principle central to safety and happiness. When in 1792, James Madison condemned

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21 2 Smith, supra note ___ at 648.
monopolies, he did so in terms that would hardly be found in any economics textbook today:

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens [the] free use of their faculties, and free choice of their occupations.... What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the oeconomical use of buttons of that material, in favor of the manufacturer of buttons of other materials!23

This “free use of their faculties, and free choice of their occupations” was what the founders meant by liberty. They no longer saw this right as merely a traditional right of Englishmen, but a natural right of all mankind. And they saw it less in Christian terms than in the secular terms of Epicurus, Gassendi, and Locke. In drafting the Declaration of Independence that was published in that same remarkable year of 1776, Jefferson does not appear to have hesitated over the words when writing out the famous phrase “the pursuit of happiness.” Yet much scholarly ink has been wasted over the question of why he departed from the usual usages such as “life, liberty, and property” or “life, liberty, and estate.” Why would Jefferson add this new, elegant term? Well, it was not new. He had George Mason’s Virginia Declaration of Rights before, him, and he had John Locke’s Essay Concerning Human Understanding, in which Locke had written that “the necessity of pursuing happiness is the foundation of liberty.”24 Each person must have the liberty, because he has the natural obligation, of using his effort to earn a living, which no other person may justly take from him.

24 John Locke, An Essay Concerning Human Understanding, § 52.
Does this mean that the right to pursue happiness refers only to gainful trade? Of course not. The right to pursue happiness includes also the right to learn, to expand our horizons, to enjoy time with our families and to do all those other things which enrich our lives, so long as we respect that right in others. “Rightful liberty,” Jefferson explained later, “is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add ‘within the limits of the law,’ because law is often but the tyrant’s will, and always so when it violates the right of an individual.”25 The right to earn a living is only part—an important part—of the right to engage in the common occupations of life.

It was, of course, tragic and ironic that at the times they were writing such things, these same men lived off of a system of slavery that was fundamentally based on destroying that very right—on taking from the slave that which he earned and allowing white masters to live off the labor of others merely because they held the whips. Samuel Johnson is reported to have asked “how is it that we hear the loudest yelps for liberty among the drivers of negroes?”26 But this was not so surprising. Every nation had lived off of slaves, and many had spoke at the same time grand words about liberty’s blessings. Indeed, it was probably the daily interaction with slaves that inspired the masters with greater terror at the thought of being reduced to such a state. What distinguished America’s founders was their recognition that they were themselves guilty of violating the principles for which they were fighting. It is their everlasting credit that they owned up to their faults. Many of us lack that courage.

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Now let us take a step forward to 1905. That was the year the Supreme Court heard the case of Joseph Lochner, a New York bakery owner who had violated state law by allowing his employee Aman Schmitter to earn some extra money by working late. Lochner probably knew that a new state law prohibited bakers from requiring or permitting employees to work more than 10 hours per day, but Lochner did allow Schmitter to work overtime, and he was soon charged with violating the Bakeshop Act. Brought before the New York Court of Appeals, he was found guilty, and appealed his case to the United States Supreme Court.

Lochner’s lawyer was Henry Weismann, who through a strange twist of fate had previously been the loudest voice in favor of passing the Bakeshop Act. By this time, Weismann explained, he had himself come to own a bakery, and he saw that this limitation on working hours was an arbitrary restriction of freedom. Previously, Weismann had argued that the law would increase employment because it would force businesses to hire more workers instead of getting the same work out of their current workforce. More, the law would ensure that bakery workers had more leisure time, surely a humanitarian goal. What these arguments overlooked was that Aman Schmitter was himself the best judge of what kind of leisure time he wanted. No doubt the working conditions of New York bakeries in 1905 were deplorable by today’s standards, and any one of us would prefer leisure to time spent working in a bakery. But the law did not propose to compensate Schmitter for the loss of his work time; it simply took away from
him the opportunity to earn more money if he so chose. The law clumsily dictated to him what others thought were his proper working hours, and did not replace the potential earnings it took away with any new opportunities. It simply made it illegal for him to work for more than a specified number of hours. The law did not make him a wealthier man; it simply made him a poorer man.

Nor did it make him safer. Of course everyone recognized that the state had the legitimate authority to protect workers against dangerous conditions of employment, and to protect the general public from dangerous products or fraudulent sales. If the law were devised to protect Schmitter from disease, or to protect consumers from dangerous foodstuffs, then no doubt the state would have been well within its proper sphere. The Fourteenth Amendment, at that time less than half a century old, recognized the state’s authority to restrict certain activities in the service of the general public good, while at the same time it forbade the state from depriving people of life, liberty or property without due process of law. This phrase—echoing Coke’s well known formulations from the Magna Charta—meant that the state could not deprive a person of freedom except when necessary to accomplish some genuine public good. It could not arbitrarily interfere with Aman Schmitter’s or Joseph Lochner’s right to earn a living.

Thus the question necessarily became, was there any reason to believe that the restriction of working hours protected the general public good? And the answer was no: there was no evidence in the record that long working hours harmed bakers or the public. In fact, the government’s attorney filed a sloppy, eighteen page brief that basically conceded that the law bore no relationship to the public health and safety. Weismann’s brief, on the other hand, made extensive arguments that there were few health effects

from working overtime in bakeries. The Court therefore ruled in favor of Lochner.

While the state may certainly restrict economic choices so as to protect the general public or to protect workers from dangerous conditions, it could not simply interfere whenever it wanted to, dictating the terms of employment on whatever grounds bureaucrats considered persuasive. “Statutes...limiting the hours in which grown and intelligent men may labor to earn their living,” the Court explained, “are mere meddlesome interferences with the rights of the individual...unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees.”

The Lochner decision was a straightforward application of principles long understood as essential to constitutional interpretation—principles articulated some three centuries earlier in the era of Edward Coke, and which barred arbitrary interference with the choices that free people make.

Twenty years later, the Court reiterated these principles in a case called Adkins. There the Justices struck down a law which set a minimum wage for women only—thereby encouraging businesses to terminate female employees and hire cheaper male labor instead. Willie Lyons, an elevator operator in a Washington D.C. hotel, sued, arguing that the law deprived her of her freedom to choose her employment. If she wanted to work for less than $16.50 per week, that was her decision, and nobody else had the right to take away that choice from her. The Court agreed. Women had every bit as much right to choose what jobs to take and how much they would work for. The government could not simply intervene to decide for her how she should use her freedom.

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29 Adkins v. Children’s Hospital, 261 U.S. 525 (1923).
And in another case, in 1932, the Court again invoked the legacy of liberty left by
the Whig antimonopoly tradition, when it invalidated an Oklahoma law requiring sellers
of ice to obtain permission first from the existing ice sellers in the community. The
scheme virtually ensured a monopoly in the ice trade, since existing sellers could block
newcomers from the market. This restriction did not protect the general public—it
simply protected existing companies against competition, to benefit them only, and to
secure for them higher prices. “There is no question now before us of any regulation by
the state to protect the consuming public.... The control here asserted does not protect
against monopoly, but tends to foster it. The aim is not to encourage competition, but to
prevent it; not to regulate the business, but to preclude persons from engaging in it.”

In none of these cases was there reference to what we would call an “economic
theory.” These were decisions well within the Anglo-American common law tradition, a
tradition which respected the rights of workers to choose for themselves the conditions of
their employment, and to open new businesses to compete with existing companies if
they chose. This was far from a worker’s panacea—it was a world of harsh conditions
and backbreaking labor, a world of poverty, ignorance, and disease; a world in which
charity and aid societies were as necessary as they were plentiful. But it was also a
society which respected the ability of employees to better their conditions if they chose,
free from the interference of groups that exploited political connections so as to enrich
themselves through the state. It was a society committed to the moral principles of
individual liberty, and willing to expand protection of that liberty to formerly excluded
groups like women, who were now recognized as being capable of making their own
decisions and pursuing their own happiness.

Today these decisions, *Lochner, Adkins, New State Ice Company*, are almost universally regarded as usurpations, as the sinister products of a conspiracy of judges who perverted the Constitution to serve their own personal views. This critique draws its inspiration from the opinion of Oliver Wendell Holmes, who dissented in *Lochner*, so it is worth looking at his views in depth.

Holmes was one of the most educated and intelligent men ever to serve on the Supreme Court. The son of one of New England’s most celebrated families, he had served honorably in the Civil War, and was wounded at Ball’s Bluff and Antietam. The experience deeply changed his life. All thought of universal principles of justice seemed ever afterwards to be moonshine to him—an invitation to further bloodshed and chaos. Yet there was nothing deeper than violence in his own view. Law was nothing more than force, and justice meant nothing more than what a given majority will fight for. Democracy was simply a way of preventing bloodshed by imposing the majority’s will on the individual through the process of law, and the individual could have no rights against the law, except when the majority chose to give him those rights. “All my life I have sneered at the natural rights of man,” Holmes said,31 and he probably never sneered so hard as he did in 1927, when he wrote a decision allowing states to force women to

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undergo sterilization operations against their will.\textsuperscript{32} For Holmes, there was only the use of force by majorities. All talk of individual freedom was airy metaphysical nonsense.\textsuperscript{33}

He was 64 when \textit{Lochner} was decided. Holmes dissented because in his view “the word ‘liberty,’ in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion.” \textsuperscript{34} What else could the word liberty possibly mean? Holmes did not say, but it certainly was not the freedom of Aman Schmitter or Joseph Lochner to make decisions about their own lives free from the arbitrary interference of others. On the contrary, this Holmes described as a “shibboleth”\textsuperscript{35}—a meaningless dogma to which one clings out of faith. This, Holmes insisted, was not what the Fourteenth Amendment meant by liberty. Instead, liberty meant the power of majorities to enforce their will on minorities who would then be left without a legal redress.

More telling still was another comment Holmes made. “This case is decided upon an economic theory which a large part of the country does not entertain.”\textsuperscript{36} Yet as we have seen, neither this nor the other cases were based on an \textit{economic} theory at all. They were based on a conception of liberty rooted in the type of \textit{moral} philosophy that Holmes disavowed. They were rooted in the proposition that the state exists to protect individual rights against arbitrary interference, and that when the government uses its authority in a manner not warranted by general principles and the common good, that action does not qualify as a “law.” This proposition meant nothing to Holmes, because he rejected the

\textsuperscript{32} \textit{Buck v. Bell}, 274 U.S. 200 (1927).
\textsuperscript{34} \textit{Lochner}, 198 U.S. at 76.
\textsuperscript{35} \textit{Id.} at 65.
\textsuperscript{36} \textit{Id.}
very possibility of a meaningful moral principle. There was no such thing as a public
good, no such thing as individual rights, no justice or injustice—there were only clashing
private interests and the arbitrary invocation of power. Indeed, Holmes claimed, a
Constitution is “made for people of fundamentally differing views.”

This last claim flies in the face of two thousand years of western political
philosophy. No thinker of whom I am aware had ever before claimed that a Constitution
was created for people who differed on fundamental principles. On the contrary, people
must share fundamentals if they are to have a constitutional order—although they might
differ on the specific policies. And the American founders had made it clear that they did
agree on fundamentals. They articulated those moral fundamentals in 1776, at the same
time that they declared themselves to be “one people,” and they described those truths
that they considered to be self-evident: that all men have an equal right to liberty, and that
when government becomes destructive of this principle, it is the right of the people to
abolish that government. These were the same founders who eleven years later would
say in the Constitution’s opening paragraph that liberty is a “blessing” which ought to be
preserved “for ourselves and our posterity.”

None of this makes sense in Holmes’ philosophy. For him, a Constitution was a
framework within which people who differed on fundamental principles could compete
for an opportunity to exploit the state’s power to further their own ends. Holmes, in
fleeing the specter of Civil War, had overturned the very foundation of American
constitutionalism, and replaced it with just that conception which the founders and their
predecessors had tried to abolish: the arbitrary use of state power to serve, not the general
public good, but the private benefit of whatever guild happens to gain the favor of those

37 Id. at 76.
holding power. Life, liberty, and the pursuit of happiness came to be viewed as simply permissions, which the state might manipulate or cut away whenever it chose. And Holmes was consistent enough, as Milton had been, to apply his principles also to freedom of expression. Though he is today regarded as a great spokesman for freedom of speech, Holmes opened one of his most famous decisions with the phrase, “persecution for the expression of opinions seems to me perfectly logical.”

The goal of Holmes’ career was to formulate a law shorn of moral considerations—all of which he considered primitive prejudices. This was an extreme position in his own day, and still has few complete subscribers. Yet modern legal academics view *Lochner* through his lens, and regard it and the other cases I have mentioned as if they simply enforced an economic theory through the force of law. In 1992, a well-regarded legal scholar could write:

I do not count the Supreme Court decisions defending contract or property rights from state regulation as Bill of Rights decisions. None of these cases represents a defense of civil liberties. The Court merely used libertarian philosophy to protect the wealthy from progressive legislation. The Court eventually rejected these economic liberty decisions because they were not connected to the text of the Constitution or any philosophy with roots in the history and traditions of our nation and its democratic process.

This, I hasten to repeat, is the dominant view in the legal academy today. It is a view that finds its origin in the Progressive era decisions of men like Oliver Wendell Holmes. It is a view radically alienated from the entire intellectual tradition of the American founding, and rejects entirely the propositions which the founders considered self-evident. It is a view that can make no sense of longstanding legal principles such as

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due process of law, that the framers thought we would understand. It is a view that today confuses and misleads the entire legal profession, from law students to judges. It walls off the law from those whom it is supposed to protect, and encourages just the evils which the Constitution was written to stop. It is a view that allows politically influential groups to deprive entrepreneurs and hardworking citizens of their right to earn a living.

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I am glad to say it is not the only view, and that there are still some who believe that among the liberties which the Constitution protects is the right to pursue a lawful occupation without unreasonable government interference. And in recent years there has been some hope that courts will again discover respect for this fundamental right. Yet there is still a major obstacle to overcome. That obstacle is the rational basis test.

The rational basis test was devised during Holmes’ era, and written into the Constitution in 1934, in a case called *Nebbia v. New York*. That decision upheld a New York law that prohibited the sale of milk at low prices. It may seem absurd to think that during the Great Depression, the government would enact a law forbidding businesses from selling cheap foodstuffs, but that was precisely what happened, and when Mr. Leo Nebbia sold two quarts of milk for less than 9 cents each, he was punished by the state. He appealed his case to the Supreme Court, which declared that from now on, if the government wished to control economic choices, it could do so in virtually every circumstance. A state may “adopt whatever economic policy may reasonably be deemed

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40 291 U.S. 502 (1934).
to promote public welfare,” and so long as the laws “are seen to have a reasonable relation to a proper legislative purpose,” they will be held constitutional.\footnote{Id. at 537.}

Thus “if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise... [T]he Legislature is primarily the judge of the necessity of such an enactment, [and] every possible presumption is in favor of its validity.”\footnote{Id. at 537-38.} Now that the state could decide to eliminate whatever competition it considered “harmful,” those business owners who lacked political influence operated at the mercy of the bureaucracy. And this is today the prevailing legal theory. When a law interferes with private property rights or with a person’s free economic choices, the courts will presume these laws to be constitutional in virtually every circumstance.

To overcome this presumption of constitutionality is a virtually impossible task. It requires the plaintiff to imagine every conceivable justification for the law, and then to disprove them, even if the justification is not one the legislature had in mind when enacting the law, and even if the state’s attorney fails to provide any evidence for it. In fact, in many cases, judges apply this presumption so strongly that they enter into the case as partisans against the plaintiff, conjuring up their own justifications for the law and upholding even absurd legislation because the judge concludes that someone might have thought it was a good idea.

Given such a strong presumption of validity, states now have the authority to establish all but the most absurd monopolies, singling out preferred businesses and giving them advantages not accorded to anyone else. Not long ago, a federal court in Louisiana
upheld a state law which required florists to obtain special licenses before entering the florist trade, even though applicants for such licenses were subjected to a test that evaluated such subjective criteria as the “beauty” of a floral design.\footnote{Meadows v. Odom, 360 F.Supp.2d 811 (M.D. La. 2005), vacated as moot, 198 Fed.Appx. 348 (5th Cir. 2006).} Such a law simply protected established florists against fair competition, and yet the court found that this law protected the public. Why? Because florists use wires to hold some floral arrangements together, and if a person did not have the proper training, he might prick his finger on such a wire. This conclusion, which could not pass the laugh test, did pass the rational basis test. Under rational basis, it is nearly impossible for entrepreneurs to vindicate their right to earn a living.

Still, there is hope. In 2002, the Sixth Circuit Court of Appeals struck down a law requiring casket sellers to obtain a license as funeral directors. Getting such a license required two years of training, in such subjects as embalming—training that could cost tens of thousands of dollars. The court found that such a requirement was far too much for a person who simply wanted to “sell a box.”\footnote{Craigmiles v. Giles, 110 F.Supp.2d 658 (E.D. Tenn. 2000), aff’d 312 F.3d 220 (6th Cir. 2002).} The law, wrote the Judges, existed solely to protect established businesses against fair competition, and this is unconstitutional. “Protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”\footnote{Craigmiles, 312 F.3d at 224.} This decision did not go very far. It simply found that lawmaking must serve some public good, and not the private welfare of the funeral directors guild.

Yet two years later, the Tenth Circuit Court of Appeals in a virtually identical case upheld the licensing requirement, declaring that even though the law did not serve...
the general public interest, it was nevertheless constitutional. “Economic protectionism,”
the judges declared, “constitutes a legitimate state interest.” After all, the judges
concluded, “dishing out special economic benefits to certain in-state industries remains
the favored pastime of state and local governments.” Thus the government may enact
legislation that has no other purpose than to prevent competition with a group that
government officials like. Laws need have no connection to a general public good—the
state may establish monopolies simply because it wants to. What, then, is the difference
between law and arbitrariness? There is none. According to this decision, whatever the
legislature chooses to enact is, ipso facto, “law,” even if it serves only the particular
interest of a favored group. Here we see the ultimate result of the Holmesian conception
of law as the clash of interests unguided by principles of justice.

These conflicting decisions are still upon the books, and they have not yet been
resolved. Fortunately, the Ninth Circuit Court of Appeals recently issued a decision that
may tip the balance for future generations. In a case called *Merrifield v. Lockyer*, the
Ninth Circuit struck down a law which required people using chemical-free methods of
pest control to first spend two years being trained in the use of chemicals, and then pass a
licensing exam. The law’s labyrinth of restrictions testifies to its absurdity. You see, the
law requires a license of any person treating pigeon, rat, or mouse infestations, but not
any other kind of pest.48

My client, Alan Merrifield, wanted to install a device called the “Bird Blaster” on
buildings to scare pigeons away. The device detects the presence of birds and then sprays
compressed air through plastic hoses, frightening any bird off of a building. According to

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46 Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004), cert. denied, 125 U.S. 1638 (2005).
47 547 F.3d 978 (9th Cir. 2008).
48 Cal. Bus. & Prof. Code § 8555(g).
the California law, if Mr. Merrifield installed this device on a building to scare pigeons away, he was required to first undergo two years of training learning how to handle pesticides, and then take a 200 question multiple choice test which contained plenty of questions about pesticides—but contains not a single question about pigeons, or about how to keep them off of buildings. On the other hand, if Mr. Merrifield installed the same device on the same building to keep seagulls or starlings or sparrows away, he would not be required to have a license at all.

Why require someone to undergo such extensive licensing simply to scare a pigeon off of a building? The answer became clear when we deposed the state’s expert witness. I asked him, “would you call this law irrational?” And he answered, with laudable honesty, “Yes I would.”49 But he went on to explain that the law was created through a compromise between those who wanted to allow people to practice chemical-free pest control and those who wanted to prevent such competition. Because pigeons, rats, and mice are the most common pests, the law was altered to require a license for the most lucrative part of the pest control trade, while allowing some minor competition when it came to seagulls or raccoons. The law, explained the state’s own witness, was consciously devised to prevent free competition and to grant a special economic favor to a particular interest group.

Despite this remarkable candor, the trial court nevertheless upheld the law. It speculated that although Mr. Merrifield did not himself use pesticides, he might enter a structure in which pesticides had been used by others, and he should know about the dangers of pesticides before doing so. Thus it made sense to require such training of him.

But if that were the case, why was such training only required if he dealt with pigeons? If he was installing a device to keep bats or squirrels away from a building, he could do so without any training, even though the building might very well be dripping with pesticides. And if the training were required because pigeons were more common than other birds, why would the examination have no questions at all about them?

In September, the Ninth Circuit reversed the trial court. The law, explained the court, “specifically singles out pest controllers like Merrifield.... Needless to say, this type of singling out, in connection with a rationale so weak that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review. Indeed, the record highlights that the irrational singling out of three types of vertebrate pests from all other vertebrate animals was designed to favor economically certain constituents at the expense of others similarly situated, such as Merrifield.”50 This violated the Constitution because “economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.”51

6.

Let me return to my main theme. The question in all of these cases—from the Case of the Monopolies in 1603, to Merrifield v. Lockyer last month, is not a question of economics but one of moral and political philosophy. What is the purpose of the state? Does it exist merely to make the powerful more powerful? Is it, as Holmes believed, an

50 547 F.3d at 991.
51 547 F.3d at 991 n. 15.
institution by which the strong organize the weak to do their bidding? Is it a shield against questions of right and wrong, so that the thefts we may not commit in person are transformed into legitimate policy simply because the state says so? Is justice, as Thrasymachus so brazenly told Socrates, merely the interest of the stronger? Or are there principles which governments must respect if they are to differ from a gang of thugs?

These questions cannot be escaped, as modern, “value-free” legal scholars would have it. They are required by the very nature of the law. The Constitution says that the government may not deprive us of life, liberty, or property without due process of “law.” What, then, is law? Is it whatever the legislature happens to enact, even those things devoid of principle or rationale? Our forebears thought that law was the use of government’s coercive powers in the service of the public good—to protect us from those who would deprive us of our freedom or the fruits of our labors. They believed that government exists to protect us from crime, even those crimes committed by the government itself. They believed that government exists to protect our rights to life, liberty, and the pursuit of happiness. They understood that that included the right to earn an honest living.

Misled by the amoral theories of men like Oliver Wendell Holmes, we lawyers have for too long shirked our duty to articulate the principles of justice and to see that those principles are followed. By shrugging at the questions “what is law,” and “what are the moral ingredients necessary to make a legislative pronouncement a law instead of an arbitrary decree?” we have allowed the state to claim that all its actions, even its unprincipled actions, are lawful simply because they are enforced with penalties. And we

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52 The classic cases explaining how this analysis—which a later generation called “substantive” due process—is carried out are Loan Ass’n v. Topeka, 87 U.S. (20 Wall.) 655 (1874), Davidson v. City of New Orleans, 96 U.S. (6 Otto) 97 (1877), and Hurtado v. California, 110 U.S. 516 (1884).
have failed to realize that in doing so we have abandoned the very reason for a
Constitution. After all, if there are no higher principles for judging the difference
between that which is law and that which is not law, then there is no reason to limit the
lawmaking authority. America’s founders believed that there were such principles, and
they therefore created constitutional limits, both “substantive” and “procedural” to ensure
that those principles were obeyed. They required that the state act only through “due
process of law,” and they knew that that phrase, like the “law of the land” requirement in
the Magna Charta, prohibited the government from simply giving economic favors to
particular interest groups. It required that the government act in the service of the
general public good, and not for private benefit. And it required that the state respect our
right to pursue happiness.

There are two reasons that the Holmesian myth persists. The first, as I have
indicated, is our smug modern presumption that morality is an irrational quantity, a
subjective preference not subject to reasoned dispute. This is a fallacy inherited from the
Pragmatists. In fact, morality has an objective basis, just as physical health does, in the
nature of man and the needs of his flourishing. In no other field of inquiry would we
assume that just because people disagree, there must consequently be no fact of the
matter. Certainly no competent lawyer would assume that it is only emotional prejudice
to prefer security to danger or respect to crime, and no competent economist would claim
that the difference between wealth and destitution is arbitrary. Our Constitution was
written to express certain shared beliefs about the real meaning of justice and freedom,

53 The connection between the “law of the land” clause and the “due process of law” clause was well
understood even before 1819, when Daniel Webster explained it in his oral argument in the Dartmouth
College case. 17 U.S. (4 Wheat.) 518, 581-82 (1819) (argument of Mr. Webster).
and our society has thrived as much as it has because those beliefs were, in a very real sense, correct.\textsuperscript{54} 

The second reason is that many lawyers continue to believe that enforcing the constitutional tradition of economic freedom would benefit only powerful business interests at the expense of vulnerable workers. Yet the truth is the reverse. Powerful businesses have the wherewithal and the influence to manipulate the ever more complicated maze of government restrictions and regulations. They can afford to play the game of the rent-seeking society. By contrast, the entrepreneur, the upstart businessman, the individual employee, lack that kind of money and influence. Willie Lyons and Alan Merrifield, the newly Oklahoma ice companies, and Aman Schmitter—they do not have the money and connections that would enable them to obtain special favors from the government. Instead, they must rely on the Constitution, and on judges sworn to uphold it, to ensure that their right to pursue happiness is not unfairly hampered. Our Constitution was written with them in mind, and when the legislature violates its duty to protect their equal rights, and serves private interests at their expense or at the expense of consumers, it is the job of courts to say no.

Meanwhile it is our job as attorneys to reacquaint ourselves with the moral principles of freedom, and the many ways in which our Constitution protects that freedom. It is time that we reexamine the prejudices inherited from Holmes and his acolytes, and to return to our rightful position as defenders of freedom. It is time that we insist that our government respect the right to pursue happiness.

\textsuperscript{54} A defense of the objectivity of morality would take me far afield. An excellent recent discussion is to be found in a symposium in the January 2008 issue of \textit{Social Philosophy And Policy}. 