Economic Liberty as the Basis of Social Liberty: *Bowers* Revised in the Context of State Constitutions

By DANIEL R. GORDON*

Introduction

The death of *Lochner v. New York*[1] in the late 1930s ultimately injured those who opposed *Lochner* and economic due process. Social progressives, people who desire to improve the economic and social status of those with less power, such as minorities, women, homosexuals, and the poor, undermined their own cause by choosing not to limit state power in the early twentieth century. Progressives opposed economic liberty as obstructing socially progressive legislation benefiting the poor and powerless in American society.[2] Rather than trying to expand federal constitutional limitations on state power, social progressives applauded and supported the enhancement of governmental power, both state and federal. As the twentieth century ends, social progressives suffer from their own unwillingness to tolerate regressive legal doctrines and policies because *Lochner* and its strong substantive due process legal philosophy remain unavailable in federal constitutional law to protect a variety of social and economic behaviors including, homosexuality, abortion, and panhandling.

Not all is lost for social progressives as they face an increasingly conservative Supreme Court. If progressives are willing to exploit state constitutional protections of economic activities, economic liberty remains available as a basis for developing a broad-ranging social liberty.

Part I of this Article reviews how the demise of *Lochner* doomed the growth of a strong social liberty protection in federal constitutional law. Part II investigates how economic liberty is a viable and strong element of state constitutional law in the late twentieth century. Part III criti-

* Associate Professor of Law, St. Thomas University School of Law; B.A., Haverford College; J.D., Boston College Law School.

1. 198 U.S. 45 (1905).

2. *See generally* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265.

ques three underlying analytical principles utilized by state courts in applying state constitutional economic liberty. Part IV applies these underlying analytical principles to homosexuality, a social behavior not protected by the federal constitution, in order to demonstrate how economic liberty principles can be utilized by social progressives to develop state constitutional social liberties far broader than any federal constitutional privacy protection.

I. The Tragedy of Social Progressivism: The Death of *Lochner*

For more than half of the decades of the twentieth century, federal constitutional law developed substantive limits to state power. During the first three decades of the twentieth century, federal constitutional law limited the states in regulating private economic activities.[3] *Lochner* provided the doctrinal and legal bases for placing limits on state governments when those governments sought to regulate certain private economic behavior.[4] The *Lochner* Court recognized that the state's police powers included the protection of safety, health, morals, and general welfare.[5] Those protective interests or purposes of the state governments, however, were interpreted narrowly. Health meant just that—health—and could not serve expansively as a rationale for legislation that really regulated the power to contract.[6] Hence, whole areas of human activity were deemed beyond the control of the basic powers of the states. Those areas included an employer's ability to require employees to disavow union membership,[7] the determination of wage rates,[8] the determination of fees charged for services,[9] and the setting of prices for products.[10] The federal constitution placed beyond state control a sphere of conduct involving the right to contract.

This zone of economic liberty ended during the Great Depression when social legislation became a legitimate exercise of state power.[11]

Since the mid-1960s, the federal constitution restricted state power on substantive grounds, to protect a zone of personal privacy and liberty

3. Gabriella S. Tussusov, Note, *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, 529-31 (1988).

4. *Lochner*, 198 U.S. at 53.

5. *Id.*

6. *Id.* at 57.

7. Coppage v. Kansas, 236 U.S. 1, 26 (1915).

8. Adkins v. Children's Hosp., 261 U.S. 525, 556-58 (1923).

9. Ribnik v. McBride, 277 U.S. 350, 357 (1928).

10. Williams v. Standard Oil Co., 278 U.S. 235, 239 (1929).

11. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397 (1937).

but not economic liberty. The sphere of protection shifted from the earlier right to contract to the right to obtain and use contraceptives,[12] to choose to bear a child,[13] and to choose to live with an extended family.[14] The zone of privacy and liberty cases apply a similar restriction on state power as do the zone of economic liberty cases. For example, *Roe v. Wade*'s exclusion of almost all state regulation during the first trimester of a pregnancy[15] differs little from the ban in *Adkins v. Children's Hospital's* ban on governmental interference in private contracting for wages.[16] Personal and economic liberties carve out areas of human behavior where government either cannot enter at all, as in the first trimester of pregnancy, or may enter only for very precise and important reasons.[17] Such liberty protections are among the strongest protections against governmental interference because they establish boundaries on governmental power. Once governmental power is limited, any state interest related to a specific outcome becomes irrelevant or inconsequential. For instance, though the *Roe* Court concedes that the state has an interest in protecting potential life, only at the end of the first trimester does that interest become meaningful.[18] Such a weakening of state interests fails to occur even in a free-speech context where purely scientific information is communicated.[19] Unfortunately, not only has federal constitutional economic liberty disappeared, but the more recently developed federal constitutional social liberty is being weakened[20] and may be abandoned.[21]

Economic liberty died after a long struggle with social progressiv-

12. *See* Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

13. Roe v. Wade, 410 U.S. 113, 115 (1973).

14. Moore v. East Cleveland, 431 U.S. 494, 504-06 (1977).

15. *Roe*, 410 U.S. at 163-64.

16. *Adkins*, 261 U.S. at 546.

17. *See Moore* 431 U.S. at 499-500 (the Court utilizes a balancing test and examines the state's purpose very closely).

18. *Roe*, 410 U.S. at 163-64.

19. *See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979). The United States government sought to enjoin the publication of a description of the design and operation of a hydrogen bomb. The description was not a "do-it-yourself" guide to the construction of a thermonuclear device. *Id.* at 993. The government alleged a threat to national security, while the *Progressive* contended no imminent threat existed. *Id.* at 991-92. The *Progressive* case is seen as a potential hindrance to scientists who want to share information about aspects of nuclear energy. *See* Mary M. Cheh, *The Progressive Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls*, 48 GEO. WASH. L. REV. 163 (1980).

20. *See* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2851-52 (1990); Webster v. Reproductive Health Servs., 492 U.S. 490, 510-11 (1989); Bowers v. Hardwick, 478 U.S. 186, 195 (1986).

21. *See Cruzan*, 110 S. Ct. at 2863 (Scalia, J., concurring); *Webster*, 492 U.S. at 534-35 (Scalia, J., concurring).

ism.[22] The *Lochner* line of cases blocked a variety of social legislation aimed at bringing about what could be termed social justice.[23] Economic liberty became a stumbling block, and in some cases a wall, impeding the creation of more humane conditions by state and federal legislation. Minimum wage legislation serves as a prime example of how social progress was thwarted by economic liberty.[24] Those who sought to improve the lot of workers, the poor, and consumers lobbied the state legislatures and Congress for statutes that offered protection against powerful business interests. The Supreme Court embittered those social progressives by striking down the legislation as violative of economic liberty.[25] The ire of social progressives was heightened during the Great Depression when the Supreme Court struck down important components of the New Deal recovery program.[26] The Court finally retreated from economic liberty doctrine in *Nebbia v. New York*[27] and *West Coast Hotel Co. v. Parrish*[28] by deferring to state legislative determinations for coping with social and economic problems.

A. The Arguments Opposing Economic Liberty

Opponents of economic liberty offered three arguments why economic liberty should cease to defeat social legislation, though the arguments focused indirectly, at best, on the need for social justice and change. The three arguments are:

(1) By blocking social legislation, the federal courts act beyond their traditional judicial function by adopting a legislative role.[29] Social issues are not the type of issues that courts are equipped to handle. The courts lack the representativeness of community values that allow government to cope with social problems.[30] In addition, the courts lack the

22. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 360-61 (1985); Arnold M. Paul, *Legal Progressivism, the Courts and the Crises of the 1890's, in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 283-92 (Lawrence M. Friedman & Harry N. Schieber eds.); CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 741-47 (1926).

23. For a statistical analysis of the cases in the early years of the *Lochner* era, see *Warren, supra* note 22, at 714-42.

24. *See, e.g.*, Donham v. West-Nelson Mfg. Co., 273 U.S. 657 (1927); Connally v. General Constr. Co., 269 U.S. 385, 388-89 (1926), Murphy v. Sardell, 269 U.S. 530 (1925).

25. FRIEDMAN, *supra* note 22, at 360-61.

26. BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 180-82, 200-08 (1942).

27. 291 U.S. 502, 537 (1934).

28. 300 U.S. 379, 399 (1937).

29. *See Nebbia*, 291 U.S. at 537.

30. *See West Coast Hotel Co.*, 300 U.S. at 399-400 (1937); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 508 (1908).

competence to play a role in resolving complex economic and social issues.[31] Such issues should be debated in legislative committees.[32]

(2) Economic liberty as a constitutional principle limits the federal constitution to one economic philosophy: freedom-of-contract, or laissez-faire economics. The constitutionalization of one economic philosophy troubles critics of economic liberty because neither the Due Process Clause in particular nor the Constitution in general mentions freedom of contract or freedom to set prices and fees.[33] Economic liberty requires the Supreme Court to read one vision of the nature of American society into the words "due process."

(3) Economic liberty and the general concept of liberty under the Due Process Clause undermine the power of the states, especially the legislatures, to address local concerns or national concerns on a local basis.[34] The states should be free to adopt whatever measures may reasonably be necessary to promote the public welfare.[35] Liberty may obstruct state powers to such a degree that the nation may want to ask again whether current notions of liberty have outlived their usefulness and whether the nation has changed to such an extent since adoption of the Fourteenth Amendment that due process should be reinterpreted.[36]

The critics argued that economic liberty and notions generally concerning liberty distorted judicial power and constitutional interpretation. The arguments read as if they were politically neutral, avoiding the espousal of policy results. The integrity of the courts and the federal constitution mattered most. The critics of economic liberty provided a later generation of constitutional critics with a set of arguments.[37]

B. The Arguments Opposing Social Liberty

The same arguments that played a role in destroying economic liberty to the benefit of social progressivism now plague social progressives who support social liberty. Modern conservative critics of social liberty have developed four arguments why social liberty fails to be a valid constitutional principle. The four arguments echo many of the concerns of

31. *See Nebbia*, 291 U.S. at 537.

32. *See* Hand, *supra* note 30 at 508.

33. *See West Coast Hotel Co.*, 300 U.S. at 391.

34. *See* Charles Warren, *The New 'Liberty' Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 464 (1926).

35. *Nebbia*, 291 U.S. at 537.

36. WARREN, *supra* note 34, at 464-65.

37. *See* Lino A. Graglia, *The Constitution, Community and Liberty*, 8 HARV. J.L. & PUB. POL'Y 291 (1985); Richard A. Posner, *Philistinism in Law*, 16 N. KY. L. REV. 415 (1989); William B. Reynolds, *Renewing the American Constitutional Heritage*, 8 HARV.J. L. & PUB. POL'Y 225 (1985).

the critics of economic liberty in the first decades of the century. Those arguments are:

(1) Social liberty distorts the roles of the courts. Legislatures tackle social issues by making law, and the judiciary has no role to play in developing social policy. The role of the judicial branch is a reactive one and not a proactive one.[38] When courts override state legislatures on policy grounds, courts act as if they are legislating.[39] When social policy issues predominate, the courts possess no more insight into alternative resolutions than do the legislatures.[40] The courts must defer to the legislatures.

(2) Even if the federal constitution fails to reflect majority values, it should not be applied in ways that flout or impede majority values.[41] Social liberty allows the Constitution to be utilized as a shield to political debate concerning social issues such as abortion, and the construction of such a shield undermines democratic processes.[42] Social liberty reflects a lack of faith in the self interest of the majority and calls into question the integrity of representative government.[43]

(3) Social liberty creates an imbalance in the American system of federalism. Federal judicial power dominates state power. The American constitutional framework should allow the federal courts to defer to state law where the states have power and competence.[44] The states constitute legal laboratories, and the federal courts should respect the states' alternative resolutions to social problems.[45] For example, state law predominates in resolving social issues such as the right to withdraw medical treatment.[46]

(4) Social liberty is not explicitly mentioned in the text of the federal constitution. Failure to restrict liberty to the text of the federal constitution allows social philosophers to read too much into it, which makes it too amenable to current social remedies.[47] Broad reading of the federal constitution results in highly politicized interpretations that

38. Reynolds, *supra* note 37, at 226.

39. Richard S. Myers, *The End of Substantive Due Process*, 45 WASH. & LEE L. REV. 557, 614 (1988).

40. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. at 2841, 2859 (Scalia, J., concurring).

41. *Bowers v. Hardwick* , 478 U.S. 186, 195-96 (1986).

42. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989).

43. *Cruzan*, 110 S. Ct. at 2863 (Scalia, J., concurring).

44. *Bowers*, 478 U.S. at 194, 196.

45. *Cruzan*, 110 S. Ct. at 2858-59 (O'Connor, J., concurring).

46. *See id.* at 2859 (Scalia, J., concurring).

47. Graglia, *supra* note 37, at 292; Myers, *supra* note 39, at 613-14; Reynolds, *supra* note 37, at 228.

reflect the value preferences of one segment of American society.[48] As a result, the text of the federal constitution yields to the social preferences of particular judges.[49]

C. Comparing Economic and Social Liberty

The arguments against social liberty include the same themes as the arguments against economic liberty. First, constitutionalism blocks the popular will. Second, the courts do not have the power and competence to tackle the policy choices at hand, and the courts should yield to the legislatures, which are empowered and competent to deal with complex social and economic issues. Last, once judges digress from the text of the federal constitution into broader principles, individual or collective values become the law. The modern critics of social liberty emphasize the individualized distortions of judicial lawmaking, while the earlier critics of economic liberty emphasized the dangers of incorporating one static economic theory into constitutional interpretation.

That the modern critics of social liberty utilize arguments similar to the arguments used against economic liberty should be no surprise. The modern critics of social liberty aggressively connect the evils of social liberty with the evils of economic liberty.[50] The modern critics remind social progressives that economic liberty undermined the socially progressive legislation of the New Deal and that the Supreme Court wisely repudiated the use of substantive due process as obstructionist.[51] The modern critics also warn that the judicial activism of the first third of the twentieth century jeopardized programs and legislation supported by social progressives of another generation.[52] These reminders and warnings serve as a message to modern social progressives: "Be consistent." The criticisms of substantive due process and liberty in the first third of the century benefited social progressives. Modern critics of substantive due process and liberty appeal to modern social progressives' intellectual honesty. The neutral criticisms of federal judicial power and the role of the federal constitution espoused by critics to defeat economic liberty must remain valid, because nothing has changed in the basic framework of the federal constitution, federal judiciary, and federalism since the 1930s.

48. Reynolds, *supra* note 37 at 229-30.

49. Graglia, *supra* note 37, at 294; Myers, *supra* note 39, at 616.

50. *See Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986); *Reynolds, supra* note 37, at 230.

51. *Bowers*, 478 U.S. at 194-95.

52. Reynolds, *supra* note 37, at 230.

When economic liberty disappeared as a strong individual right in the 1930s, social progressives won a programmatic or political victory, but they lost strong doctrinal and philosophical bases for the later development of social liberty. Social progressivism would be on firmer legal ground as the twenty-first century approaches if social progressives had tolerated the existence of economic liberty. Substantive due process in the 1990s would be celebrating its centennial.[53] Economic liberty by this point would be a venerable mainstay of American constitutional law. The idea that the federal constitution places substantial limits on state power could serve as an easily expandable doctrinal basis for social liberty. Instead, the Court in *Griswold v. Connecticut*[54] defined a special and narrow zone of familial liberty derived from *Pierce v. Society of Sisters*[55] and *Meyer v. Nebraska*.[56] *Griswold* failed to provide a general constitutional philosophy of limitation of state power. Economic liberty would have provided social progressives with a broader base from which to expand individual rights.

It is difficult to state what would have occurred if *Lochner* and its progeny had remained valid and strong constitutional law. Some evidence exists. Changes in the mid-twentieth century indicate how social progressives could have utilized economic liberty to create and nurture social liberty. Changes in the American social structure encouraged changes in federal constitutional law. Specifically, the racist caste system of segregation began to fall into disfavor, especially during World War II.[57] A shift toward racial desegregation existed during the middle decades of this century.[58] The nexus between social change and constitutional law occurred in *Brown v. Board of Education*,[59] in which the United States Supreme Court ordered local officials acting under the color of state law to enforce social interaction between black and white students.[60] *Brown* began the social-constitutional revolution of the last thirty or so years in which the federal courts sought to create changes in American society.[61]

53. The precursor to *Lochner* was Allgeyer v. Louisiana, 165 U.S. 578 (1897).

54. 381 U.S. 479, 485 (1965).

55. 268 U.S. 510, 514 (1925).

56. 262 U.S. 390, 399 (1923).

57. CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 37-44 (1983).

58. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality (1975).

59. 347 U.S. 483 (1954).

60. *Id.* at 495.

61. *See* Posner, *supra* note 37, at 418-19; Reynolds, *supra* note 37, at 231-32.

If economic liberty had existed during the past thirty years as social change pressured the federal legal system into creating further legal and social change, the federal courts would have been confronted with a problem of logic. How could the Supreme Court justify the existence of liberty that protected economic activity without also providing liberty that protected social activity? The Court would have been placed in the position of prioritizing economic values over social values in a social and legal climate in which social values were increasingly more important. Social progressives could have easily required the Court to face this inconsistency in the nature of due process liberty. In fact, *Brown* provides a good example of how social liberty could have served as a sturdier doctrinal basis for the end of segregation. The *Brown* Court experienced problems in finding a doctrinal basis for applying the Equal Protection Clause because the intent of the authors of the Fourteenth Amendment was difficult to understand. Public education existed in only a rudimentary form in 1868 when the Fourteenth Amendment was adopted.[62] The *Brown* Court analyzed inequality under equal protection by finding psycho-social injury to children in segregated black schools, and that finding explained only why school segregation violated equal protection even when educational facilities were arguably equal though definitely separate.[63]

Applying economic liberty analysis to school segregation could have delivered a surer message to segregationist state officials. A basic component of economic liberty involved testing the legitimacy of state power. If the ends to be achieved by a state were outside the police powers legitimately allowed the states by the Fourteenth Amendment, liberty existed. The legitimate powers included protecting the safety, health, morals, and general welfare of the people.[64] Two analyses helped determine whether state purposes fit within legitimate state powers. First, the court determined the actual goal of a state statute. That actual goal was closely analyzed to ensure that it fit into one of the legitimate state powers, which were defined narrowly. The claim that a state statutory goal fit within a legitimate state power could not be pretextual.[65] Second, the court deemed certain human activities to be protected by economic liberty. The Supreme Court utilized a traditionalist-historical approach to determining what activities were so protected. For instance, the right to make a living was traceable to the concept of the pursuit of happiness in

62. *Brown*, 347 U.S. at 489-90.
63. *Id.* at 494.
64. *Lochner*, 198 U.S. at 53.
65. *Id.* at 56.

the Declaration of Independence.[66] Economic liberty included an inalienable right to pursue an occupation. As a result of this analysis, certain economic activity constitutionally was categorized beyond the state power to prohibit and regulate. The federal constitution reflected the history and culture of the American nation, and the history and culture became intertwined with the liberties protected by the federal constitution.

Both analyses for determining whether state purposes fit within state powers are applicable to *Brown*, though the context transcends economics. First, the segregationist state officials probably would allege a number of legitimate goals such as keeping order[67] and preserving the moral beliefs of the majority.[68] Due process requires that these goals be scrutinized carefully, and a close scrutiny of segregationist laws would allow social progressives to focus judicial attention directly on the racist and biased rationales for the segregation statutes.[69] The goal of separating the races because one race considers itself superior falls farther outside the protection of health, safety, morals, and general welfare than restricting the hours of employment. The proponents of restricting hours of employment argued that the restrictions were legitimate public health measures, but the Supreme Court found that the restrictions were labor measures outside the police power.[70] The *Brown* Court could easily have found that the segregation statutes were social stratification measures outside the morals-protection and public safety powers of the states. Next, social progressives could have argued that the individual right to choose among available state services and obtain an education free of racial distinctions was a traditional liberty included in due process. In evaluating such an argument, the *Brown* Court need not have concerned itself with the intent of the Framers of the Fourteenth Amendment in relation to public schools.[71] Instead, the Court could have focused more directly on the context of the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments as the result of the Civil War, much as the Court had focused on the nature of the American economic system when the Court reviewed economic regulations.[72] The Civil War and the constitu-

66. Allgeyer v. Louisiana, 165 U.S. 578, 589-90 (1897) (citing Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746, 762 (1884)).

67. *See* Cooper v. Aaron, 358 U.S. 1, 12-13 (1958) (decided in the context of violence created by attempts to desegregate the Little Rock schools).

68. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

69. Loving v. Virginia, 388 U.S. 1, 11 (1967).

70. *Lochner*, 198 U.S. at 54-58.

71. *Brown*, 347 U.S. at 489-90.

72. *Allgeyer v. Louisiana*, 165 U.S. 578, 589-91 (1897).

tional amendments that followed, instilled in the Constitution an antipathy to regulating people and their activities on the basis of race[73] or of other social distinctions.[74] The right of the individual to relate freely to others, including public officials, unhampered by legal restrictions based on race, was secure.

Social progressives needed to view the detriments of *Lochner* and economic liberty as narrow and not very consequential. *Nebbia v. New York*[75] and *West Coast Hotel Co. v. Parrish*[76] appear to save the United States of the late 1930s from the continued restrictions of *Lochner*. *Lochner* and economic liberty were perceived as threatening the New Deal efforts to bring the United States out of the Great Depression.[77] Two problems arise from this view of economic liberty indicating some political bias and historical distortion. On the one hand, *Lochner* and economic liberty would have been only partially disruptive of federal governmental action to improve the social welfare of those suffering from economic dislocation. On the other, governmental efforts to overcome the impacts of the Depression have been overstated and economic liberty could not have hampered recovery in a decisive fashion.

Economic liberty certainly hampered some of the New Deal efforts to revive the American economy in the early 1930s.[78] A distinction must be made, however, between the types of efforts attempted by the New Deal. First, the federal government attempted to regulate segments of the economy[79] or the relationship between workers and their employers.[80] Economic liberty undermined those types of regulatory efforts.[81] But such regulation was only one aspect of the federal government's efforts to eradicate widespread poverty and unemployment. The redistribution of monies to those in need was an equally important component of

73. *See* BARNES, *supra* note 57, at 24-51.

74. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

75. 291 U.S. 502 (1934).

76. 300 U.S. 379 (1937).

77. *See* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 40-45; Robert L. Stern, *The Commerce Clause and the National Economy*, 1933-1946, 59 HARV. L. REV. 643, 653-74 (1946); Frank R. Strong, *The Economic Philosophy of* Lochner: *Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419, 447-55 (1973).

78. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495, 528-29 (1935); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330, 374 (1935).

79. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

80. Bituminous Coal Act, ch. 824, 49 Stat. 991 (1935) (repealed 1937).

81. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); *Schechter*, 295 U.S. at 550.

the New Deal.[82] Economic liberty would not have prevented economic redistribution and the rise of the welfare state.[83]

The distinction between the regulatory state, proscribed by economic liberty, and the welfare state, unhindered by economic liberty, appeared vividly in *United States v. Butler*,[84] in which the Supreme Court invalidated the Agricultural Adjustment Act of 1933.[85] Under the agricultural adjustment scheme, the federal government sought to raise farm prices by contracting with farmers to reduce their farming acreage in return for benefit payments.[86] The Court struck down the scheme, not because Congress was spending tax monies to help farmers or to further the general welfare, but because the act authorized the expenditure of federal funds to regulate and control agricultural production.[87] The federal government possesses the authority to tax and spend for a wide variety of purposes,[88] but it lacks the authority to control agriculture, which the states may regulate and control.[89] Regulation would be hampered by economic liberty, but welfare programs and social insurance, such as Social Security, that avoid regulating or controlling economic activity were valid and acceptable under economic liberty.[90]

Another example of the distinction between the regulatory state and the welfare state is the contrast between minimum wage legislation and unemployment insurance. In *Adkins v. Children's Hospital*,[91] the Supreme Court struck down a federal statute that required employers in the District of Columbia to pay a minimum wage to women and children.[92] The statutory scheme was regulatory in nature. First, a three-member board investigated wage conditions and established minimum wages for different groups of employers.[93] Second, employers were required under the statute to comply with minimum wage laws approved by the board. Any violations by employers could result in a misdemeanor conviction, punishable by fine and imprisonment.[94] The minimum wage statute controlled private behavior, that of employers.

82. *See, e.g.*, Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. sections 301-306 (1988)).
83. *See* Helvering v. Davis, 301 U.S. 619, 645 (1937).
84. 297 U.S. 1, 68 (1936).
85. Act of May 12, 1933, ch. 25, 48 Stat. 31.
86. *Butler*, 297 U.S. at 54-55.
87. *Id.* at 68.
88. *Id.* at 65-67.
89. *Id.* at 68.
90. *See Helvering*, 301 U.S. at 644-45.
91. 261 U.S. 525, 553-57 (1923).
92. Act of Sept. 19, 1918, ch. 174, 40 Stat. 960.
93. *Adkins*, 261 U.S. at 540-41.
94. *Id.* at 541.

Though the impositions on employers resulted in some redistribution of wealth between employer and employee, the gist of the statutory scheme involved control over private economic decisions through threats of punitive coercion. The Court conceived of the minimum wage as a price-fixing law[95] establishing the prices of labor in contravention of the liberty to contract.[96]

The unemployment insurance program challenged in *Steward Machine Co. v. Davis*, stands in contrast to the minimum wage schemes in *Adkins*.[97] In *Steward*, the Supreme Court upheld the validity of the unemployment insurance provisions of the Social Security Act.[98] Under the statute, specified employers paid an excise tax based on total wages payable by the employers.[99] Tax receipts collected by the Secretary of the Treasury would be distributed to state unemployment compensation offices.[100] The unemployment insurance scheme serves as a redistributive method benefiting the unemployed at the expense of those who pay the tax. The program lacks the coercive components aimed at changing private conduct as found in the minimum wage context. Employers would have to pay the tax under a wide variety of circumstances, and employer behavior might only be indirectly affected by the tax. Possibly employers would want to avoid laying off employees to insure that contributions would be lower in the future. That result, however, is not the intent of the insurance program, and probably many employers would have to act in concert to prevent increases in unemployment expenditures. The Court analyzed the unemployment insurance program by reviewing the constitutional and traditional taxing powers of Congress[101] and government generally.[102] Congressional taxing power is comprehensive[103] as is the power to appropriate public monies.[104] The power of American government to redistribute wealth through taxation and expenditure is comprehensive, and government may spend tax monies to ameliorate economic crises.[105]

Whether viewing the regulatory or the welfare-redistribution aspects

95. *Id.* at 554.
96. *Id.* at 553.
97. 301 U.S. 548 (1937).
98. Social Security Act, ch. 531, 49 Stat. 620 (codified as amended at 42 U.S.C. sections 301-306 (1988)).
99. *See* 301 U.S. at 574.
100. *Id.* at 576.
101. *Id.* at 581.
102. *Id.* at 579-80.
103. *Id.* at 581.
104. *Id.* at 585.
105. *Id.* at 586-87.

of the New Deal,[106] observers question its efficacy. At best, the New Deal brought about a partial recovery.[107] Unemployment remained stubbornly high throughout the Depression Years.[108] The New Deal failed to produce any far-reaching structural changes in the American economic system.[109] What really changed the American economy, by creating an economic recovery, was the Second World War.[110] The weakness of the New Deal as a policy and a political institutional process indicates that social liberty played a small role in deterring economic and social progress in the 1930s. Certainly, *Schechter Poultry Corp. v. United States*[111] serves as a visible roadblock in the way of progress, but the underlying dynamics of the NIRA probably did far more to destroy itself than did *Schechter*.[112]

Social progressives, fearful of turning their backs on the governmental interventionism of the New Deal, are faced with an intellectual choice. Social progressives may have to make a tradeoff between the regulatory aspects of governmental interventionism on behalf of the powerless in American society and the creation of a zone of social noninterference protecting the powerless against these same governments, both federal and state. The tradeoff seems to be an imbalanced one and should be easy to make. Even if the regulatory state is hampered by the rejuvenation of economic liberty transformed into social liberty, the welfare state should continue. The sacrifice of the regulatory state involves modest losses, because the archetypal regulatory state, the New Deal, looms as a modest success, if that.

The development of social liberty based on the doctrines and analyses of economic liberty would have provided those dedicated to securing the rights of the powerless in American society a constitutional method to limit state prohibitions and restrictions on social intercourse and private decisionmaking. Unfortunately, the demise of federal constitutional *economic* liberty ended any hope for creating a broad federal constitutional *social* liberty. Even in the 1990s, however, social progressives have an opportunity to fashion constitutional social liberty based on constitutional economic liberty. History can be retraced and transformed.

106. The New Deal involved a hodgepodge of regulatory and redistribution programs. JAMES M. BURNS, THE CROSSWINDS FREEDOM 214-15 (1989).

107. *Id.* at 128.

108. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 393 (1980).

109. BURNS, *supra* note 106, at 128.

110. ZINN, *supra* note 108, at 393; BURNS, *supra* note 106, at 215.

111. 295 U.S. 495 (1935).

112. ZINN, *supra* note 108, at 383.

II. The Remaining Basis for Social Liberty: Social Progressives Obtain a Second Opportunity to Appreciate Economic Liberty

As the twenty-first century approaches, constitutional economic liberty remains a viable and strong element of state constitutional law. Social progressives still possess the opportunity to exploit economic liberty to strengthen individual rights by urging the courts to recognize social liberty. They have a second chance to utilize economic liberty instead of criticizing and destroying it.

Since the demise of federal constitutional economic liberty in the late 1930s, state constitutions have protected a variety of economic activities from state prohibitions and regulations.[113] Among the economic activities protected are commission negotiations by insurance agents,[114] construction of a medical facility without a certificate of need,[115] direct business solicitation by public insurance adjusters,[116] advertisement of the names and prices of prescription drugs,[117] retail gasoline pricing,[118] street vending,[119] ticket scalping,[120] liquor pricing,[121] and milk pricing.[122]

The state courts derive economic liberty from state constitutional due process clauses[123] that protect against the deprivation of life, liberty,

113. *See* John A.C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 226 (1958).

114. Dade County Consumer Advocate's Office v. Department of Ins., 457 So. 2d 495 (Fla. App. 1984), *aff'd*, 492 So. 2d 1032 (Fla. 1986).

115. *In re* Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729 (N.C. 1973). *See also* 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 (1990). *But see* Mount Royal Towers v. Alabama Bd. of Health, 388 So. 2d 1209 (Ala. 1980).

116. Larson v. Lesser, 106 So. 2d 188 (Fla. 1958).

117. Stadnik v. Shell's City, Inc., 140 So. 2d 871 (Fla. 1962). *See also* Florida Bd. of Pharmacy v. Webb's City, Inc., 219 So. 2d 681 (Fla. 1969).

118. Alabama Indep. Serv. Station Ass'n v. McDowell, 6 So. 2d 502 (Ala. 1942). *See also* Alabama *ex rel.* Galanos v. Mapco Petroleum, Inc., 519 So. 2d 1275 (Ala. 1987).

119. Good Humor Corp. v. City of New York, 49 N.E.2d 153 (N.Y. 1943). *See* Gabriella S. Tussuson, Note, *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 (1988).

120. Estell v. City of Birmingham, 286 So. 2d 872 (Ala. 1973).

121. Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).

122. Gillette Dairy v. Nebraska Dairy Prods. Bd., 219 N.W.2d 214 (Neb. 1974); Harris v. Duncan, 67 S.E.2d 692 (Ga. 1951).

123. *See, e.g.*, Murphy v. Quinn, 402 So. 2d 1033, 1034 (Fla. 1981) (Florida Supreme Court applied FLA. CONST. art. I, § 9); *Gillette Dairy*, 219 N.W.2d at 220 (Nebraska Supreme Court used NEB. CONST. art. I, § 3).

or property "but by the law of the land,"[124] and state constitutional clauses that protect the inalienable rights of life, liberty, and the pursuit of happiness.[125] Some of the courts also refer to due process under the federal constitution at the same time they cite to their own state constitutions.[126] The state courts develop their law of economic liberty both independent of and dependent on the older and outmoded federal constitutional economic liberty analysis represented by *Lochner* and devalued by *Nebbia v. New York*.[127] The Georgia Supreme Court in *Harris v. Duncan* relied on the dissent in *Nebbia* by Justice McReynolds to analyze how the milk industry is not affected with the public interest and therefore not subject to state price controls.[128] Some of the state cases[129] rely on the federal constitutional law "affected with a public interest" test.[130] However, to develop economic liberty the state courts also rely on their own state constitutionally based thinking about due process and liberty. Even in *Duncan*, Chief Justice Duckworth, in his concurrence, notes that the invocation of the Georgia Due Process Clause by a litigant requires a decision based on the Georgia Constitution unhampered by the decisions of the United States Supreme Court concerning federal due process.[131] Also, state economic liberty can arise primarily from state constitutional law and analyses.[132] Though federal constitutional law is mentioned, federal constitutional law serves only to aid the state court in its thinking and is neither binding nor determinative.[133]

Whether relying on older federal constitutional economic liberty principles or their own state constitutional due process principles, the state courts, using their own state constitutions, have developed a general standard of protection for economic activity. That standard is based on a

124. In re Certificate of Need for Aston Park Hosp., 193 S.E.2d 729, 734-35 (North Carolina Supreme Court used N.C. CONST. art. I, § 19).

125. *Estell*, 286 So. 2d at 875 (Alabama Supreme Court relied on ALA. CONST. art. I, §§ 1, 35).

126. *See, e.g., Good Humor*, 49 N.E.2d at 155.

127. 291 U.S. 502 (1934).

128. Harris v. Duncan, 67 S.E.2d 692, 694 (Ga. 1951).

129. *See, e.g., Estell*, 286 So. 2d at 874; *Alabama Indep. Serv. Station*, 6 So. 2d at 506. *But see* Mount Royal Towers, Inc. v. Alabama Bd. of Health, 388 So. 2d 1209, 1213 (Ala. 1980).

130. *See* Wolf Packing Co. v. Court of Indus. Relations of Kansas, 262 U.S. 522 (1923) (Court recognized that some businesses were imbued with a public interest and subject to state regulation).

131. Harris v. Duncan, 67 S.E.2d 692, 696 (Ga. 1951)(Duckworth, J., concurring).

132. Dade County Consumer Advocate's Office v. Department of Ins., 457 So. 2d 495, 497 (Fla. Dist. Ct. App. 1984).

133. *Id.* at 497-98 (court refers to First Amendment commercial speech cases to demonstrate why the public need not be protected from low cost, low quality services by restrictive state regulations).

means-ends analysis.[134] The courts identify the ends or goals of a state statute or regulation and determine whether those ends or goals are legitimate. Next, the courts review whether the means provided by the statute or regulation fulfill those ends or goals of the statute. On the ends side of the analysis, the statute or regulation must meet general tests. Legislation must reasonably and substantially promote the public health, safety, or welfare, and must reasonably relate to a legitimate state interest that protects the public.[135] On the "means" side of the analysis, the courts examine the relationship between the purpose of the statute and the operation of the statute. The courts require that a legitimate bona fide relationship exist between a permissible public purpose and the legislation that furthers that purpose.[136] A legislature may not impose unreasonable, arbitrary, discriminatory, or confiscatory conditions.[137]

Economic liberty exists in the late twentieth century in state constitutional law. Social progressives possess the opportunity to expand economic liberty in order to fashion social liberty. What aids social progressives in that task are the economic liberty analyses utilized by the state courts in protecting economic activity.

III. Gems to Be Minded: Economic Liberty Analyses

State courts utilize three analytical principles in applying economic liberty.[138] At least one of these principles appears in each economic liberty case, and often all three appear. These three principles are: defining the limits of state governmental power, utilizing an in-depth review of state regulation, and remaining suspicious of state regulations that benefit the few instead of the whole polity.

A. Recognizing the Limits of Power

State courts recognize limits to state power to regulate economic activity. The courts focus heavily on the ends component of the means-ends legal standard. Unlike modern federal substantive due process cases involving economic regulations,[139] the state cases avoid being deferential

134. *See, e.g.*, Alabama *ex rel.* Galanos v. Mapco Petroleum, Inc. 519 So. 2d 175, 1284 (Ala. 1987).

135. *Dade County Consumer Advocate's Office*, 457 So. 2d at 497; Larson v. Lesser, 106 So. 2d 188, 192 (Fla. 1958).

136. Mount Royal Towers, Inc. v. Alabama Bd. of Health, 388 So. 2d 1209, 1214 (Ala. 1980).

137. *Gillette Dairy, Inc. v. Nebrsaka Dairy Prods. Bd.*, 219 N.W.2d 214, 219 (Neb. 1974).

138. *See* Daniel R. Gordon, *Progressives Retreat: Falling Back from the Federal Constitution to the State Constitutions*, 23 ARIZ. ST. L.J. 801, 817-18 (1991).

139. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

to the state interests or purposes furthered by a statute or regulation. State power lacks flexibility and elasticity. Two methods of defining and limiting state power prevail. Either the state courts focus on defining the legitimate ends or goals of state regulation—and, therefore, state power—or the courts recognize certain human behavior as either beyond regulation or regulated only in those few circumstances where a very strong state purpose exists.

1. Defining Legitimate Ends

Statutes must reasonably and substantially promote the public health, safety, and welfare.[140] The use of the words "public health, safety, or welfare" to describe legitimate goals or purposes of state statutes is neither ritualistic nor talismanic. The state courts ascribe a variety of meanings to these terms. Some meanings are vague and others clearly defined. The outer limit of state power occurs when a statute fails in any way to promote the people's health, safety, or welfare.[141] Even though such a limit on state power may appear deferential, that limit does acknowledge a point past which the state possesses no power. The cases tend to narrow state power as a concept. For example, statutes must remedy actual problems that exist. In *Gillette Dairy, Inc. v. Nebraska Dairy Products Board*, the court concedes that a statute could require a milk distributor to sell above its actual cost in order to prevent price undercutting that drives competitors out of business.[142] In contrast, the court found that a statute could not require milk distributors to sell above an industry average cost far above distributors' actual costs, because such a requirement not only fails to remedy unfair competition but tends to create industry inefficiency.[143] Hence, the state has the power to remedy only observable and tangible problems.

Not only should legislation tackle observable and tangible problems, but a balance must exist between the degree of burden legislation imposes, the importance of the right infringed, and the gravity of those observable and tangible problems with which legislation deals.[144] The state has limited power to create a high degree of burden when a right is important and the actual conditions are not grave. The police power is

140. Dade County Consumer Advocate's Office v. Department of Ins., 457 So. 2d 495, 497 (Fla. App. 1984).

141. Department of Ins. v. Dade County Consumer Advocate's Office, 492 So. 2d 1032, 1034 (Fla. 1986).

142. 219 N.W.2d 214, 221 (Neb. 1974).

143. *See id.* at 220-21.

144. Mount Royal Towers Inc. v. Alabama Bd. of Health, 388 So. 2d 1209, 1215 (Ala. 1980).

restricted to those issues that by necessity affect the public welfare.[145] Not every issue addressed by the legislature is one of necessity or affects the public welfare. Some issues are only personal or only involve a small class of people instead of the general public.[146]

Themes of realism and practicality permeate the cases. Power exists to tackle concrete and widespread community problems. It serves the good of the community, and the community must experience tangible benefits before the community allows legal restrictions and regulations to burden it. The specific powers that the state courts recognize as beyond the police powers are good examples of this theme. States possess no power to curb bargaining,[147] to assist medical care facilities in maintaining high bed capacities,[148] to discourage competition,[149] or to create monopolies.[150] These limitations on state power imply certain positive community values favored and protected by the state courts. For instance, the community benefits from a free-market economy that fosters competition.[151] State power exists to further these values rather than undermine them. When people are acting under the positive influence of these values, the state possesses no power to regulate them.

2. *Recognizing Human Behavior That Is Beyond State Control*

A second means of analyzing the limits of state power focuses on the limits of power, but instead deems some human behaviors beyond state regulation. Such an approach is a more positive one. Rather than defining what the state lacks power to do, attention focuses on what people may do without governmental restraints. People have the liberty to pursue certain activity without state interference. First, people may do what is lawful, such as sell ice cream on a street corner, without interference.[152] The definition of "lawful" is unclear, but must mean something other than that the legislature has deemed certain activity lawless under the challenged statute. Otherwise, no statute would be protected under economic liberty, which would be controlled solely by legislative determination. Instead, "lawful" means activity that is recognized and regulated as legitimate behavior by statutes generally though still in violation

145. Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371, 374 (Fla. 1949).
146. *Id.*
147. Department of Ins. v. Dade County Consumer Advocate's Office, 492 So.2d 1032, 1033 (Fla. 1986).
148. *In re* Certificate of Need for Aston Park Hosp., 193 S.E.2d 729, 734 (N.C. 1973).
149. Alabama Indep. Serv. Station Ass'n v. McDowell, 6 So. 2d 502, 507 (Ala. 1942).
150. *Aston Park Hosp.*, 193 S.E.2d at 734.
151. Dade County Consumer Advocate's Office v. Department of Ins., 457 So. 2d 495, 497 (Fla. Dist. Ct. App. 1984).
152. Good Humor Corp.v. City of New York, 49 N.E.2d 155 (N.Y. 1943).

of the challenged statute.[153] Even that definition allows the legislature to contour the limits of economic liberty to some degree.

The courts venture beyond a legislative definition of what is lawful activity that the states may not prohibit. Liberty exists to pursue a useful and harmless occupation such as selling gasoline at a discount.[154] An activity is lawful if it is common, traditional, and conducted in a manner that does not annoy people or impede other lawful activity, such as using the public streets.[155] Certain human behavior, such as selling useful products, is generally accepted because no one is hurt and people may even benefit. Recognizing that states should avoid interfering with such behavior, the courts maintain a zone of governmental non-interference.

The recognition of boundaries on state power means that the actions of state legislatures are always open to questions of legitimacy. State legislatures may possess inherent police power in the American system of government and law-making,[156] but that power has limits. Not only do the state courts define the limits of power when they apply economic liberty, but they also review state statutes and regulations very closely.

B. The Nature of Judicial Review

State courts refuse to accord deference to state legislatures when those legislatures enact statutes regulating economic activities and behavior. Courts rarely characterize their scrutiny of economic legislation, and that scrutiny is not the heightened scrutiny utilized by the federal courts in equal protection cases.[157] At least one court, however, refers to its own and other state courts' scrutiny of economic regulations as "more rigorous" than that of the federal courts.[158] The courts avoid accepting at face value the purposes of legislation and the state interests asserted by the state or parties seeking to enforce economic legislation.[159] Courts review whether legislative findings are reasonable and valid.[160] Overall, courts scrutinize the result and impact of legislation on economic behavior to gauge whether that legislation fits within the state's police pow-

153. *Id.*

154. Alabama Indep. Serv. Station Ass'n v. McDowell, 6 So. 2d 502, 507 (Ala. 1942).

155. *Good Humor*, 49 N.E.2d at 155.

156. *See* Client Follow-up Co. v. Hynes, 390 N.E.2d 847, 849 (Ill. 1979); Kansas *ex rel.* Schneider v. Kennedy, 587 P.2d 844, 850 (Kan. 1978).

157. Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

158. Mount Royal Towers, Inc. v. Alabama Bd. of Health, 388 So. 2d 1209, 1213 (Ala. 1908).

159. *See, e.g.*, Dade County Consumer Advocate's Office v. Department of Ins., 457 So. 2d 495, 497 (Fla. Dist. Ct. App. 1984); Stadnik v. Shell City, Inc., 140 So. 2d 871, 875 (Fla. 1962).

160. Harris v. Duncan, 67 S.E.2d 692, 694 (Ga. 1951).

ers.[161] Often, courts perform non-empirical analyses of social behavior and the impact of legislation on that behavior.[162]

In re Certificate of Need for Aston Park Hospital[163] provides a good example of how a state court critically reviews economic legislation. The *Aston Park* court reviewed a statute that required medical care facilities to obtain a certificate of need before constructing or adding patient-care bed capacity.[164] A private hospital proposed to construct a 200-bed facility in place of its existing 50-bed facility, but the North Carolina Medical Care Commission denied the hospital's application for a certificate of need.[165] The Medical Care Commission argued that the certificate of need requirement served three state interests or purposes relating to the protection of public health. First, certificates of need prevented limited medical staffing resources from being spread too thin by excess hospital bed capacity, thereby endangering patient care. Second, concentrated bed capacity assured more efficient use of physician time. Third, excess bed capacity would require that the overhead cost of vacant beds be charged to patients who utilize beds, raising the costs of hospital care to patients.[166] Overall, the Medical Care Commission asserted that the quality of patient care services was intertwined with controlling the cost of medical services, and controlling medical care facility construction played an important role in controlling costs and quality.

The *Aston Park* court disregarded much of the Medical Care Commission's arguments about how certificates of need protect quality health services. The court agreed that the state possessed a strong interest in assuring that hospital construction was adequate in design, structure, and equipment for patient care purposes.[167] The court, however, found that the certificate-of-need legislation failed to further such purposes despite the assertions of the Medical Care Commission to the contrary. The court viewed the statute as having the narrow purpose of keeping established and existing hospital beds occupied for the economic good of established and existing medical care facilities.[168] The court, utilizing what it characterized as common knowledge, disputed the Medical Care Commission's arguments that excess bed capacity increases hospital costs. According to the court, common knowledge indicated that costs

161. *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371, 374 (Fla. 1949).
162. *Dade County Consumer Advocate's Office*, 457 So. 2d at 498.
163. 193 S.E.2d 729 (N.C. 1979).
164. N.C. GEN. STAT. §§ 90-289, 291 (1971)(repealed 1973).
165. 193 S.E.2d at 730.
166. *Id.* at 734.
167. *Id.* at 733.
168. *Id.* at 734.

rose when patients were unable to obtain promptly vacant hospital rooms. The court concluded that the true purpose of the statute was not health care cost-protection, but rather, the creation of healthcare monopolies among existing facilities. The court proceeded to find that competition would serve the purpose of controlling health care costs better than restrictive certificates of need would.[169]

Deference to state legislatures does not constrain state courts from applying economic liberty. Though the courts avoid identifying a heightened scrutiny, the courts utilize an in-depth analytical approach to testing the purposes and interests served by economic regulations. Courts do not accept at face value state assertions concerning the purposes and interests furthered. Instead, courts aggressively observe human behavior and economic processes and test whether statutes actually further understandable and rational state interests.

C. Requiring That Statutes Serve the Many and Not the Few

State courts react negatively to economic regulation that either prefers the interest of one group over those of another or prefers the interest of one group over those of the general public. Economic liberty requires that sovereign power never be granted in favor of one segment of the population to the detriment of another group unless the general welfare is served.[170] To justify economic regulation, a state must demonstrate how the legislation benefits the general public as opposed to a particular class.[171] The state courts guard against narrow domination of legal regulation by small groups because those courts are concerned about manufacturing monopolies. For example, a few large liquor companies could use statutory law to maintain their dominant position.[172] The focus of attention becomes the purpose of law in a constitutionally based legal system. Law serves the public generally and the public welfare dominates the application of law. The public welfare opposes state subordination of the rights of one group to advance the welfare of another group.[173] Law is neutral and, in a constitutional framework, no entity has the right to capture the state power for its own narrow interests. The courts imply a sensitivity to the realities of the relationship between

169. *Id.*

170. *Liquor Store, Inc. v. Continental Distilling Corp.*,40 So. 2d 371, 374 (Fla. 1949); *Department of Ins. v. Dade County Consumer Advocate's Office*, 492 So. 2d 1032, 1034 (Fla. 1986).

171. *Aston Park Hosp.*, 193 S.E.2d at 735 (citing Lawton v. Steele, 152 U.S. 133, 137 (1893)).

172. *Liquor Store, Inc.*, 40 So. 2d at 375-76.

173. *Id.* at 374.

law and political power. One of the newer cases addressed the relationship between law and politics in the context of economic interest groups and pressure groups seeking the passage of legislation for their own narrow purposes.[174] Statutes are not automatically accorded popular legitimacy because they are enacted by the people's representatives; too often, small and powerful lobbies or even large and powerful lobbies will dominate what should be an open and public process of lawmaking. Lawmaking and law can be captured by the few, and the public is not served. Economic liberty protects the public from powerful economic forces that can distort lawmaking and law for their own purposes.

IV. Revisiting Gay Freedom and *Bowers* in the Context of Economic Liberty Analyses

Bowers v. Hardwick upheld a Georgia statute that criminalized sodomy.[175] The statute provided that anyone convicted of the sex acts involved in sodomy would be punished by imprisonment from anywhere between one and twenty years.[176] Georgia police arrested a gay man while he was engaging in sodomy with an adult in the bedroom of the arrestee's home.[177] The gay defendant never had the opportunity to apply the analytical components of economic due process under the Georgia Constitution.[178] *Harris v. Duncan*[179] would have provided him with the opportunity to apply the range of economic liberty analyses (outlined in Part III of this Article) to his social liberty issue.

Superimposing economic liberty analyses on a social liberty problem or issue leads to a different result from that reached by the *Bowers* Court, which reviewed the Georgia statute in the light of federal constitutional privacy law.[180]

A. Injurious Impact

Economic liberty requires that in order for a state to regulate human behavior, that behavior must have an actual, identifiable injurious impact

174. *Mount Royal Towers Inc. v. Alabama Bd. of Health*, 388 So. 2d 1209, 1214 (Ala. 1980).

175. 478 U.S. 186 (1986); *see also* Gordon, *supra* note 138, at 718.

176. GA. CODE ANN. § 16-6-2 (1984).

177. *Bowers*, 478 U.S. at 188 .

178. The district attorney never presented the charges to a grand jury, and the arrestee brought suit in Federal District Court to challenge the constitutionality of the statute under the federal constitution. *Id.* at 186.

179. 67 S.E.2d 692 (Ga. 1951).

180. *Bowers*, 478 U.S. at 190-91.

on society[181] or must not be viewed as lawful or generally accepted in society.[182] Homosexual conduct may not be viewed generally as widely accepted lawful activity,[183] but the state will be hard-pressed to prove that sodomy has an actual injurious impact on society. Personal activity that occurs solely within the confines of an individual's residence most often has limited impact beyond the parties involved.[184] Private adult sexual activity in the confines of a bedroom, or the kitchen for that matter, does not have the societal or moral impact of a murder in that same bedroom or kitchen.[185] The impact on the community determines the actual injurious impact of a private, adult, consensual sexual act on society. The public nature of the act must be analyzed, but not in the sense of analyzing only the location of the act. The social impact must be broader. This analysis is similar to that of the state courts in viewing the broader monopolistic impact of price-fixing statutes.[186] A private sexual act that arises from a commercial circumstance in which prostitutes utilize a public park to attract customers has serious public impact that may justify the use of state power.[187] Not only may such behavior negatively impact the use of a public facility, but it may also encourage people to view sexuality as a commodity as opposed to intimate, personal self-fulfillment.[188] The Georgia sodomy statute blurs the distinction between private, consensual, personal activity and truly injurious public-impact conduct. That statute applies even when no identifiable public harm exists, such as when sodomy occurs in a private residence between two consenting adults. The economic liberty requirement of actual public harm translates into a greater sensitivity to the distinction between private personal acts and publicly felt behavior. That distinction creates one of the bases for social liberty.

B. State Interests

Economic liberty requires in-depth judicial review of the purposes and state interests to be fulfilled by legislation. Courts will not accept asserted state interests at face value, and will deem some such interests insufficient to justify the application of state power to a problem. Over-

181. *See supra* notes 140-51 and accompanying text.

182. *See supra* notes 152-56 and accompanying text.

183. *See Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).

184. *See* Stanley v. Georgia, 394 U.S. 557 (1969); Ravin v. State, 537 P.2d 494, 504, 511 (Alaska 1975).

185. *See Bowers*, 478 U.S. at 212 (Blackmun, J., dissenting).

186. *See* Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949).

187. *See* State v. Gray, 413 N.W.2d 107, 113-14 (Minn. 1987); Gordon v. State, 360 S.E.2d 253 (Ga. 1987).

188. *See Bowers*, 478 U.S. at 213 (Blackmun, J., dissenting).

all, the courts refuse to allow the state to assert pretextual rationalizations for state utilization of its power.[189] In a sense, economic liberty analysis pierces the legislative veil[190] of asserted state interests and purposes. Applying this analysis to an anti-sodomy statute such as the one in *Bowers* would probably involve testing state interests concerning health, safety, and morality. In fact, the *Bowers* case never focused on the state interests to be furthered by the Georgia statute. The Eleventh Circuit remanded to the trial court the issue whether the state had a compelling interest in regulating private, consensual, adult sodomy.[191] The United States Supreme Court found no fundamental right of privacy encompassing homosexual relations against which state interests would be weighed.[192]

We can surmise what the asserted state purposes and interests involving an anti-sodomy statute would be. Health and safety issues would probably predominate. Sodomy may play a role in the spread of diseases such as AIDS. Minors must be protected from the corruption of homosexual sex.[193] The ready availability of sodomy may lead to the commercial sale of sex in public locations such as parks.[194] Piercing the veil of state interests requires that asserted state purposes and interests be scrutinized in depth. For instance, none of these purposes or interests justify criminalizing private, consensual, adult sexual behavior unrelated to the commercial sale of sex. The health concerns are overstated because AIDS can be spread by a number of sexual and nonsexual means including blood transfusions, and can be prevented by using a condom.[195] No reason exists for the state to outlaw one way of spreading a disease when a number of other ways remain legitimate, lawful behavior. Piercing the veil of state interests regarding an anti-sodomy statute that prohibits sexual intimacy between two consenting adults in a noncommercial, private context probably will lead to the true interest served by such statutes; furthering public morality. Certainly, the Supreme Court recognized the moral overtones involving anti-sodomy statutes when it explained in *Bowers* why a rational basis for the statute existed.[196] The problem with morality being the purpose of a statute restricting social relations and

189. *See supra* notes 157-69 and accompanying text.

190. *See, e.g.*, Walkovszky v. Carlton, 223 N.E.2d 6, 13 (N.Y. 1966) (court uses piercing of the veil in its traditional corporate context to determine whether a corporate entity should be disregarded as a sham).

191. Hardwick v. Bowers, 760 F.2d 1202, 1212-13 (11th Cir. 1985).

192. *Bowers*, 478 U.S. at 191.

193. *See* Ray v. State, 389 S.E.2d 326, 328 (Ga. 1990).

194. *See* State v. Gray, 413 N.W.2d 107, 113-14 (Minn. 1987).

195. *See* Rasmussen v. South Florida Blood Serv., 500 So. 2d 533 (Fla. 1987).

196. *Bowers*, 478 U.S. at 196 (Blackmun, J., dissenting).

liberty is that special or selected social groups are served at the expense of other groups, which undermines another analytical premise of economic liberty.

C. Serving the Few

Economic liberty discourages state regulation that serves the interests of one segment of society to the detriment of another segment of society.[197] If morality serves as the true underlying purpose of an anti-sodomy statute,[198] one segment of society benefits to the detriment of another. Those who are homophobic, or at least oppose homosexual behavior, have utilized the legislature to prevent sexual behavior that they believe is illegitimate. State power then reflects limited moral interests. By choosing between competing private values instead of maximizing public values, the legislature violates principles of economic liberty. In the context of sexual behavior, the private values preferred are moral ones.[199] Anti-sodomy statutes reflect particularly narrow private-institutional moral interests. Statutes regulating sexual behavior in general originate from religious attitudes,[200] and anti-sodomy legislation in particular originates from theology.[201] Religious institutions, their followers, and those who sympathize with them utilize the legislature to criminalize behavior that runs contrary to their private moral beliefs concerning private, consensual, adult sex. Gay men who aspire to experience sexual intimacy suffer from this unidimensional usurpation of legislative police powers. Anti-sodomy statutes create a type of moral monopoly much like the economic monopolies created by price-fixing statutes.

Conclusion: Social Liberty and the Creation of a Pluralistic Society

Economic liberty rests on respect for a free and open market system.[202] The courts assume that a free-market system creates good, normal, and desirable societal results. Under state constitutions, state power was never created to undermine what is considered good, normal, and desired. Historically, the free market existed as an underpinning of

197. *See supra* notes 170-74 and accompanying text.

198. *See supra* note 196 and accompanying text.

199. *See Bowers*, 478 U.S. at 212-13 (Blackmun, J., dissenting).

200. *See* Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 393-94 (1963).

201. *See Bowers*, 478 U.S. at 211-12 n.6 (Blackmun, J., dissenting).

202. *See* Dade County Consumer Advocate's Office v. Department of Ins., 457 So. 2d 495, 498 (Fla. App. 1984).

American society, and the power of law was not intended to destroy that underpinning. Social progressives should be able to make the same arguments concerning a variety of private sexuality. In a sense, the free-market concept transcends economics and includes a variety of behaviors. When private moral choices do not harm society, those choices should be accorded legal legitimacy just as economic choices are. Social liberty then protects social pluralism, which in turn encourages people to choose a variety of ideas and behaviors. The state has no more interest in regulating a social variety of choices than it does economic choices.

Social progressives still have the opportunity to utilize economic liberty to preserve and expand social choices. State constitutions represent their second chance to exploit economic liberty rather than oppose and destroy it. Before the end of the twentieth century, American constitutional law, albeit state constitutional law, could include a broad-based protection of liberty far more secure than the narrow federal constitutional privacy protections of the 1970s and 1980s. Progressives need to recognize the importance of limiting state power and the role of the state constitution in creating such limits.