CRS Annotated Constitution

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Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FOURTEENTH AMENDMENT
SECTION 1. RIGHTS GUARANTEED: CITIZENS OF THE UNITED STATES

In the Dred Scott Case,1 Chief Justice Taney for the Court ruled that United States citizenship was enjoyed by two classes of individuals: (1) white persons born in the United States as descendents of "persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States and [who] became also citizens of this new political body," the United States of America, and (2) those who, having been "born outside the dominions of the United States," had migrated thereto and been naturalized therein. The States were competent, he continued, to confer state citizenship upon anyone in their midst, but they could not make the recipient of such status a citizen of the United States. The "Negro," or "African race," according to the Chief Justice, was ineligible to attain United States citizenship, either from a State or by virtue of birth in the United States, even as a free man descended from a Negro residing as a free man in one of the States at the date of ratification of the Constitution.2 Congress, first in Sec. 1 of the Civil Rights Act of 1866 3 and then in the first sentence[p.1566]of Sec. 1 of the Fourteenth Amendment,4 set aside the Dred Scott holding in a sentence "declaratory of existing rights, and affirmative of existing law. . . ."5

While clearly establishing a national rule on national citizenship and settling a controversy of long standing with regard to the derivation of national citizenship, the Fourteenth Amendment did not obliterate the distinction between national and state citizenship, but rather preserved it.6 The Court has accorded the first sentence of Sec. 1 a construction in accordance with the congressional intentions, holding that a child born in the United States of Chinese parents who themselves were ineligible to be naturalized is nevertheless a citizen of the United States entitled

to all the rights and privileges of citizenship.7 Congress' intent in including the qualifying phrase "and subject to the jurisdiction thereof," was apparently to exclude from the reach of the language children born of diplomatic representatives of a foreign state and children born of alien enemies in hostile occupation, both recognized exceptions to the common–law rule of acquired citizenship by birth,8 as well as children of members of Indian tribes subject to tribal laws.9 The lower courts have generally held that the citizenship of the parents determines the citizenship of children born on vessels in United States territorial waters or on the high seas.10

In Afroyim v. Rusk,11 a divided Court extended the force of this first sentence beyond prior holdings, ruling that it withdrew[p.1567]from the Government of the United States the power to expatriate United States citizens against their will for any reason. "[T]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other government unit. It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes. . . . This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted."12 In a subsequent decision, however, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of Sec. 1 and that Congress could therefore impose a reasonable and non–arbitrary condition subsequent upon their continued retention of United States citizenship.13 Between these two decisions there is a tension which should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States.14

[p.1568]

FOURTEENTH AMENDMENT
SECTION 1. RIGHTS GUARANTEED: PRIVILEGES AND IMMUNITIES

Supplement: [P. 1568, change heading to:]

Unique among constitutional provisions, the privileges and immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a "practical nullity" by a single decision of the Supreme Court issued within five years after its ratification. In the Slaughter–House Cases,15 a bare majority of the Court frustrated the aims of the most aggressive sponsors of this clause, to whom was attributed an intention to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" with a view to enabling business to develop unimpeded by state interference. This expansive alteration of the federal system was to have been achieved by converting the rights of the citizens of each State as of the date of the adoption of the Fourteenth Amendment into privileges and immunities of United States citizenship and thereafter perpetuating this newly defined status quo through judicial

condemnation of any state law challenged as "abridging" any one of the latter privileges. To have fostered such intentions, the Court declared, would have been "to transfer the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," and to "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character. . . . We are convinced that no such results were intended by the Congress . . . , nor by the legislatures . . . which ratified" this amendment, and that the sole "pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

Conformably to these conclusions, the Court advised the New Orleans butchers that the Louisiana statute, conferring on a single corporation a monopoly of the business of slaughtering cattle, abrogated no rights possessed by them as United States citizens; insofar as that law interfered with their claimed privilege of pursuing the lawful calling of butchering animals, the privilege thus terminated was merely one of "those which belonged to the citizens of the States as such." Privileges and immunities of state citizenship[p.1569]had been "left to the state governments for security and protection" and had not been placed by this clause "under the special care of the Federal Government." The only privileges which the Fourteenth Amendment protected against state encroachment were declared to be those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws."16 These privileges, however, had been available to United States citizens and protected from state interference by operation of federal supremacy even prior to the adoption of the Fourteenth Amendment. The Slaughter–House Cases, therefore, reduced the privileges and immunities clause to a superfluous reiteration of a prohibition already operative against the states.

Although the Court has expressed a reluctance to attempt a definitive enumeration of those privileges and immunities of United States citizens which are protected against state encroachment, it nevertheless felt obliged in the Slaughter–House Cases "to suggest some which owe their existence to the Federal Government, its National character, its Constitution, or its laws."17 Among those which it then identified were the right of access to the seat of Government and to the seaports, subtreasuries, land officers, and courts of justice in the several States, the right to demand protection of the Federal Government on the high seas or abroad, the right of assembly, the privilege of habeas corpus, the right to use the navigable waters of the United States, and rights secured by treaty. In Twining v. New Jersey,18 the Court recognized "among the rights and privileges" of national citizenship the right to pass freely from State to State,19 the right to petition Congress for a redress of grievances,20 the right to vote for national officers,21 the[p.1570]right to enter public lands,22 the right to be protected against violence while in the lawful custody of a United States marshal,23 and the right to inform the United States authorities of violation of its laws.24 Earlier, in a decision not mentioned in Twining, the Court had also acknowledged that the carrying on of interstate commerce is "a right which every citizen of the United States is entitled to exercise."25

In modern times, the Court has continued the minor role accorded to the clause, only occasionally manifesting a disposition to enlarge the restraint which it imposes upon state action. Colgate v. Harvey,26 which was overruled five years later,27 represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the privileges and immunities clause into a source of protection of other than those "interests growing out of the relationship between the citizen and the national government." Here, the Court declared that the right of a citizen resident in one State to contract in another, to transact any lawful business, or to make a loan of money, in any State other than that in which the citizen resides was a privilege of national citizenship which was abridged by a state income tax law excluding from taxable income interest received on money loaned within the State. In Hague v. CIO,28 two and perhaps three justices thought that freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States citizen, and in Edwards v. California29 four Justices were prepared to rely on the clause.30 In Oyama v. California,31 in a single sentence the Court agreed with the contention of a native–born youth that a state Alien Land Law, applied to work a forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible for citizenship and precluded from owning land, deprived him "of his privileges as an American citizen." The right to acquire and retain property had previously not been set[p.1571]forth in any of the enumerations as one of the privileges protected against state abridgment, although a federal statute enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as white citizens enjoyed.32

Supplement: P. 1571, add new paragraph to text following n.32:]

In a doctrinal shift of uncertain significance, the Court will apparently evaluate challenges to durational residency requirements, previously considered as violations of the right to travel derived from the Equal Protection Clause, as a potential violation of the Privileges or Immunities Clause. Thus, where a California law restricted the level of welfare benefits available to Californians resident less than a year to the level of benefits available in the State of their prior residence, the Court found a violation of the right of newly arrived citizens to be treated the same as other state citizens.1 Despite suggestions that this opinion will open the door to a "guaranteed equal access to all public benefits," 2 it seems more likely that the Court is protecting the privilege of being treated immediately as a full citizen of the State one chooses for permanent residence.3

In other respects, however, claims based on this clause have been rejected.33

[p.1572]

The Development of Substantive Due Process

Although many years after ratification the Court ventured the not very informative observation that the Fourteenth Amendment "operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment,"34 and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth,"35 the significance of the due process clause as a restraint on state action appears to have been grossly underestimated by litigants no less than by the Court in the years immediately following its adoption. From the outset of our constitutional history due process of law as it occurs in the Fifth Amendment had been recognized as a restraint upon government, but, with the conspicuous exception of the Dred Scott decision,36 only in the narrower sense that a legislature must provide "due process for the enforcement of law."

Thus, in the Slaughter–House Cases,37 in which the clause was invoked by a group of butchers challenging the validity of a Louisiana statute which conferred upon one corporation the exclusive privilege of butchering cattle in New Orleans, the Court declared that the prohibition against a deprivation of property "has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some forms of expression in the constitution of nearly all the States, as a restraint upon the power of the States. . . . We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." Four years later, in Munn v. Illinois,38 the Court again refused to interpret the due process clause as invalidating[p.1573]state legislation regulating the rates charged for the transportation and warehousing of grain. Rejecting contentions that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its use and by transferring to the public an interest in a private enterprise, Chief Justice Waite emphasized that "the great office of statutes is to remedy defects in the common law as they are developed. . . . We know that this power [of rate regulation] may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

Deploring such attempts, nullified consistently in the preceding cases, to convert the due process clause into a substantive restraint on the powers of the States, Justice Miller in Davidson v. New Orleans,39 obliquely counseled against a departure from the conventional application of the clause, albeit he acknowledged the difficulty of arriving at a precise, all–inclusive definition thereof. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is

here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude[p.1574]those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental of law.

"But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom . . . in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require. . . ."

A bare half–dozen years later, in again reaching a result in harmony with past precedents, the Justices gave fair warning of the imminence of a modification of their views. After noting that the due process clause, by reason of its operation upon "all the powers of government, legislative as well as executive and judicial," could not be appraised solely in terms of the "sanction of settled usage," Justice Mathews, speaking for the Court in Hurtado v. California,40 declared that "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self–governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." Thus were the States put on notice that every species of state legislation, whether dealing with procedural or substantive rights, was subject to the scrutiny of the Court when the question of its essential justice was raised.

What induced the Court to dismiss its fears of upsetting the balance in the distribution of powers under the federal system and to enlarge its own supervisory powers over state legislation was the increasing number of cases seeking protection of property rights against the remedial social legislation States were enacting in the wake of industrial expansion. At the same time, the added emphasis on the due process clause afforded the Court an opportunity to compensate for its earlier virtual nullification of the privileges and immunities clause of the Amendment. So far as such modification of its position needed to be justified in legal terms, theories concerning the relation of government to private rights were available[p.1575]to demonstrate the impropriety of leaving to the state legislatures the same ample range of police power they had enjoyed prior to the Civil War. Preliminary to this consummation, however, the Slaughter–House Cases and Munn v. Illinois had to be overruled at least in part, and the views of the dissenting Justices in those cases converted into majority doctrine.

About twenty years were required to complete this process, in the course of which the restricted view of the police power advanced by Justice Field in his dissent in Munn v. Illinois,41 namely, that it is solely a power to prevent injury, was in effect ratified by the Court itself. This occurred in Mugler v. Kansas,42 where the power was defined as embracing no more than the power to promote public health, morals, and safety. During the same interval, ideas embodying the social compact and natural rights, which had been espoused by Justice Bradley in his dissent in the Slaughter–House Cases,43 had been transformed tentatively into constitutionally enforceable limitations upon government.44 The consequence was that the States in exercising their police powers could foster only those purposes of health, morals, and safety which the Court had enumerated, and could employ only such means as would not unreasonably interfere with the fundamentally natural rights of liberty and property, which Justice Bradley had equated with freedom to pursue a lawful calling and to make contracts for that purpose.45

So having narrowed the scope of the state's police power in deference to the natural rights of liberty and property, the Court next proceeded to read into the concepts currently accepted theories of laissez faire economics, reinforced by the doctrine of Social Darwinism as elaborated by Herbert Spencer, to the end that "liberty," in[p.1576]particular, became synonymous with governmental hands–off in the field of private economic relations. In Budd v. New York,46 Justice Brewer in dictum declared: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government." And to implement this point of view the Court next undertook to water down the accepted maxim that a state statute must be presumed to be valid until clearly shown to be otherwise.47 The first step was taken with opposite intention. This occurred in Munn v. Illinois,48 where the Court, in sustaining the legislation before it, declared: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed." Ten years later, in Mugler v. Kansas,49 this procedure was improved upon, and a state– wide anti–liquor law was sustained on the basis of the proposition that deleterious social effects of the excessive use of alcoholic liquors were sufficiently notorious for the Court to be able to take notice of them, that is to say, for the Court to review and appraise the consideration which had induced the legislature to enact the statute in the first place.50 However, in Powell v. Pennsylvania,51 decided the following year, the Court, confronted with a similar act involving oleomargarine, concerning which it was unable to claim a like measure of common knowledge, fell back upon the doctrine of presumed validity and sustained the measure, declaring that "it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law."

In contrast to the presumed validity rule, under which the Court ordinarily is not obliged to go beyond the record of evidence submitted by the litigants in determining the validity of a statute, the judicial notice principle, as developed in Mugler v. Kansas, carried the inference that unless the Court, independently of the record, is able to ascertain the existence of justifying facts accessible to it by the rules governing judicial notice, it will be obliged to invalidate a police power regulation as bearing no reasonable or adequate relation to the purposes to be subserved by the latter;[p.1577]namely, health, morals, or safety. For appraising state legislation affecting neither liberty nor property, the Court found the rule of presumed validity quite serviceable, but for invalidating legislation constituting governmental interference in the field of economic

relations, and, more particularly, labor–management relations, the Court found the principle of judicial notice more advantageous. This advantage was enhanced by the disposition of the Court, in litigation embracing the latter type of legislation, to shift the burden of proof from the litigant charging unconstitutionality to the State seeking enforcement. To the State was transferred the task of demonstrating that a statute interfering with the natural right of liberty or property was in fact "authorized" by the Constitution, and not merely that the latter did not expressly prohibit enactment of the same.

In 1934 the Court in Nebbia v. New York[52] discarded this approach to economic legislation, and has not since returned to it. The modern approach was evidenced in a 1955 decision reversing a lower court's judgment invalidating a state statutory scheme regulating the sale of eyeglasses to the advantage of ophthalmologists and optometrists in private professional practice and adversely to opticians and to those employed by or using space in business establishments. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in Munn v. Illinois, 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"[53] Yet the Court went on to assess the reasons which might have justified the legislature in prescribing the regulation at issue, leaving open the possibility that some regulation might be found unreasonable.[54] More recent decisions, however, have limited inquiry to whether the legislation is arbitrary or irrational, and have not addressed "reasonableness."[55]

[p.1578]

"Persons" Defined.—Notwithstanding the historical controversy that has been waged concerning whether the framers of the Fourteenth Amendment intended the word "person" to mean only natural persons, or whether the word was substituted for the word "citizen" with a view to protecting corporations from oppressive state legislation,[56] the Supreme Court, as early as the Granger Cases,[57] decided in 1877, upheld on the merits various state laws without raising any question as to the status of railway corporation plaintiffs to advance due process contentions. There is no doubt that a corporation may not be deprived of its property without due process of law,[58] and although prior decisions had held that the "liberty" guaranteed by the Fourteenth Amendment is the liberty of natural, not artificial, persons,[59] nevertheless a newspaper corporation was sustained, in 1936, in its objection that a state law deprived it of liberty of press.[60] As to the natural persons protected by the due process clause, these include all human beings regardless of race, color, or citizenship.[61]

Ordinarily, the mere interest of an official as such, in contrast to an actual injury sustained by a natural or artificial person through invasion of personal or property rights, has not been[p.1579]deemed adequate to enable him to invoke the protection of the Fourteenth Amendment against state action.[62] Similarly, municipal corporations are viewed as having no standing "to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator," the State.[63] However, state officers are acknowledged to have an interest, despite their not having sustained any "private damage," in resisting an "endeavor to prevent the enforcement of laws in relation to which they have official duties," and, accordingly, may apply

to federal courts for the "review of decisions of state courts declaring state statutes which [they] seek to enforce to be repugnant to the" Fourteenth Amendment.64

Police Power Defined and Limited.—The police power of a State today embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public safety, health, and morals, and is not confined to the suppression of what is offensive, disorderly, or unsanitary, but extends to what is for the greatest welfare of the state.65

Because the police power is the least limitable of the exercises of government, such limitations as are applicable are not readily definable. These limitations can be determined, therefore, only[p.1580]through appropriate regard to the subject matter of the exercise of that power.66 "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise."67 Insofar as the police power is utilized by a State, the means employed to effect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public, specifically, the public health, public safety, or public morals, or some other phase of the general welfare.68

A general rule often invoked is that if a police power regulation goes too far, it will be recognized as a taking of property for which compensation must be paid.69 Yet where mutual advantage is a sufficient compensation, an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose seems to be a private use.70 On the other hand, mere "cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power."71 Moreover, it is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking without due process of law.72 Similarly, initial compliance with a regulation which is valid when adopted occasions no forfeiture of the right to protest when that regulation subsequently loses its validity by becoming confiscatory in its operation.73

[p.1581]

"Liberty".—The "liberty" guaranteed by the due process clause has been variously defined by the Court, as will be seen hereinafter. In general, in the early years, it meant almost exclusively "liberty of contract," but with the demise of liberty of contract came a general broadening of "liberty" to include personal, political and social rights and privileges.74 Nonetheless, the Court is generally chary of expanding the concept absent statutorily recognized rights.75

FOURTEENTH AMENDMENT
SECTION 1. RIGHTS GUARANTEED DUE PROCESS OF LAW

Liberty of Contract

Regulatory Labor Laws Generally.—Liberty of contract, a concept originally advanced by Justices Bradley and Field in the Slaughter–House Cases,[76] was elevated to the status of accepted doctrine in Allgeyer v. Louisiana.[77] Applied repeatedly in subsequent cases as a restraint on federal and state power, freedom of contract was also alluded to as a property right, as is evident in the language of the Court in Coppage v. Kansas.[78] "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be[p.1582]struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long–established constitutional sense."

By a process of reasoning that was almost completely discarded during the Depression, the Court was nevertheless able, prior thereto, to sustain state ameliorative legislation by acknowledging that freedom of contract was "a qualified and not an absolute right. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community. . . . In dealing with the relation of the employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."[79]

While continuing to acknowledge in abstract terms that freedom of contract is not absolute, the Court in fact was committed to the principle that freedom of contract is the general rule and that legislative authority to abridge it could be justified only by exceptional circumstances. To maintain such abridgments at a minimum, the Court intermittently employed the rule of judicial notice in a manner best exemplified by a comparison of the early cases of Holden v. Hardy[80] and Lochner v. New York,[81] decisions which bear the same relation to each other as Powell v. Pennsylvania[82] and Mugler v. Kansas.[83]

In Holden v. Hardy,[84] the Court, in reliance upon the principle of presumed validity, allowed the burden of proof to remain with those attacking the validity of a statute and upheld a Utah act limiting the period of labor in mines to eight hours per day. Taking cognizance of the fact that labor below the surface of the earth was attended by risk to person and to health and for these reasons had long been the subject of state intervention, the Court registered its willingness to sustain a limitation on freedom of contract which a state legislature had adjudged "necessary for the preservation of health of employees," and for which there were "reasonable grounds for believing that . . . [it was] supported by the facts."

Seven years later, however, a radically altered Court was predisposed in favor of the doctrine of judicial notice, and applied that[p.1583]doctrine to conclude in Lochner v. New York[85] that a law restricting employment in bakeries to ten hours per day and 60 hours per week was an unconstitutional interference with the right of adult laborers, sui juris, to contract for their means of livelihood. Denying that in so holding the Court was in effect substituting its own judgment for that of the legislature, Justice Peckham nevertheless maintained that whether the act was within the police power of the State was a "question that must be answered by the Court," and then, in disregard of the accumulated medical evidence proffered in support of the act, uttered the following observation. "In looking through statistics regarding all trades and occupations, it

may be true that the trade of a baker does not appear to be as healthy as some trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . It might be safely affirmed that almost all occupations more or less affect the health. . . . But are we all, on that account, at the mercy of the legislative majorities?"86

Two dissenting opinions were filed in the case. Justice Harlan, pointing to the abundance of medical testimony tending to show that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages, concluded that the very existence of such evidence left the reasonableness of the measure open to discussion and that the latter fact of itself put the statute within legislative discretion. "The responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . [T]he public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."87

The second dissenting opinion, written by Justice Holmes, has received the greater measure of attention because the views expressed therein were a forecast of the line of reasoning to be fol[p.1584]lowed by the Court some decades later. "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relations of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."88

In part, Justice Holmes' criticism of his colleagues was unfair, for his "rational and fair man" could not function in a vacuum, and, in appraising the constitutionality of state legislation, could no more avoid being guided by his preferences or "economic predilections" than were the Justices constituting the majority. Insofar as he accepted the broader conception of due process of law in preference to the historical concept thereof as pertaining to the enforcement rather than

the making of law, and did not affirmatively advocate a return to the maxim that the possibility of abuse is no argument against possession of a power, Justice Holmes, whether consciously or not, was thus prepared to observe, along with his opponents in the majority, the very practices which were deemed to have rendered inevitable the assumption by the Court of a "perpetual censorship" over state legislation. The basic distinction, therefore, between the positions taken by Justice Peckham for the majority and Justice Holmes, for what was then the minority, was the[p.1585]espousal of the conflicting doctrines of judicial notice by the former and of presumed validity by the latter.

Although the Holmes dissent bore fruit in time in the form of the Bunting v. Oregon89 and Muller v. Oregon90 decisions modifying Lochner, the doctrinal approach employed in the earlier of these by Justice Brewer continued to prevail until the Depression in the 1930's. In view of the shift in the burden of proof which application of the principle of judicial notice entailed, counsel defending the constitutionality of social legislation developed the practice of submitting voluminous factual briefs replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals. Whenever the Court was disposed to uphold measures pertaining to industrial relations, such as laws limiting hours of work,91 it generally intimated that the facts thus submitted by way of justification had been authenticated sufficiently for it to take judicial cognizance thereof. On the other hand, whenever it chose to invalidate comparable legislation, such as enactments establishing minimum wage for women and children,92 it brushed aside such supporting data, proclaimed its inability to perceive any reasonable connection between the statute and the legitimate objectives of health or safety, and condemned the statute as an arbitrary interference with freedom of contract.

During the great Depression, however, the laissez faire tenet of self–help was supplanted by the belief that it is peculiarly the duty of government to help those who are unable to help themselves. To sustain remedial legislation enacted in conformity with the latter philosophy, the Court had to revise extensively its previously formulated concepts of "liberty" under the due process clause. Not only did the Court take judicial notice of the demands for relief arising from the Depression when it overturned prior holdings and sustained minimum wage legislation,93 but, in upholding state legislation designed to protect workers in their efforts to organize and bargain collectively, the Court had to reconsider the scope of an[p.1586]employer's liberty of contract and recognize a correlative liberty of employees that state legislatures could protect.

To the extent that it acknowledged that liberty of the individual may be infringed by the coercive conduct of other individuals no less than by the arbitrary action of public officials, the Court in effect transformed the due process clause into a source of encouragement to state legislatures to intervene affirmatively to mitigate the effects of such coercion. By such modification of its views, liberty, in the constitutional sense of freedom resulting from restraint upon government, was replaced by the civil liberty which an individual enjoys by virtue of the restraints which government, in his behalf, imposes upon his neighbors.

Laws Regulating Hours of Labor.—Even during the Lochner era, the due process clause was construed as permitting enactment by the States of maximum hours laws applicable to women workers94 and to workers in specified lines of work thought to be physically demanding or

otherwise worthy of special protection.95 Because of the almost plenary powers of the State and its municipal subdivisions to determine the conditions for work on public projects, statutes limiting the hours of labor on public works were also upheld at a relatively early date.96

Laws Regulating Labor in Mines.—The regulation of mines being patently within the police power, States during this period were also upheld in the enactment of laws providing for appointment of mining inspectors and requiring payment of their fees by mine owners,97 compelling employment of only licensed mine managers and mine examiners, and imposing upon mine owners liability for the willful failure of their manager and examiner to furnish a reasonably safe place for workmen.98 Other similar regulations which have been sustained have included laws requiring that underground passageways meet or exceed a minimum width,99 that boundary pillars be installed between adjoining coal properties as[p.1587]a protection against flood in case of abandonment,100 and that washhouses be provided for employees.101

Law Prohibiting Employment of Children in Hazardous Occupations.—To make effective its prohibition against the employment of persons under 16 years of age in dangerous occupations, a State has been held to be competent to require employers at their peril to ascertain whether their employees are in fact below that age.102

Laws Regulating Payment of Wages.—No unconstitutional deprivation of liberty of contract was deemed to have been occasioned by a statute requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages.103 Nor was any constitutional defect discernible in laws requiring railroads to pay their employees semimonthly104 and to pay them on the day of discharge, without abatement or reduction, any funds due them.105 Similarly, freedom of contract was held not to be infringed by an act requiring that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface, and conditioning such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission.106

Minimum Wage Laws.—The theory that a law prescribing minimum wages for women and children violates due process by impairing freedom of contract was finally discarded in 1937.107 The modern theory of the Court, particularly when labor is the beneficiary of legislation, was stated by Justice Douglas for a majority of the Court, in the following terms: "Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits. . . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard[p.1588]of the public welfare; they may within extremely broad limits control practices in the business–labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."108 Proceeding from this basis the Court sustained a Missouri statute giving employees the right to absent themselves four hours on election day, between the opening and closing of the polls, without deduction of wages for their absence.

It was admitted that this was a minimum wage law, but, said Justice Douglas, "the protection of the right of suffrage under our scheme of things is basic and fundamental," and hence within the

police power. "Of course," the Justice added, "many forms of regulation reduce the net return of the enterprise. . . . Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well–being of the community is one part of it; the political well–being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the Lochner, Coppage, and Adkins cases."109

Workers' Compensation Laws.—"This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow–servant rule and other common–law rules affecting the employer's liability for personal injuries to the employee."110 "These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of em[p.1589]ployment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change."111 Accordingly, a state statute which provided an exclusive system to govern the liabilities of employers and the rights of employees and their dependents to compensation for disabling injuries and death caused by accident in certain hazardous occupations,112 was held not to work a denial of due process in rendering the employer liable irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow–servants, nor in depriving the employee or his dependents of the higher damages which, in some cases, might be rendered under these doctrines.113 Likewise, an act which allowed an injured employee an election of remedies permitting restricted recovery under a compensation law although guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act, did not deprive an employer of his property without due process of law.114

The imposition upon coal mine operators, and ultimately coal consumers, of the liability of compensating former employees who terminated work in the industry before passage of the law for black lung disabilities contracted in the course of their work was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.115 Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, i.e., that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law; therefore, legislation

imposing liability on the basis of deterrence or of blameworthiness might not have passed muster.

[p.1590]

Contracts limiting liability for injuries, consummated in advance of the injury received, may be prohibited by the legislature, which may further stipulate that subsequent acceptance of benefits under such contracts shall not constitute satisfaction of a claim for injuries thereafter sustained.116 Also, as applied to a nonresident alien employee hired within the State but injured outside, an act forbidding any contracts exempting employers from liability for injuries outside the State has been construed as not denying due process to the employer.117 The fact that a State, after having allowed employers to cover their liability with a private insurer, subsequently withdrew that privilege and required them to contribute to a state insurance fund was held to effect no unconstitutional deprivation as applied to an employer who had obtained protection from an insurance company before this change went into effect.118 As long as the right to come under a workmen's compensation statute is optional with an employer, the latter, having chosen to accept benefits thereof, is estopped from attempting to escape its burdens by challenging the constitutionality of a provision thereof which makes the finding of fact of an industrial commission conclusive if supported by any evidence regardless of its preponderance.119

When, by the terms of a workers' compensation statute, the wrongdoer, in case of wrongful death, is obliged to indemnify the employer or the insurance carrier of the employer of the decedent, in the amount which the latter were required under the act to contribute into special compensation funds, no unconstitutional deprivation of the wrongdoer's property was discernible.120 By the same course of reasoning neither the employer nor the carrier was held to have been denied due process by another provision in an act requiring payments by them, in case an injured employee dies without dependents, into special funds to be used for vocational rehabilitation or disability compensation of injured workers of other establishments.121 Compensation also need not be based exclusively on loss of earning power, and an award authorized by statute for injuries resulting in disfigurement of the face or head, independent of compensation for inability to work, has been conceded to be neither an arbitrary nor oppressive exercise of the police power.122

[p.1591]

Collective Bargaining.—During the 1930s, liberty, as translated into what one Justice labeled the Allgeyer–Lochner–Adair–Coppage doctrine,123 lost its potency as an obstacle to legislation calculated to enhance the bargaining capacity of workers as against that already possessed by their employers. Prior to the manifestation, in Senn v. Tile Layers Union,124 of a greater willingness to defer to legislative judgment as to the wisdom and need of such enactments, the Court had, on occasion, sustained measures affecting the employment relationship, e.g., a statute requiring every corporation to furnish, upon request by any employee being discharged or leaving its service, a letter, signed by the superintendent or manager, setting forth the nature and duration of the employee's service and the true cause for leaving.125 Added provisions that such letters should be on plain paper selected by the em[p.1592]ployee, signed in ink and sealed, and free from superfluous figures and words, were also sustained as not amounting to any

unconstitutional deprivation of liberty and property.126 On the ground that the right to strike is not absolute, the Court in a similar manner upheld a statute under which a labor union official was punished for having ordered a strike for the purpose of coercing an employer to pay a wage claim of a former employee.127

The significance of Senn v. Tile Layers Union128 as an indicator of the range of the alteration of the Court's views concerning the constitutionality of state labor legislation, derives in part from the fact that the statute upheld therein was not appreciably different from that voided in Truax v. Corrigan.129 Both statutes withheld the remedy of injunction. Because, however, the invalidated act did not contain the more liberal and also more precise definition of a labor dispute set forth in the sustained enactment and, above all, did not affirmatively purport to sanction peaceful picketing only, the Court was enabled to maintain that Truax v. Corrigan, insofar as "the statute there in question was . . . applied to legalize conduct which was not simply peaceful picketing," was distinguishable. The statute upheld in Senn authorized the giving of publicity to labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct; the statute was applied to deny an injunction to a tiling contractor being picketed by a union because he refused to sign a closed shop agreement containing a provision requiring him to abstain from working in his own business as a tile layer or helper. Inasmuch as the enhancement of job opportunities for members of the union was a legitimate objective, the State was held competent to authorize the fostering of that end by peaceful picketing, and the fact that the sustaining of the union in its efforts at peaceful persuasion might have the effect of preventing Senn from continuing in business as an independent entrepreneur was declared to present an issue of public policy exclusively for legislative determination.130

Years later, the policy of many state legislatures had evolved in the direction of attempting to control the abuse of the enormous economic power that previously enacted protective measures had[p.1593]enabled labor unions to amass, and here too the Court found restrictions constitutional. Thus the Court upheld application of a state prohibition on racial discrimination by unions, rejecting claims that the measure interfered unlawfully with the union's right to choose its members and abridged its property rights, and liberty of contract. Inasmuch as the union "[held] itself out to represent the general business needs of employees" and functioned "under the protection of the State," the union was deemed to have forfeited the right to claim exemption from legislation protecting workers against discriminatory exclusion.131

Similarly approved as constitutional in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.132 and AFL v. American Sash & Door Co.133 were state laws outlawing the closed shop. When labor unions invoked in their own defense the freedom of contract doctrine that hitherto had been employed to nullify legislation intended for their protection, the Court, speaking through Justice Black, announced its refusal "to return . . . to . . . [a] due process philosophy that has been deliberately discarded. . . . The due process clause," it maintained, does not "forbid a State to pass laws clearly designed to safeguard the opportunity of nonunion workers to get and hold jobs, free from discrimination against them because they are nonunion workers."134 Also in harmony with the last mentioned pair of cases is UAW v. WERB,135 upholding enforcement of the Wisconsin Employment Peace Act to proscribe as an unfair labor practice efforts of a union, after collective bargaining negotiations had become deadlocked, to

coerce an employer through a "slow–down" in production achieved by the frequent, irregular, and unannounced calling of union meetings during working hours. "No one," declared the Court, can question "the State's power to police coercion by . . . methods" which involve "considerable injury to[p.1594]property and intimidation of other employees by threats."136 Finally, in Giboney v. Empire Storage Co.,137 the Court acknowledged that no violation of the Constitution results when a state law forbidding agreements in restraint of trade is construed by state courts as forbidding members of a union of ice peddlers from peacefully picketing a wholesale ice distributor's place of business for the sole purpose of inducing the latter not to sell to nonunion peddlers.

FOURTEENTH AMENDMENT
SECTION 1. RIGHTS GUARANTEED
DUE PROCESS OF LAW

Regulation of Business Enterprises: Rates, Charges, and Conditions of Service

"Business Affected With a Public Interest"—In endeavoring to measure the impact of the due process clause upon efforts by the States to control the charges exacted by various businesses for their services, the Supreme Court, almost from the inception of the Fourteenth Amendment, devoted itself to the examination of two questions: (1) whether the clause precluded that kind of regulation of certain types of business, and (2) the nature of the restraint, if any, which this clause imposed on state control of rates in the case of businesses as to which such control existed. For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court appears to have underestimated the significance of the due process clause as a substantive restraint on the power of States to fix rates chargeable by an industry deemed appropriately subject to such controls. Thus, in Munn v. Illinois,138 the first of the "Granger Cases," in which maximum charges established by a state legislature for Chicago grain elevator companies were challenged, not as being confiscatory in character, but rather as a regulation beyond the power of any state agency to impose, the Court, in an opinion that was largely dictum, declared that the due process clause did not operate as a safeguard against oppressive rates, that if regulation was permissible, the severity thereof was within legislative discretion and could be ameliorated only by resort to the polls. Not much time elapsed, however, before the Court effected a complete withdrawal from this position. By 1890 139 it had fully converted the due process clause into a positive restriction which the judicial branch was duty bound to enforce whenever state agencies sought to impose rates which, in its estimation, were arbitrary or unreasonable.

[p.1595]

In contrast to the speed with which the Court arrived at those above mentioned conclusions, more than fifty years were to elapse before it developed its currently applicable formula for determining the propriety of subjecting specific businesses to state regulation of their prices or charges. Prior to 1934, unless a business was "affected with a public interest," control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, this standard, "business affected with a public interest," never acquired any precise meaning, and as a consequence lawyers were never able to identify all those qualities or attributes which invariably

distinguished a business so affected from one not so affected. The most coherent effort by the Court was the following classification prepared by Chief Justice Taft.140 "(1) Those [businesses] which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. . . . (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Through application of this now outmoded formula the Court found it possible to sustain state laws regulating charges made by grain elevators,141 stockyards,142 and tobacco warehouses,143 and fire insurance rates144 and commissions paid to fire insurance agents.145 Voided, because the businesses sought to be controlled[p.1596]were deemed to be not so affected, were state statutes fixing the price at which gasoline may be sold,146 or at which ticket brokers may resell tickets purchased from theatres,147 and limiting competition in the manufacture and sale of ice through the withholding of licenses to engage therein.148

Nebbia v. New York.—In upholding, by a vote of five–to–four, a depression–induced New York statute fixing prices at which fluid milk might be sold, the Court in 1934 finally shelved the concept of "a business affected with a public interest."149 Older decisions, insofar as they negatived a power to control prices in businesses found not "to be clothed with a public use" were now viewed as resting, "finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect. Price control, like any other form of regulation, is [now] unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." Conceding that "the dairy industry is not, in the accepted sense of the phrase, a public utility," that is, a "business affected with a public interest," the Court in effect declared that price control henceforth is to be viewed merely as an exercise by the government of its police power, and as such is subject only to the restrictions which due process imposes on arbitrary interference with liberty and property. Nor was the Court disturbed by the fact that a "scientific validity" had been claimed for the theories of Adam Smith relating to the "price that will clear the market." However much the minority might stress the unreasonableness of any artificial state regulation interfering with[p.1597]the determination of prices by "natural forces,"150 the majority was content to note that the "due process clause makes no mention of prices" and that "the courts are both incompetent and unauthorized to deal with the wisdom of the policy adopted or the practicability of the law enacted to forward it."

Having thus concluded that it is no longer the nature of the business that determines the validity of a regulation of its rates or charges but solely the reasonableness of the regulation, the Court

had little difficulty in upholding, in Olsen v. Nebraska,151 a state law prescribing the maximum commission which private employment agencies may charge. Rejecting the contentions of the employment agencies that the need for such protective legislation had not been shown, the Court held that differences of opinion as to the wisdom, need, or appropriateness of the legislation "suggest a choice which should be left to the States;" and that there was "no necessity for the State to demonstrate before us that evils persist despite the competition" between public, charitable, and private employment agencies. The older case of Ribnik v. McBride,152 which had invalidated similar legislation upon the now obsolete concept of a "business affected with a public interest," was expressly overruled.

FOURTEENTH AMENDMENT
SECTION 1. RIGHTS GUARANTEED
DUE PROCESS OF LAW

Judicial Review of Publicly Determined Rates and Charges

Development.—In Munn v. Illinois,153 its initial holding concerning the applicability of the Fourteenth Amendment to governmental price fixing,154 the Court not only asserted that governmental regulation of rates charged by public utilities and allied businesses was within the States' police power, but added that the determination of such rates by a legislature was conclusive and not subject to judicial review or revision. Expanding the range of per[p.1598]missible governmental fixing of prices, the Court in Nebbia155 declared that prices established for business in general would invite judicial condemnation only if "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." The latter standard of judicial appraisal, as will be subsequently noted, represents less of a departure from the principle enunciated in the Munn case than that which the Court evolved, in the years following 1877, to measure the validity of state imposed public utility rates, and this difference in the judicial treatment of prices and rates accordingly warrants an explanation at the outset. Unlike operators of public utilities who, in return for the grant of certain exclusive, virtually monopolistic privileges by the governmental unit enfranchising them, must assume an obligation to provide continuous service, proprietors of other businesses are in receipt of no similar special advantages and accordingly are unrestricted in the exercise of their right to liquidate and close their establishments. Owners of ordinary businesses, therefore, at liberty to escape by dissolution the consequences of publicly imposed charges deemed to be oppressive, have thus far been unable to convince the courts that they too, no less than public utilities, are in need of protection through judicial review.

Consistently with its initial pronouncement in the Munn case that reasonableness of compensation allowed under permissible rate regulation presented a legislative rather than a judicial question, the Court, in Davidson v. New Orleans,156 also rejected the contention that, by virtue of the due process clause, businesses were nevertheless entitled to "just compensation" for losses resulting from price controls. Less than a decade was to elapse, however, before the Court, appalled perhaps by prospective consequences of leaving business "at the mercy of the majority of the legislature," began to reverse itself. Thus, in 1886, Chief Justice Waite, in the Railroad Commission Cases,157 warned that "this power to regulate is not a power to destroy; [and] the State cannot do that in law which amounts to a taking of property for public use without just

compensation or without due process of law;" in other words, a confiscatory rate could not be imposed. By treating "due process of law" and "just compensation" as equivalents, the Court, contrary to its earlier holding in Davidson v. New Orleans, was in effect asserting that the imposition of a rate so low as to damage or diminish private property ceased to be an exercise of a State's police[p.1599]power and became one of eminent domain. Nevertheless, even the added measure of protection afforded by the doctrine of the Railroad Commission Cases proved inadequate to satisfy public utilities; the doctrine allowed courts to intervene only to prevent legislative imposition of a confiscatory rate, a rate so low as to be productive of a loss and to amount to taking of property without just compensation. The utilities sought nothing less than a judicial acknowledgment that courts could review the "reasonableness" of legislative rates. Although as late as 1888 the Court doubted that it possessed the requisite power,158 it finally acceded to the wishes of the utilities in 1890, and, in Chicago, M. & St.P. Railway v. Minnesota159 ruled as follows: "The question of the reasonableness of rates . . . , involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . ."

Despite a last–ditch attempt to reconcile Munn with Chicago, M. & St.P. Railway by confining application of the latter decision to cases in which rates had been fixed by a commission and denying its pertinence to rates directly imposed by a legislature,160 the Court in Reagan v. Farmer's Loan and Trust Co.161 set at rest all lingering doubts over the scope of judicial intervention by declaring that, "if a carrier," in the absence of a legislative rate, "attempted to charge a shipper an unreasonable sum," the Court, in accordance with common law principles, will pass on the reasonableness of its rates, and has "jurisdiction . . . to award the shipper any amount exacted . . . in excess of a reasonable rate. . . . The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of a carrier prescribes the rates."162 Reiterating virtually the same principle in Smyth v. Ames,163 the[p.1600]Court not only obliterated the distinction between confiscatory and unreasonable rates but contributed the additional observation that the requirements of due process are not met unless a court not only reviews the reasonableness of a rate but also determines whether the rate permits the utility to earn a fair return on a fair valuation of its investment.

Limitations on Judicial Review.—Even while reviewing the reasonableness of rates the Court recognized some limits on judicial review. As early as 1894, the Court asserted: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; . . . [however, there can be no doubt] of their power and duty to inquire whether a body of rates . . . is unjust and unreasonable . . . and if found so to be, to restrain its operation."164 And later, in 1910, the Court made a similar observation that courts may not, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside" an order of the commission within the scope of the power delegated to such commission, upon the ground that such power was unwisely or expediently exercised.165

Also inferable from these early holdings, and effective to restrict the bounds of judicial investigation, is a distinction between factual questions that relate only to the wisdom or expediency of a rate order, and are unreviewable, and other factual determinations that bear on a commission's power to act and are inseparable from the constitutional issue of confiscation, hence are reviewable. This distinction was accorded adequate emphasis by the Court in[p.1601]Louisville & Nashville R.R. v. Garrett,166 in which it declared that "the appropriate question for the courts" is simply whether a "commission," in establishing a rate, "acted within the scope of its power" and did not violate "constitutional rights . . . by imposing confiscatory requirements." The carrier contesting the rate was not entitled to have a court also pass upon a question of fact regarding the reasonableness of a higher rate the carrier charged prior to the order of the commission. All that need concern a court, it said, is the fairness of the proceeding whereby the commission determined that the existing rate was excessive, but not the expediency or wisdom of the commission's having superseded that rate with a rate regulation of its own.

Likewise, with a view to diminishing the number of opportunities courts have for invalidating rate regulations of state commissions, the Court placed various obstacles in the path of the complaining litigant. Thus, not only must a person challenging a rate assume the burden of proof,167 but he must present a case of "manifest constitutional invalidity";168 if, notwithstanding this effort, the question of confiscation remains in doubt, no relief will be granted.169 Moreover, even though a public utility which has petitioned a commission for relief from allegedly confiscatory rates need not await indefinitely for the commission's decision before applying to a court for equitable relief,170 the court ought not to interfere in advance of any experience of the practical result of such rates.171

In the course of time, however, a distinction emerged between ordinary factual determinations by state commissions and factual determinations which were found to be inseparable from the legal and constitutional issue of confiscation. In two older cases arising from proceedings begun in lower federal courts to enjoin rates, the Court initially adopted the position that it would not disturb findings of fact insofar as these were supported by substantial evidence. Thus, in San Diego Land Company v. National City,172 the Court declared that after a legislative body had fairly and fully investigated and acted, by fixing what it believed to be reasonable rates, the courts cannot step in and set aside the action due to a different conclusion about the reasonableness of the rates. "Judicial[p.1602]interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." And in a similar later case173 the Court expressed even more clearly its reluctance to reexamine ordinary factual determinations. It is not bound "to reexamine and weigh all the evidence . . . or to proceed according to . . . [its] independent opinion as to what are proper rates. It is enough if . . . [the Court] cannot say that it was impossible for a fair–minded board to come to the result which was reached."

Moreover, in reviewing orders of the Interstate Commerce Commission, the Court, at least in earlier years,174 chose to be guided by approximately the same standards it had originally formulated for examining regulations of state commissions. The following excerpt from its holding in ICC v. Union Pacific R.R.175 represents an adequate summation of the law as it stood

prior to 1920: "[Q]uestions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that the rate is so low as to be confiscatory . . . ; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling . . . [The Commission's] conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision . . . can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The Ben Avon Case.—These standards of review were abruptly rejected by the Court in Ohio Valley Co. v. Ben Avon Bor[p.1603]ough,176 as being no longer sufficient to satisfy the requirements of due process. Unlike previous confiscatory rate litigation, which had developed from rulings of lower federal courts in injunctive proceedings, this case reached the Supreme Court by way of appeal from a state appellate tribunal;177 although the state court had in fact reviewed the evidence and ascertained that the state commission's findings of fact were supported by substantial evidence, it also construed the statute providing for review as denying to state courts "the power to pass upon the weight of such evidence." Largely on the strength of this interpretation of the applicable state statute, the Court held that when the order of a legislature, or of a commission, prescribing a schedule of maximum future rates is challenged as confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

Without departing from the ruling previously enunciated in Louisville & Nashville R.R. v. Garrett,178 that the failure of a State to grant a statutory right of judicial appeal from a commission's regulation is not violative of due process as long as relief is obtainable by a bill in equity for injunction, the Court also held that the alternative remedy of injunction expressly provided by state law did not afford an adequate opportunity for testing judicially a confiscatory rate order. It conceded the principle stressed by the dissenting Justices that "where a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review."179

History of the Valuation Question.—For almost fifty years the Court wandered through a maze of conflicting formulas for valuing public service corporation property only to emerge therefrom in 1944 at a point not very far removed from Munn v. Illinois.180 [p.1605]By holding in FPC v. Natural Gas Pipeline Co.,181 that the "Constitution does not bind rate–making bodies to the service of any single formula or combination of formulas," and in FPC v. Hope Natu[p.1606]ral Gas Co.,182 that "it is the result reached not the method employed which is controlling, . . . [that] it is not the theory but the impact of the rate order which counts, [and that] if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the

Act is at an end," the Court, in effect, abdicated from the position assumed in the Ben Avon case.183 Without surrendering the judicial power to declare rates unconstitutional on ground of a substantive deprivation of due process,184 the Court announced that it would not overturn a result it deemed to be just simply because "the method employed [by a commission] to reach that result may contain infirmities. . . . [A] Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order . . . carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."185 The Court recently reaffirmed Hope Natural Gas's emphasis on the bottom line: "[t]he Constitution within broad limits leaves the States free to decide what rate–setting methodology best meets their needs in balancing the interests of the utility and the public."186

[p.1607]

In dispensing with the necessity of observing the old formulas for rate computation, the Court did not articulate any substitute guidance for ascertaining whether a so–called end result is unreasonable. It did intimate that rate–making "involves a balancing of the investor and consumer interests," which does not, however, "'insure that the business shall produce net revenues'. . . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."187

FOURTEENTH AMENDMENT
SECTION 1. RIGHTS GUARANTEED
DUE PROCESS OF LAW

Regulation of Public Utilities (Other Than Rates)

In General.—By virtue of the nature of the business they carry on and the public's interest in it, public utilities are subject to state regulation exerted either directly by the legislature or by duly authorized administrative bodies.188 But because the property of public utilities remains under the full protection of the Constitution, it follows that whenever the state regulates in a manner that infringes the right of ownership in what the Court considers to be an "arbitrary" or "unreasonable" way, due process is violated.189 Thus, a city cannot take possession of the equipment of a street railway company, the franchise of which has expired,190 although it may subject the company to the alternative of accepting an inadequate price for its property or of ceasing operations and removing its property from the streets.191 Likewise, a city desirous of establishing a lighting system of its own may not remove, without compensation, the fixtures of a lighting company already occupying the streets under a franchise,192 although it may compete with a com[p.1608]pany that has no exclusive charter.193 The property of a telegraph company is not illegally taken, however, by a municipal ordinance that demands, as a condition for the establishment of poles and conduits in city streets, that the city's wires be carried free of charge, and which provides for the moving of the conduits, when necessary, at company expense.194

And, the fact that a State, by mere legislative or administrative fiat, cannot convert a private carrier into a common carrier will not protect a foreign corporation which has elected to enter a State the constitution and laws of which require that it operate its local private pipe line as a common carrier. Such foreign corporation is viewed as having waived its constitutional right to be secure against imposition of conditions which amount to a taking of property without due process of law.195

Compulsory Expenditures: Grade Crossings, and the Like.— Generally, the enforcement of uncompensated obedience to a regulation for the public health and safety is not an unconstitutional taking of property without due process of law.196 Thus, where the applicable rule so required at the time of the granting of its charter, a water company may be compelled to furnish connections at its own expense to one residing on an ungraded street in which it voluntarily laid its lines.197 However, if pipe and telephone lines are located on a right of way owned by a pipeline company, the latter cannot, without a denial of due process, be required to relocate such equipment at its own expense,198 but if its pipes are laid under city streets, a gas company validly may be obligated to assume the cost of moving them to accommodate a municipal drainage system.199

To require a turnpike company, as a condition of its taking tolls, to keep its road in repair and to suspend collection thereof, conformably to a state statute, until the road is put in good order, does not take property without due process of law, notwithstanding the fact that present patronage does not yield revenue sufficient to[p.1609]maintain the road in proper condition.200 Nor is a railroad bridge company unconstitutionally deprived of its property when, in the absence of proof that the addition will not yield a reasonable return, it is ordered to widen its bridge by inclusion of a pathway for pedestrians and a roadway for vehicles.201

Similarly upheld against due process/taking claims were requirements that railroads repair a viaduct under which they operate,202 or reconstruct a bridge or provide means for passing water for drainage through their embankment,203 or sprinkle that part of the street occupied by them.204 On the other hand, a requirement that an underground cattle–pass is be constructed, not as a safety measure but as a means of sparing the farmer the inconvenience attendant upon the use of an existing and adequate grade crossing, was held to be a prohibited taking of the railroad's property for private use.205 As to grade crossing elimination, the rule is well established that the state may exact from railroads the whole, or such part, of the cost thereof as it deems appropriate, even though commercial highway users, who make no contribution whatsoever, benefit from such improvements.

While the power of the State in this respect is not unlimited, and an "arbitrary" and "unreasonable" imposition may be set aside, the Court's modern approach to substantive due process analysis makes this possibility far less likely than it once was. Distinguishing a 1935 case invalidating a statutorily mandated 50% cost sharing which in effect prevented particularized findings of reasonableness (and which contained language suggesting that railroads could not fairly be required to subsidize competitive transportation modes),206 the Court in 1953 ruled that the costs of grade separation improvements need not be allocated solely on the basis of benefits that would accrue to railroad property.207 While the Court cautioned that "allocation of costs must be fair and reasonable," it also took an approach very deferential to

local governmental decisions, stating that in the exercise of the police power to meet transportation, safety, and convenience needs of a growing community,[p.1610]"the cost of such improvements may be allocated all to the railroads."

Compellable Services.—The primary duty of a public utility being to serve on reasonable terms all those who desire the service it renders, it follows that a company cannot pick and choose and elect to serve only those portions of its territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. Compelling a gas company to continue serving specified cities as long as it continues to do business in other parts of the State entails therefore no unconstitutional deprivation.208 Likewise, a railway may be compelled to continue the service of a branch or part of a line although the operation involves a loss.209 But even though a utility, as a condition of enjoyment of powers and privileges granted by the State, is under a continuing obligation to provide reasonably adequate service, and even though that obligation cannot be avoided merely because performance occasions financial loss, yet if a company is at liberty to surrender its franchise and discontinue operations, it cannot be compelled to continue at a loss.210

Pursuant to the principle that a State may require railroads to provide adequate facilities suitable for the convenience of the communities they serve,211 such carriers have been obligated to establish stations at proper places for the convenience of patrons,212 to stop all their intrastate trains at county seats,213 to run a regular passenger train instead of a mixed passenger and freight train,214 to furnish passenger service on a branch line previously devoted exclusively to carrying freight,215 to restore a siding used principally by a particular plant but available generally as a public track, and to continue, even though not profitable by itself, sidetrack216 as well as the upkeep of a switch track leading from its main line to[p.1611]industrial plants.217 However, a statute requiring a railroad without indemnification to install switches on the application of owners of grain elevators erected on its right–of–way was held void.218 Whether a state order requiring transportation service is to be viewed as reasonable may necessitate consideration of such facts as the likelihood that pecuniary loss will result to the carrier, the nature, extent and productiveness of the carrier's intrastate business, the character of the service required, the public need for it, and its effect upon service already being rendered.219 Requirements for service having no substantial relation to transportation have been voided, as in the case of an order requiring railroads to maintain cattle scales to facilitate trading in cattle,220 and a prohibition against letting down an unengaged upper berth while the lower berth was occupied.221

"Since the decision in Wisconsin, M. & P.R. Co. v. Jacobson, 179 U.S. 287 (1900) , there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connections. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. . . . If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then,

upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' . . . Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the Court must consider all the facts— the places and persons interested, the vol[p.1612]ume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier."222

Although a carrier is under a duty to accept goods tendered at its station, it cannot be required, upon payment simply for the service of carriage, to accept cars offered at an arbitrary connection point near its terminus by a competing road seeking to reach and use the former's terminal facilities. Nor may a carrier be required to deliver its cars to connecting carriers without adequate protection from loss or undue detention or compensation for their use.223 But a carrier may be compelled to interchange its freight cars with other carriers under reasonable terms,224 and to accept, for reshipment over its lines to points within the State, cars already loaded and in suitable condition.225

Due process is not denied when two carriers, who wholly own and dominate a small connecting railroad, are prohibited from exacting higher charges from shippers accepting delivery over said connecting road than are collected from shippers taking delivery at the terminals of said carriers.226 Nor is it "unreasonable" or "arbitrary" to require a railroad to desist from demanding advance payment on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment.227

Safety Regulations Applicable to Railroads.—Governmental power to regulate railroads in the interest of safety has long been conceded. The following regulations have been upheld: a prohibition against operation on certain streets,228 restrictions on speed, operations, and the like, in business sections,229 requirement of construction of a sidewalk across a right of way,230 or removal of a track crossing at a thoroughfare,231 compelling the presence of a flagman at a crossing notwithstanding that automatic devices might be cheaper and better,232 compulsory examination of[p.1613]employees for color blindness,233 full crews on certain trains,234 specification of a type of locomotive headlight,235 safety appliance regulations,236 and a prohibition on the heating of passenger cars from stoves or furnaces inside or suspended from the cars.237

Statutory Liabilities and Penalties Applicable to Railroads.—A statute making the initial carrier,238 or the connecting or delivering carrier,239 liable to the shipper for the nondelivery of goods is not unconstitutional; nor is a law which provides that a railroad shall be responsible in damages to the owner of property injured by fire communicated by its locomotive engines and which grants the railroad an insurable interest in such property along its route and authority to procure insurance against such liability.240 Equally consistent with the requirements of due process are the following two enactments: the first, imposing on all common carriers a penalty for failure to settle within a reasonable specified period claims for freight lost or damaged in shipment and conditioning payment of that penalty upon recovery by the claimant in a subsequent suit of more than the amount tendered,241 and the second, levying double damages and an attorney's fee upon a railroad for failure to pay within a reasonable time after demand the

amount claimed by an owner for stock injured or killed. However, the Court subsequently limited its approval of the latter statute to cases in which the plaintiff had not demanded more than he recovered in court;242 when the penalty is exacted in a case in which the plaintiff initially demanded more than he sued for and recovered, a defendant railroad is arbitrarily deprived of its property for refusing to meet the initial excessive demand.243

Also invalidated during this period of heightened judicial scrutiny was a penalty imposed on a carrier that had collected transportation charges in excess of established maximum rates; the penalty of $500 liquidated damages plus a reasonable attorney's fee[p.1614]was disproportionate to actual damages and was exacted under conditions not affording the carrier an adequate opportunity to safely test the validity of the rates before liability attached.244 Where the carrier did have an opportunity to test the reasonableness of the rate, however, and collection of an overcharge did not proceed from any belief that the rate was invalid, the Court indicated that the validity of the penalty imposed need not be tested by comparison with the amount of the overcharge. Inasmuch as a penalty is imposed as punishment for violation of law, the legislature may adjust its amount to the public wrong rather than the private injury, and the only limitation which the Fourteenth Amendment imposes is that the penalty prescribed shall not be "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." In accordance with the latter standard, a statute granting an aggrieved passenger (who recovered $100 for an overcharge of 60 cents) the right to recover in a civil suit not less than $50 nor more than $300 plus costs and a reasonable attorney's fee was upheld.245

For like reasons, the Court also upheld a statute requiring railroads to erect and maintain fences and cattle guards, and making them liable in double the amount of damages for their failure to so maintain them,246 and another law that established a minimum rate of speed for delivery of livestock and that required every carrier violating the requirement to pay the owner of the livestock the sum of $10 per car per hour.247 On the other hand, the Court struck down as arbitrary and oppressive assessment of fines of $100 per day (and aggregating $3,600) on a telephone company that, in accordance with its established and uncontested regulations, suspended the service of a patron in arrears.248

Footnotes

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1 Scott v. Sandford, 60 U.S. (19 How.) 393, 404–06, 417–18, 419–20 (1857).
2 The controversy, political as well as constitutional, which this case stirred and still stirs, is exemplified and analyzed in the material collected in S. Kutler, The Dred Scott Decision: Law or Politics? (1967).
3 "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s]. . . ." Ch. 31, 14 Stat. 27 .
4 The proposed amendment as it passed the House contained no such provision, and it was decided in the Senate to include language like that finally adopted. Cong. Globe, 39th Cong., 1st Sess. 2560, 2768–69, 2869 (1866). The sponsor of the language said: "This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every

person born within the limits of the United States, and subject to their jurisdiction, is . . . a citizen of the United States." Id. at 2890. The legislative history is discussed at some length in Afroyim v. Rusk, 387 U.S. 253, 282–86 (1967) (Justice Harlan dissenting).
5 United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898) .
6 Slaughter–House Cases, 83 U.S. (16 Wall.) 36, 74 (1873).
7 United States v. Wong Kim Ark, 169 U.S. 649 (1898) .
8 Id. at 682.
9 Id. at 680–82; Elk v. Wilkins, 112 U.S. 94, 99 (1884) .
10 United States v. Gordon, 25 Fed. Cas. 1364 (C.C.S.D.N.Y. 1861) (No. 15,231); In re Look Tin Sing, 21 F. 905 (C.C.Cal. 1884); Lam Mow v. Nagle, 24 F.2d 316 (9th Cir. 1928).
11 387 U.S. 253 (1967) . Though the Court upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in Mackenzie v. Hare, 239 U.S. 299 (1915) , the subject first received extended judicial treatment in Perez v. Brownell, 356 U.S. 44 (1958) , in which by a five–to–four decision the Court upheld a statute denaturalizing a native–born citizen for having voted in a foreign election. For the Court, Justice Frankfurter reasoned that Congress' power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in acts of that citizen which might embarrass relations with a foreign nation. Id. at 60–62. Three of the dissenters denied that Congress had any power to denaturalize. See discussion supra pp. 272–76. In the years before Afroyim, a series of decisions had curbed congressional power.
12 Afroyim v. Rusk, 387 U.S. 253, 262–63 (1967) . Four dissenters, Justices Harlan, Clark, Stewart, and White, controverted the Court's reliance on the history and meaning of the Fourteenth Amendment and reasserted Justice Frankfurter's previous reasoning in Perez. Id. at 268.
13 Rogers v. Bellei, 401 U.S. 815 (1971) . This, too, was a five–to–four decision, Justices Blackmun, Harlan, Stewart, and White, and Chief Justice Burger in the majority, and Justices Black, Douglas, Brennan, and Marshall dissenting.
14 Insurance Co. v. New Orleans, 13 Fed. Cas. 67 (C.C.D.La. 1870). Not being citizens of the United States, corporations accordingly have been declared unable "to claim the protection of that clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State." Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1869) . This conclusion was in harmony with the earlier holding in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869), to the effect that corporations were not within the scope of the privileges and immunities clause of state citizenship set out in Article IV, Sec. 2. See also Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126 (1912) ; Berea College v. Kentucky, 211 U.S. 45 (1908) ; Liberty Warehouse Co. v. Tobacco Growers, 276 U.S. 71, 89 (1928) ; Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) .
15 83 U.S. (16 Wall.) 36, 71, 77–79 (1873).
16 Id. at 78–79.
17 Id. at 79.
18 211 U.S. 78, 97 (1908) .
19 Citing Crandall v. Nevada, 73 U.S. (65 Wall.) 35 (1868). It was observed in United States v. Wheeler, 254 U.S. 281, 299 (1920) , that the statute at issue in Crandall was actually held to burden directly the performance by the United States of its governmental functions. Cf. Passenger Cases, 48 U.S. (7 How.) 282, 491–92 (1849) (Chief Justice Taney dissenting). Four concurring Justices in Edwards v. California, 314 U.S. 160, 177, 181 (1941) , would have

grounded a right of interstate travel on the privileges and immunities clause. More recently, the Court declined to ascribe a source but was content to assert the right to be protected. United States v. Guest, 383 U.S. 745, 758 (1966) ; Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969) . Three Justices ascribed the source to this clause in Oregon v. Mitchell, 400 U.S. 112, 285–87 (1970) (Justices Stewart and Blackmun and Chief Justice Burger, concurring in part and dissenting in part).
20 Citing United States v. Cruikshank, 92 U.S. 542 (1876) .
21 Citing Ex parte Yarbrough, 110 U.S. 651 (1884) ; Wiley v. Sinkler, 179 U.S. 58 (1900) . Note Justice Douglas' reliance on this clause in Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (concurring in part and dissenting in part).
22 Citing United States v. Waddell, 112 U.S. 76 (1884) .
23 Citing Logan v. United States, 144 U.S. 263 (1892) .
24 Citing In re Quarles and Butler, 158 U.S. 532 (1895) .
25 Crutcher v. Kentucky, 141 U.S. 47, 57 (1891) .
26 296 U.S. 404 (1935) .
27 Madden v. Kentucky, 309 U.S. 83, 93 (1940) .
28 307 U.S. 496, 510–18 (1939) (Justices Roberts and Black; Chief Justice Hughes may or may not have concurred on this point. Id. at 532). Justices Stone and Reed preferred to base the decision on the due process clause. Id. at 518.
29 314 U.S. 160, 177–83 (1941) .
30 See also Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (Justice Douglas); id. at 285–87 (Justices Stewart and Blackmun and Chief Justice Burger).
31 332 U.S. 633, 640 (1948) .
32 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 , now 42 U.S.C. Sec. 1982 , as amended.
33 E.g., Holden v. Hardy, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines); Williams v. Fears, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the State); Wilmington Mining Co. v. Fulton, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen); Heim v. McCall, 239 U.S. 175 (1915) ; Crane v. New York, 239 U.S. 195 (1915) (statute restricting employment on state public works to citizens of the United States, with a preference to citizens of the State); Missouri Pacific Ry. v. Castle, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence); Western Union Tel. Co. v. Milling Co., 218 U.S. 406 (1910) (statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873); In re Lockwood, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law); Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) (law taxing a debt owed a resident citizen by a resident of another State and secured by mortgage of land in the debtor's State); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Mugler v. Kansas, 123 U.S. 623 (1887) ; Crowley v. Christensen, 137 U.S. 86, 91 (1890) ; Giozza v. Tiernan, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors); In re Kemmler, 136 U.S. 436 (1890) (statute regulating the method of capital punishment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (statute regulating the franchise to male citizens); Pope v. Williams, 193 U.S. 621 (1904) (statute requiring persons coming into a State to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters); Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922)

(statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized); Walker v. Sauvinet, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law); Presser v. Illinois, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the Governor); Maxwell v. Dow, 176 U.S. 581, 596, 597–98 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association (other than benevolent orders, and the like) with knowledge that the association has failed to file its constitution and membership lists); Palko v. Connecticut, 302 U.S. 319 (1937) (statute allowing a State to appeal in criminal cases for errors of law and to retry the accused); Breedlove v. Suttles, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote); Madden v. Kentucky, 309 U.S. 83, 92–93 (1940) , (overruling Colgate v. Harvey, 296 U.S. 404, 430 (1935)) (statute whereby deposits in banks outside the State are taxed at 50 cents per $100); Snowden v. Hughes, 321 U.S. 1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship); MacDougall v. Green, 335 U.S. 281 (1948) (Illinois Election Code requirement that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least 50 of the 102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87% in the 49 most populous counties); New York v. O'Neill, 359 U.S. 1 (1959) (Uniform Reciprocal State Law to secure attendance of witnesses from within or without a State in criminal proceedings); James v. Valtierra, 402 U.S. 137 (1971) (a provision in a state constitution to the effect that low–rent housing projects could not be developed, constructed, or acquired by any state governmental body without the affirmative vote of a majority of those citizens participating in a community referendum).

34 Hibben v. Smith, 191 U.S. 310, 325 (1903) .

35 Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905) . See also French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901) .

36 Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857), is the exception.

37 83 U.S. (16 Wall.) 36, 80–81 (1873).

38 94 U.S. 113, 134 (1877) .

39 96 U.S. 97, 103–04 (1878) .

40 110 U.S. 516, 528, 532, 536 (1884) .

41 94 U.S. 113, 141–48 (1877) .

42 123 U.S. 623, 661 (1887) .

43 83 U.S. (16 Wall.) 36, 113–14, 116, 122 (1873).

44 Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, 662 (1875). "There are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist. . . ."

45 "Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all. . . . This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property right. . . . A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously

adopted, does deprive them of liberty as well as property, without due process of law." Slaughter–House Cases, 83 U.S. (16 Wall.) 36, 116, 122 (1873) (Justice Bradley dissenting).
46 143 U.S. 517, 551 (1892) .
47 See Fletcher v. Peck, 10. U.S. (6 Cr.) 87, 128 (1810).
48 94 U.S. 113, 123, 182 (1877) .
49 123 U.S. 623 (1887) .
50 Id. at 662. "We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact . . . that . . . pauperism, and crime . . . are, in some degree, at least, traceable to this evil."
51 127 U.S. 678, 685 (1888) .
52 291 U.S. 502 (1934) .
53 Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) .
54 Id. at 487, 491.
55 The Court has pronounced a strict "hands–off" standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such legislation is to be "accorded the traditional presumption of constitutionality generally accorded economic regulations" and is to be "upheld absent proof of arbitrariness or irrationality on the part of Congress." That the accommodation among interests which the legislative branch has struck "may have profound and far–reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83–84 (1978) . See also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976) ; Hodel v. Indiana, 452 U.S. 314, 333 (1981) ; New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978) ; Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978) ; Brotherhood of Locomotive Firemen v. Chicago, R.I. & P. R.R., 393 U.S. 129, 143 (1968) ; Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963) .
56 See Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 L. J. 371 (1938).
57 Munn v. Illinois, 94 U.S. 113 (1877) . In a case arising under the Fifth Amendment, decided almost at the same time, the Court explicitly declared the United States "equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law." Sinking Fund Cases, 99 U.S. 700, 718–19 (1879) .
58 Smyth v. Ames, 169 U.S. 466, 522, 526 (1898) ; Kentucky Co. v. Paramount Exch., 262 U.S. 544, 550 (1923) ; Liggett Co. v. Baldridge, 278 U.S. 105 (1928) .
59 Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906) ; Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907) ; Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) . Earlier, in Northern Securities Co. v. United States, 193 U.S. 197, 362 (1904) , a case interpreting the federal antitrust law, Justice Brewer, in a concurring opinion, had declared that "a corporation . . . is not endowed with the inalienable rights of a natural person."
60 Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"). In First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) , faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. See id. at 778 n.14

(reserving question). But see id. at 809, 822 (Justices White and Rehnquist dissenting) (corporations as creatures of the state have the rights state gives them).
61 Yick Wo v. Hopkins, 118 U.S. 356 (1886) ; Terrace v. Thompson, 263 U.S. 197, 216 (1923) . See Hellenic Lines v. Rhodetis, 398 U.S. 306, 309 (1970) .
62 Pennie v. Reis, 132 U.S. 464 (1889) ; Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900) ; Tyler v. Judges of Court of Registration, 179 U.S. 405, 410 (1900) ; Straus v. Foxworth, 231 U.S. 162 (1913) ; Columbus & G. Ry. v. Miller, 283 U.S. 96 (1931) .
63 City of Pawhuska v. Pawhuska Oil Co., 250 U.S. 394 (1919) ; City of Trenton v. New Jersey, 262 U.S. 182 (1923) ; Williams v. Mayor of Baltimore, 289 U.S. 36 (1933) . But see Madison School Dist. v. WERC, 429 U.S. 167, 175 n.7 (1976) (reserving question whether municipal corporation as an employer has a First Amendment right assertable against State).
64 Coleman v. Miller, 307 U.S. 433, 441, 442, 443, 445 (1939) ; Boynton v. Hutchinson Gas Co., 291 U.S. 656 (1934) ; South Carolina Hwy. Dept. v. Barnwell Bros., 303 U.S. 177 (1938) . The converse is not true, however, and the interest of a state official in vindicating the Constitution gives him no legal standing to attack the constitutionality of a state statute in order to avoid compliance with it. Smith v. Indiana, 191 U.S. 138 (1903) ; Braxton County Court v. West Virginia, 208 U.S. 192 (1908) ; Marshall v. Dye, 231 U.S. 250 (1913) ; Stewart v. Kansas City, 239 U.S. 14 (1915) . See also Coleman v. Miller, 307 U.S. 433, 437–46 (1939) .
65 Long ago Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824). See California Reduction Co. v. Sanitary Works, 199 U.S. 306, 318 (1905) ; Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906) ; Bacon v. Walker, 204 U.S. 311 (1907) ; Eubank v. Richmond, 226 U.S. 137 (1912) ; Schmidinger v. Chicago, 226 U.S. 578 (1913) ; Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915) ; Nebbia v. New York, 291 U.S. 502 (1934) ; Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) . See also Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (police power encompasses preservation of historic landmarks; land–use restrictions may be enacted to enhance the quality of life by preserving the character and aesthetic features of city); City of New Orleans v. Dukes, 427 U.S. 297 (1976) ; Young v. American Mini Theatres, 427 U.S. 50 (1976) .
66 Hudson Water Co. v. McCarter, 209 U.S. 349 (1908) ; Eubank v. Richmond, 226 U.S. 137, 142 (1912) ; Erie R.R. v. Williams, 233 U.S. 685, 699 (1914) ; Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915) ; Hadacheck v. Sebastian, 239 U.S. 394 (1915) ; Hall v. Geiger–Jones Co., 242 U.S. 539 (1917) ; Panhandle Eastern Pipeline Co. v. Highway Comm'n, 294 U.S. 613, 622 (1935) .
67 Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914) .
68 Liggett Co. v. Baldridge, 278 U.S. 105, 111–12 (1928) ; Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936) .
69 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) ; Welch v. Swasey, 214 U.S. 91, 107 (1909) . See also Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) ; Agins v. City of Tiburon, 447 U.S. 255 (1980) . See supra, pp. 1382–95.
70 Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) .
71 Erie R.R. v. Williams, 233 U.S. 685, 700 (1914) .
72 New Orleans Public Service v. New Orleans, 281 U.S. 682, 687 (1930) .
73 Abie State Bank v. Bryan, 282 U.S. 765, 776 (1931) .

74 See the tentative effort in Hampton v. Mow Sun Wong, 426 U.S. 88, 102 & n.23 (1976), apparently to expand upon the concept of "liberty" within the meaning of the Fifth Amendment's due process clause and necessarily therefore the Fourteenth's.
75 See the substantial confinement of the concept in Meachum v. Fano, 427 U.S. 215 (1976) ; and Montanye v. Haymes, 427 U.S. 236 (1976) , in which the Court applied to its determination of what is a liberty interest the "entitlement" doctrine developed in property cases, in which the interest is made to depend upon state recognition of the interest through positive law, an approach contrary to previous due process–liberty analysis. Cf. Morrissey v. Brewer, 408 U.S. 471, 482 (1972) . For more recent cases, see DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no Due Process violation for failure of state to protect an abused child from his parent, even though abuse had been detected by social service agency); Collins v. City of Harker Heights, 112 Ct. 1061 (1992) (failure of city to warn its employees about workplace hazards does not violate due process; the due process clause does not impose a duty on the city to provide employees with a safe working environment).

Supplement: [P. 1581, add to n.75:]

County of Sacramento v. Lewis, 523 U.S. 833 (1998) (high–speed automobile chase by police officer causing death through deliberate or reckless indifference to life would not violate the Fourteenth Amendment's guarantee of substantive due process).

76 83 U.S. (16 Wall.) 36 (1873).
77 165 U.S. 578, 589 (1897) . "The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."
78 236 U.S. 1, 14 (1915) .
79 Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549, 567, 570 (1911) . See also Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 534 (1923) .
80 169 U.S. 366 (1898) .
81 198 U.S. 45 (1905) .
82 127 U.S. 678 (1888) .
83 123 U.S. 623 (1887) .
84 169 U.S. 366, 398 (1898) .
85 198 U.S. 45 (1905) .
86 Id. at 58–59.
87 Id. at 71, 74 (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903)).
88 198U.S. at 75–76 198U.S. at 75–76 (1905).
89 243 U.S. 426 (1917) .
90 208 U.S. 412 (1908) .
91 Id.
92 Adkins v. Children's Hospital, 261 U.S. 525 (1923) ; Stettler v. O'Hara, 243 U.S. 629 (1917) ; Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) .

93 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) . Thus the National Labor Relations Act was declared not to "interfere with the normal exercise of the right of the employer to select its employees or to discharge them." However, restraint of the employer for the purpose of preventing an unjust interference with the correlative right of his employees to organize was declared not to be arbitrary. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 45–46 (1937) .
94 Miller v. Wilson, 236 U.S. 373 (1915) (statute limiting work to 8 hours/day, 48 hours/week); Bosley v. McLaughlin, 236 U.S. 385 (1915) (same restrictions for women working as pharmacists or student nurses). See also Muller v. Oregon, 208 U.S. 412 (1908) (10 hours/day as applied to work in laundries); Riley v. Massachusetts, 232 U.S. 671 (1914) (violation of lunch hour required to be posted).
95 See, e.g., Holden v. Hardy, 169 U.S. 366 (1898) (statute limiting the hours of labor in mines and smelters to eight hours per day); Bunting v. Oregon, 243 U.S. 426 (1917) (statute limiting to ten hours per day, with the possibility of 3 hours per day of overtime at time–and–a–half pay, work in any mill, factory, or manufacturing establishment).
96 Atkin v. Kansas, 191 U.S. 207 (1903) .
97 St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203 (1902) .
98 Wilmington Mining Co. v. Fulton, 205 U.S. 60 (1907) .
99 Barrett v. Indiana, 229 U.S. 26 (1913) .
100 Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) .
101 Booth v. Indiana, 237 U.S. 391 (1915) .
102 Sturges & Burn v. Beauchamp, 231 U.S. 320 (1913) .
103 Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901) ; Dayton Coal and Iron Co. v. Barton, 183 U.S. 23 (1901) ; Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914) .
104 Erie R.R. v. Williams, 233 U.S. 685 (1914) .
105 St. Louis, I. Mt. & S.P. Ry. v. Paul, 173 U.S. 404 (1899) .
106 Rail Coal Co. v. Ohio Industrial Comm'n, 236 U.S. 338 (1915) . See also McLean v. Arkansas, 211 U.S. 539 (1909) .
107 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923) , a Fifth Amendment case); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) .
108 Day–Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) .
109 Id. at 424–25. See also Dean v. Gadsden Times Pub. Co., 412 U.S. 543 (1973) (sustaining statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).
110 New York Cent. R.R. v. White, 243 U.S. 188, 200 (1917) .
111 Arizona Employers' Liability Cases, 250 U.S. 400, 419–20 (1919) .
112 In determining what occupations may be brought under the designation of "hazardous," the legislature may carry the idea to the "vanishing point." Ward & Gow v. Krinsky, 259 U.S. 503, 520 (1922) .
113 New York Central R.R. v. White, 243 U.S. 188 (1917) ; Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) .
114 Arizona Employers' Liability Cases, 250 U.S. 400 (1919) .
115 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976) . But see id. at 38 (Justice Powell concurring).
116 Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549 (1911) .

117 Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935) .
118 Thornton v. Duffy, 254 U.S. 361 (1920) .
119 Booth Fisheries v. Industrial Comm'n, 271 U.S. 208 (1926) .
120 Staten Island Ry. v. Phoenix Co., 281 U.S. 98 (1930) .
121 Sheehan Co. v. Shuler, 265 U.S. 371 (1924) ; New York State Rys. v. Shuler, 265 U.S. 379 (1924) .
122 New York Cent. R.R. v. Bianc, 250 U.S. 596 (1919) . Attorneys are not deprived of property or their liberty of contract by restriction imposed by the State on the fees which they may charge in cases arising under the workmen's compensation law. Yeiser v. Dysart, 267 U.S. 540 (1925) .
123 Justice Black in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949) . In his concurring opinion, contained in the companion case of AFL v. American Sash & Door Co., 335 U.S. 538, 543–44 (1949) , Justice Frankfurter summarized the now obsolete doctrines employed by the Court to strike down state laws fostering unionization. "[U]nionization encountered the shibboleths of a premachine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of 'liberty' were equated with theories of laissez faire. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. . . . The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage–earners' bargaining power. With that attitude as a premise, Adair v. United States, 208 U.S. 161 (1908) , and Coppage v. Kansas, 236 U.S. 1 (1915) , followed logically enough; not even Truax v. Corrigan, 257 U.S. 312 (1921) , could be considered unexpected." In Adair and Coppage the Court voided statutes outlawing "yellow dog" contracts whereby, as a condition of obtaining employment, a worker had to agree not to join or to remain a member of a union; these laws, the Court ruled, impaired the employer's "freedom of contract"—the employer's unrestricted right to hire and fire. In Truax, the Court on similar grounds invalidated an Arizona statute which denied the use of injunctions to employers seeking to restrain picketing and various other communicative actions by striking employees. And in Wolff Co. v. Industrial Court, 262 U.S. 522 (1923) ; 267 U.S. 552 (1925) and Dorchy v. Kansas, 264 U.S. 286 (1924) , the Court had also ruled that a statute compelling employers and employees to submit their controversies over wages and hours to state arbitration was unconstitutional as part of a system compelling employers and employees to continue in business on terms not of their own making.
124 301 U.S. 486 (1937) .
125 Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922) . In conjunction with its approval of this statute, the Court also sanctioned judicial enforcement of a local policy rule which rendered illegal an agreement of several insurance companies having a local monopoly of a line of insurance, to the effect that no company would employ within two years anyone who had been discharged from, or left, the service of any of the others.
126 Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922) .
127 Dorchy v. Kansas, 272 U.S. 306 (1926) .
128 301 U.S. 468 (1937) .
129 257 U.S. 312 (1921) .

130 Cases disposing of the contention that restraints on picketing amount to a denial of freedom of speech and constitute therefore a deprivation of liberty without due process of law have been set forth under the First Amendment. See pp. 1102, 1121, supra.
131 Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945) . Justice Frankfurter, concurring, declared that "the insistence by individuals of their private prejudices . . ., in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." Id. at 98.
132 335 U.S. 525 (1949) .
133 335 U.S. 538 (1949) .
134 335 U.S. 525, 534, 537. In a lengthy opinion, in which he registered his concurrence with both decisions, Justice Frankfurter set forth extensive statistical data calculated to prove that labor unions not only were possessed of considerable economic power but by virtue of such power were no longer dependent on the closed shop for survival. He would therefore leave to the legislatures the determination "whether it is preferable in the public interest that trade unions should be subjected to state intervention or left to the free play of social forces, whether experience has disclosed 'union unfair labor practices,' and if so, whether legislative correction is more appropriate than self– discipline and pressure of public opinion. . . ." Id. at 538, 549–50.
135 336 U.S. 245 (1949) .
136 Id. at 253.
137 336 U.S. 490 (1949) . Other recent cases regulating picketing are treated under the First Amendment. See pp. 1173–79, supra.
138 94 U.S. 113 (1877) .
139 Chicago, M. & St.P. Ry. v. Minnesota, 134 U.S. 418 (1890) .
140 Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535–36 (1923) .
141 Munn v. Illinois, 94 U.S. 113 (1877) ; Budd v. New York, 143 U.S. 517, 546 (1892) ; Brass v. North Dakota ex rel. Stoesser, 153 U.S. 391 (1894) .
142 Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901) .
143 Townsend v. Yeomans, 301 U.S. 441 (1937) .
144 German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914) ; Aetna Insurance Co. v. Hyde, 275 U.S. 440 (1928) .
145 O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251 (1931) .
146 Williams v. Standard Oil Co., 278 U.S. 235 (1929) .
147 Tyson & Bro. v. Banton, 273 U.S. 418 (1927) .
148 New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) . See also Adams v. Tanner, 244 U.S. 590 (1917) ; Weaver v. Palmer Bro., 270 U.S. 402 (1926) .
149 Nebbia v. New York, 291 U.S. 502, 531–32, 535–37, 539 (1934) . In reaching this conclusion the Court might be said to have elevated to the status of prevailing doctrine the views advanced in previous decisions by dissenting Justices. Thus, Justice Stone, dissenting in Ribnik v. McBride, 277 U.S. 350, 359–60 (1928) , had declared: "Price regulation is within the State's power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole." In his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262, 302– 03 (1932), Justice Brandeis had also observed: "The notion of a distinct category of business 'affected with a public interest' employing property 'devoted to a public use' rests upon

historical error. In my opinion the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible."

150 Justice McReynolds, speaking for the dissenting Justices, labelled the controls imposed by the challenged statute as a "fanciful scheme to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold." Intimating that the New York statute was as efficacious as a safety regulation which required "householders to pour oil on their roofs as a means of curbing the spread of a neighborhood fire," Justice McReynolds insisted that "this Court must have regard to the wisdom of the enactment," and must determine "whether the means proposed have reasonable relation to something within legislative power." 291S., 556, 558 (1934).

151 313 U.S. 236, 246 (1941) .

152 277 U.S. 350 (1928) . Adams v. Tanner, 244 U.S. 590 (1917) , was disapproved in Ferguson v. Skrupa, 372 U.S. 726 (1963) , and Tyson & Bro. v. Banton, 273 U.S. 418 (1927) , was effectively overruled in Gold v. DiCarlo, 380 U.S. 520 (1965) , without the Court hearing argument on it.

153 94 U.S. 113 (1877) . See also Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1877) .

154 Rate–making is deemed to be one species of price fixing. FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 603 (1942) .

155 Nebbia v. New York, 291 U.S. 502, 539 (1934) .

156 96 U.S. 97 (1878) . See also Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897) .

157 116 U.S. 307 (1886) .

158 Dow v. Beidelman, 125 U.S. 680 (1888) .

159 134 U.S. 418, 458 (1890) .

160 Budd v. New York, 143 U.S. 517 (1892) .

161 154 U.S. 362, 397 (1894) .

162 Insofar as judicial intervention resulting in the invalidation of legislatively imposed rates has involved carriers, it should be noted that the successful complainant invariably has been the carrier, not the shipper.

163 169 U.S. 466 (1898) . Of course the validity of rates prescribed by a State for services wholly within its limits must be determined wholly without reference to the interstate business done by a public utility. Domestic business should not be made to bear the losses on interstate business and vice versa. Thus a State has no power to require the hauling of logs at a loss or at rates that are unreasonable, even if a railroad receives adequate revenues from the intrastate long haul and the interstate lumber haul taken together. On the other hand, in determining whether intrastate passenger railway rates are confiscatory, all parts of the system within the State (including sleeping, parlor, and dining cars) should be embraced in the computation, and the unremunerative parts should not be excluded because built primarily for interstate traffic or not required to supply local transportation needs. See Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 434–35 (1913) ; Chicago, M. & St.P. Ry. v. Public Util. Comm'n, 274 U.S. 344 (1927) ; Groesbeck v. Duluth, S.S. & A. Ry., 250 U.S. 607 (1919) . The maxim that a legislature cannot delegate legislative power is qualified to permit creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. To prevent a holding of invalid delegation of legislative power, the legislature must constrain the board with a certain course of procedure and certain rules of decision in the performance of its functions, with

which the agency must substantially comply to validate its action. Wichita R.R. v. Public Util. Comm'n, 260 U.S. 48 (1922) .
164 Reagan v. Farmers' Loan & Trust Co., 154, U.S. 362, 397 (1894).
165 ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910) . This statement, made in the context of federal ratemaking, appears to be equally applicable to judicial review of state agency actions.
166 231 U.S. 298, 310–13 (1913) .
167 Des Moines Gas Co. v. Des Moines, 238 U.S. 153 (1915) .
168 Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 452 (1913) .
169 Knoxville v. Water Co., 212 U.S. 1 (1909) .
170 Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926) .
171 Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909) .
172 174 U.S. 739, 750, 754 (1899) . See also Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 433 (1913) .
173 San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 441, 442 (1903) . See also Van Dyke v. Geary, 244 U.S. 39 (1917) ; Georgia Ry. v. Railroad Comm'n, 262 U.S. 625, 634 (1923) .
174 For its current position, see Crowell v. Benson, 285 U.S. 22 (1932) .
175 222 U.S. 541, 547–48 (1912) . See also ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910) .
176 253 U.S. 287 (1920) .
177 Id. at 289. In injunctive proceedings, evidence is freshly introduced whereas in the cases received on appeal from state courts, the evidence is found within the record.
178 231 U.S. 298 (1913) .
179 253 U.S. 287, 291, 295 (1920) .
180 94 U.S. 113 (1877) . Because some of these methods or formulas, no longer required as a matter of constitutional law, may continue to be used by state commissions in drafting rate orders, a survey is provided below. (1) Fair Value.—On the premise that a utility is entitled to demand a rate schedule that will yield a "fair return upon the value" of the property which it employs for public convenience, the Court in Smyth v. Ames, 169 U.S. 466, 546–47 (1898) , held that determination of such value necessitated consideration of at least such factors as "the original cost of construction, the amount expended in permanent improvements, the amount and market value of . . . [the utility's] bonds and stock, the present as compared with the original cost of construction, [replacement cost], the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses. (2) Reproduction Cost.—Prior to the demise in 1944 of the Smyth v. Ames fair value formula, two of the components thereof were accorded special emphasis with the second quickly surpassing the first in measure of importance. These were: (1) the actual cost of the property ("the original cost of construction together with the amount expended in permanent improvements") and (2) reproduction costs ("the present as compared with the original cost of construction"). For varied application of the reproduction cost formula, see San Diego Land Co. v. National City, 174 U.S. 739, 757 (1899) ; San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 443 (1903) ; Willcox v. Consolidated Gas Co., 212 U.S. 19, 52 (1909) ; Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352 (1913) ; Galveston Elec. Co. v. Galveston, 258 U.S. 388, 392 (1922) ; Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276 (1923) ; Bluefield Co. v. Public Serv. Comm'n, 262 U.S. 679 (1923) ; Georgia Ry. v. Railroad Comm'n, 262 U.S. 625, 630 (1923) ; McCardle v. Indianapolis Co., 272 U.S. 400 (1926) ; St Louis & O'Fallon Ry. v. United States, 279 U.S. 461 (1929) . (3) Prudent Investment (Versus Reproduction Cost).—This

method of valuation, championed by Justice Brandeis in a separate opinion in Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291–92, 302, 306–07 (1923) , was defined as follows: "The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of capital . . . the allowance for the risk incurred; and enough more to attract capital. . . . Where the financing has been proper, the cost to the utility of the capital, required to construct, equip and operate its plant, should measure the rate of return which the Constitution guarantees opportunity to earn." Advantages to be derived from "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return" would, according to Justice Brandeis, be nothing less than the attainment of a "basis for decision which is certain and stable. The rate base would be ascertained as a fact, not determined as a matter of opinion. It would not fluctuate with the market price of labor, or materials, or money.

As a method of valuation, the prudent investment theory was not accorded any acceptance until the Depression of the 1930's. The sharp decline in prices which occurred during this period doubtless contributed to the loss of affection for reproduction costs. In Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287 (1933) and Railroad Comm'n v. Pacific Gas Co., 302 U.S. 388, 399, 405 (1938) , the Court upheld respectively a valuation from which reproduction costs had been excluded and another in which historical cost served as the rate base. Later, in 1942, when in FPC v. Natural Gas Pipeline Co., 315 U.S. 575, the Court further emphasized its abandonment of the reproduction cost factor, there developed momentarily the prospect that prudent investment might be substituted. This possibility was quickly negatived, however, by the Hope Gas case, (FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)), which dispensed with the necessity of relying upon any formula for the purpose of fixing valid rates. (4) Depreciation.— No less indispensable to the determination of the fair value mentioned in Smyth v. Ames was the amount of depreciation to be allowed as a deduction from the measure of cost employed, whether the latter be actual cost, reproduction cost, or any other form of cost determination. Although not mentioned in Smyth v. Ames, the Court gave this item consideration in Knoxville v. Water Co., 212 U.S. 1, 9–10 (1909) ; but notwithstanding its early recognition as an allowable item of deduction in determining value, depreciation continued to be the subject of controversy arising out of the difficulty of ascertaining it and of computing annual allowances to cover the same. Indicative of such controversy was the disagreement as to whether annual allowances shall be in such amount as will permit the replacement of equipment at current costs, i.e., present value, or at original cost. In the Hope Gas case, 320U.S. at 606 320U.S. at 606, the Court reversed United Railways v. West, 280 U.S. 234, 253–254 (1930) , insofar as that holding rejected original cost as the basis of annual depreciation allowances. (5) Going Concern Value and Good Will.— Whether intangibles were to be included in valuation was not passed upon in Smyth v. Ames, but shortly thereafter, in Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 165 (1915) , the Court declared it to be self–evident "that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, . . . [and that] this element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return. . . ." Generally described as going concern value, this element has never been precisely defined by the Court. In its latest pronouncement on the subject, uttered in FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 589 (1942) , the Court denied that there is any "constitutional requirement that going concern value, even when it is an appropriate element to be included in a rate base, must be separately stated

and appraised as such. . . . [Valuations have often been sustained] without separate appraisal of the going concern element. . . . When that has been done, the burden rests on the regulated company to show that this item has neither been adequately covered in the rate base nor recouped from prior earnings of the business." Franchise value and good will, on the other hand, have been consistently excluded from valuation; the latter presumably because a utility invariably enjoys a monopoly and consumers have no choice in the matter of patronizing it. The latter proposition has been developed in the following cases: Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909) ; Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 163–64 (1915) ; Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922) ; Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287, 313 (1933) . (6) Salvage Value.—It is not a constitutional error to disregard theoretical reproduction cost for a plant which "'no responsible person would think of reproducing." Accordingly, where, due to adverse conditions, a street–surface railroad had lost all value except for scrap or salvage, it was permissible for a commission, as the Court held in Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 562, 564 (1945) , to use as a rate the price at which the utility offered to sell its property to a citizen. Moreover, the Commission's order was not invalid even through under the prescribed rate the utility would operate at a loss; for the due process clause cannot be invoked to protect a public utility against business hazards, such as the loss of, or failure to obtain patronage. On the other hand, in the case of a water company whose franchise has expired, but where there is no other source of supply, its plant should be valued as actually in use rather than at what the property would bring for some other use in case the city should build its own plant. Denver v. Denver Union Water Co., 246 U.S. 178 (1918) . (7) Past Losses and Gains.—"The Constitution [does not] require that the losses of . . . [a] business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned." FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942) . Nor can past losses be used to enhance the value of the property to support a claim that rates for the future are confiscatory, Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922) , any more than profits of the past can be used to sustain confiscatory rates for the future Newton v. Consolidated Gas Co., 258 U.S. 165, 175 (1922) ; Board of Comm'rs v. New York Tel. Co., 271 U.S. 23, 31–32 (1926) .

181 315 U.S. 575, 586 (1942) .

182 320 U.S. 591, 602 (1944) . Although this and the previously cited decision arose out of controversies involving the National Gas Act of 1938, the principles laid down therein are believed to be applicable to the review of rate orders of state commissions, except insofar as the latter operate in obedience to laws containing unique standards or procedures.

183 Ohio Valley Co. v. Ben Avon Borough, 253 U.S. 287 (1920) .

184 In FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 599 (1942) , Justices Black, Douglas, and Murphy, in a concurring opinion, proposed to travel the road all the way back to Munn v. Illinois, and deprive courts of the power to void rates simply because they deem the latter to be unreasonable. In a concurring opinion, in Driscoll v. Edison Co., 307 U.S. 104, 122 (1939) , Justice Frankfurter temporarily adopted a similar position; he declared that "the only relevant function of law . . . [in rate controversies] is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process." However, in his dissent in FPC v. Hope Natural Gas Co., 320 U.S. 591, 625 (1944) , he disassociated himself from this proposal, and asserted that "it was decided [more than fifty years ago] that the final say under the Constitution lies with the judiciary."

185 FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944) , See also Wisconsin v. FPC, 373 U.S. 294, 299, 317, 326 (1963) , wherein the Court tentatively approved an "area rate approach," that is "the determination of fair prices for gas, based on reasonable financial requirements of the industry, for . . . the various producing areas of the country," and with rates being established on an area basis rather than on an individual company basis. Four dissenters, Justices Clark, Black, Brennan, and Chief Justice Warren, labelled area pricing a "wild goose chase," and stated that the Commission had acted in an arbitrary and unreasonable manner entirely outside traditional concepts of administrative due process. Area rates were approved in Permian Basin Area Rate Cases, 390 U.S. 747 (1968) .

186 Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989) (rejecting takings challenge to Pennsylvania rule preventing utilities from amortizing costs of canceled nuclear plants).

187 FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (citing Chicago G.T. Ry. v. Wellman, 143 U.S. 339, 345–46 (1892)); Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291 (1923) .

188 Atlantic Coast Line R.R. v. Corporation Comm'n, 206 U.S. 1, 19 (1907) (citing Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877)). See also Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908) ; Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919) .

189 Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 344 (1892) ; Mississippi R.R. Comm'n v. Mobile & Ohio R.R., 244 U.S. 388, 391 (1917) . See also Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910) ; Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935) .

190 Cleveland Electric Ry. v. Cleveland, 204 U.S. 116 (1907) .

191 Detroit United Ry. v. Detroit, 255 U.S. 171 (1921) . See also Denver v. New York Trust Co., 229 U.S. 123 (1913) .

192 Los Angeles v. Los Angeles Gas Corp., 251 U.S. 32 (1919) .

193 Newburyport Water Co. v. Newburyport, 193 U.S. 561 (1904) . See also Skaneateles Water Co. v. Skaneateles, 184 U.S. 354 (1902) ; Helena Water Works Co. v. Helena, 195 U.S. 383 (1904) ; Madera Water Works v. Madera, 228 U.S. 454 (1913) .

194 Western Union Tel. Co. v. Richmond, 224 U.S. 160 (1912) .

195 Pierce Oil Corp. v. Phoenix Ref. Co., 259 U.S. 125 (1922) .

196 Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914) . See also Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 255 (1897) ; Chicago, B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 591–92 (1906) ; New Orleans Pub. Serv. v. New Orleans, 281 U.S. 682 (1930) .

197 Consumers' Co. v. Hatch, 224 U.S. 148 (1912) .

198 Panhandle Eastern Pipe Line Co. v. Highway Comm'n, 294 U.S. 613 (1935) .

199 New Orleans Gas Co. v. Drainage Comm'n, 197 U.S. 453 (1905) .

200 Norfolk Turnpike Co. v. Virginia, 225 U.S. 264 (1912) .

201 International Bridge Co. v. New York, 254 U.S. 126 (1920) .

202 Chicago, B. & Q. R.R. v. Nebraska, 170 U.S. 57 (1898) .

203 Chicago, B. & Q. Ry. v. Drainage Comm'n, 200 U.S. 561 (1906) ; Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915) ; Lake Shore & Mich. So. Ry. v. Clough, 242 U.S. 375 (1917) .

204 Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919) .

205 Chicago, St. P., Mo. & O. Ry. v. Holmberg, 282 U.S. 162 (1930) .

206 Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) . See also Lehigh Valley R.R. v. Commissioners, 278 U.S. 24, 35 (1928) (upholding imposition of grade crossing costs on a railroad although "near the line of reasonableness," and reiterating that "unreasonably extravagant" requirements would be struck down).

207 Atchison T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346, 352 (1953) .
208 United Gas Co. v. Railroad Comm'n, 278 U.S. 300, 308–09 (1929) . See also New York ex rel. Woodhaven Gas Light Co. v. Public Serv. Comm'n, 269 U.S. 244 (1925) ; New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917) .
209 Missouri Pac. Ry. v. Kansas, 216 U.S. 262 (1910) ; Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917) ; Fort Smith Traction Co. v. Bourland, 267 U.S. 330 (1925) .
210 Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603, 607 (1917) ; Brooks–Scanlon Co. v. Railroad Comm'n, 251 U.S. 396 (1920) ; Railroad Comm'n v. Eastern Tex. R.R., 264 U.S. 79 (1924) ; Broad River Co. v. South Carolina ex rel. Daniel, 281 U.S. 537 (1930) .
211 Atchison, T. & S.F. Ry. v. Railroad Comm'n, 283 U.S. 380, 394–95 (1931) .
212 Minneapolis & St. L. R.R. v. Minnesota, 193 U.S. 53 (1904) .
213 Gladson v. Minnesota, 166 U.S. 427 (1897) .
214 Missouri Pac. Ry. v. Kansas, 216 U.S. 262 (1910) .
215 Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917) .
216 Lake Erie & W. R.R. v. Public Util. Comm'n, 249 U.S. 422 (1919) ; Western & Atlantic R.R. v. Public Comm'n, 267 U.S. 493 (1925) .
217 Alton R.R. v. Illinois Commerce Comm'n, 305 U.S. 548 (1939) .
218 Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910) .
219 Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603, 607 (1917) .
220 Great Northern Ry. v. Minnesota, 238 U.S. 340 (1915) ; Great Northern Ry. Co. v. Cahill, 253 U.S. 71 (1920) .
221 Chicago, M. & St. P. R.R. v. Wisconsin, 238 U.S. 491 (1915) .
222 Washington ex rel. Oregon R.R. & Nav. Co. v. Fairchild, 224 U.S. 510, 528–29 (1912) . See also Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915) ; Seaboard Air Line R.R. v. Georgia R.R. Comm'n, 240 U.S. 324, 327 (1916) .
223 Louisville & Nashville R.R. v. Stock Yards Co., 212 U.S. 132 (1909) .
224 Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915) .
225 Chicago, M. & St. P. Ry. v. Iowa, 233 U.S. 334 (1914) .
226 Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass'n, 247 U.S. 490 (1918) . Nor are railroads denied due process when they are forbidden to exact a greater charge for a shorter distance than for a longer distance. Louisville & Nashville R.R. v. Kentucky, 183 U.S. 503, 512 (1902) ; Missouri Pacific Ry. v. McGrew Coal Co., 244 U.S. 191 (1917) .
227 Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915) .
228 Railroad Co. v. Richmond, 96 U.S. 521 (1878) .
229 Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1914) .
230 Great Northern Ry. v. Minnesota ex rel. Clara City, 246 U.S. 434 (1918) .
231 Denver & R. G. R.R. v. Denver, 250 U.S. 241 (1919) .
232 Nashville, C. & St. L. Ry. v. White, 278 U.S. 456 (1929) .
233 Nashville, C. & St. L. Ry. v. Alabama, 128 U.S. 96 (1888) .
234 Chicago, R.I. & P. Ry. v. Arkansas, 219 U.S. 453 (1911) ; St. Louis, I. Mt. & So. Ry. v. Arkansas, 240 U.S. 518 (1916) ; Missouri Pacific R.R. v. Norwood, 283 U.S. 249 (1931) ; Firemen v. Chicago, R.I. & P.R.R. 393 U.S. 129 (1968) .
235 Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280 (1914) .
236 Erie R.R. v. Solomon, 237 U.S. 427 (1915) .
237 New York, N.H. and H.R.R. v. New York, 165 U.S. 628 (1897) .

238 Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922) . See also Yazoo & Miss. V.R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912) ; cf. Adams Express Co. v. Croninger, 226 U.S. 491 (1913) .
239 Atlantic Coast Line R.R. v. Glenn, 239 U.S. 388 (1915) .
240 St. Louis & San Francisco Ry. v. Mathews, 165 U.S. 1 (1897) .
241 Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922) .
242 Kansas City Ry. v. Anderson, 233 U.S. 325 (1914) .
243 St. Louis, I. Mt. & So. Ry. v. Wynne, 224 U.S. 354 (1912) . See also Chicago, M. & St. P. Ry. v. Polt, 232 U.S. 165 (1914) .
244 Missouri Pacific Ry. v. Tucker, 230 U.S. 340 (1913) .
245 St. Louis, I. Mt. & So. Ry. v. Williams, 251 U.S. 63, 67 (1919) .
246 Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885) ; Minneapolis Ry. v. Beckwith, 129 U.S. 26 (1889) .
247 Chicago, B. & Q. R.R. v. Cram, 228 U.S. 70 (1913) .
248 Southwestern Tel. Co. v. Danaher, 238 U.S. 482 (1915) .

Supplement Footnotes

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1 Saenz v. Roe, 526 U.S. 489 (1999) .
2 526U.S. at 525 526U.S. at 525 (Thomas, J., dissenting).
3 The right of United States citizens to choose their State of residence is specifically protected by the first sentence of the Fourteenth Amendment—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . . ."