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The Abortion Right, Originalism, and the Fourteenth Amendment

Steven Graines

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THE ABORTION RIGHT, ORIGINALISM, AND THE
FOURTEENTH AMENDMENT

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The Supreme Court in *Roe v. Wade* held that the abortion right is a fundament of the constitutional right to personal privacy.³ The *Roe* Court’s privacy analysis has been criticized by constitutional scholars from the right and left as lacking a textual basis in the Constitution.⁴ Some scholars have attempted to re-conceive the abortion right on equal protection terms, but the requirement of purposeful discrimination⁵ has hobbled such efforts.⁶ Despite the difficulties of grounding the abortion right in the Due Process Clause or the Equal Protection Clause, this right does have a basis in the text of the Constitution or the Privileges or Immunities Clause of the Fourteenth Amendment,⁷ a passage that was so recently revived or at least remembered in *Saenz v. Roe*.⁸ The Privileges or Immunities Clause, unlike the modern Equal Protection Clause, does not require a demonstration of purposeful discrimination⁹ and so this

³*Roe v. Wade*, 410 U.S. 113, 154 (1973).

⁴*See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Laurence Tribe, *Foreword: Toward a Model of the Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973).

⁵*See, e.g.*, *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

⁶*See, e.g.*, Reva Siegel, *Reasoning From the Body: A Historical Perspective On Abortion Regulation And Questions Of Equal Protection*, 44 STAN. L. REV. 261 (1992); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

⁷U.S. CONST. Amend. XIV, § 1 in part that: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

⁸119 S. Ct. 1518 (1999).

⁹*See supra* note 7.

obstacle cannot hamper the argument presented herein as it did the equal protection arguments.

In this article, the Privileges or Immunities Clause will be re-conceived in its original context, at the center of the Fourteenth Amendment.¹⁰ This re-conception includes the assumption that *The Slaughter-House Cases*¹¹ were decided incorrectly.¹² The contention of the article is that abortion restrictions, as a specific originalist matter, can be considered economic legislation and that they also economically burden women,¹³ such that they unconstitutionally abridge two privileges or immunities, the Lochnerian liberties to contract and the engagement in any of the common occupations. Specifically, abortion restrictions violate “the prohibition on redistributive ‘class’ legislation . . . that was deeply rooted in the original understanding of the Fourteenth Amendment.”¹⁴ This claim is confined to a reconciliation of the original understanding of the Fourteenth Amendment with the *Casey* Court’s holding that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”¹⁵

I. A BRIEF DIAGRAM OF THE MECHANISM

To arrive at a modern, yet specific originalist understanding of the liberty to contract and the liberty to engage in any of the common occupations, their existence, scope, importance and applicability to women must be first identified through an examination of the *Lochner*-era Supreme Court jurisprudence. The modern component of the originalist understanding of privileges or immunities is added by examining a specific originalist conception of Section Five of the Fourteenth Amendment, which grants Congress the power to interpret civil rights established prior to the ratification of the Fourteenth Amendment by enacting “appropriate legislation.”¹⁶ As will be contended, Congress’ interpretive power under Section Five is a specific originalist mechanism allowing Congress to recognize and to respond to changed social contexts, including economic realities for women and social attitudes on women. Two such responses are the Family Medical Leave Act¹⁷ and the Pregnancy Discrimination Act.¹⁸ These two statutes will be examined for

¹⁰See Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1241 (1998) (asserting that the Privileges or Immunities Clause is the clause from which the framers of the Fourteenth Amendment expected most).

¹¹83 U.S. (16 Wall.) 36 (1872).

¹²See Rosen, *supra* note 10, at 1241 (arguing that “‘everyone,’ we’re told, now agrees that the Supreme Court took a wrong turn in the *Slaughter-House* cases in 1873, when a narrow majority read the Privileges or Immunities Clause of the Fourteenth Amendment out of the Constitution by construing it into irrelevancy”).

¹³See Siegel, *supra* note 6; see also MacKinnon, *supra* note 6.

¹⁴See Rosen, *supra* note 10, at 1248.

¹⁵*Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992). Thus, this article need not entertain, e.g., fetal rights.

¹⁶U.S. CONST. amend. XIV, § 5.

¹⁷29 U.S.C. § 2601 (1998).

¹⁸Pub. L. 95-555 (codified at 42 U.S.C. § 2000e(k) (1998)).

Congress' understanding and treatment of women's reproductive role in economic terms and how this understanding and treatment affects the constitutionality of abortion restrictions.

The suggested "resurrection" of the Lochnerian civil rights will be seen not to vitiate the New Deal, because the "resurrection" does not require an exclusive economic premise of classical economics to the exclusion of the progressive economics of the New Deal. Rather the argument can be seen as relying on the premise of the Fourteenth Amendment in its original context, a securing of "limited absolute equality,"¹⁹ as interpreted by Congress pursuant to Section Five. In addition, the New Deal will be seen as only reducing the importance of Lochnerian rights, but not nullifying them, and in the process can be seen as consistent with an originalist view of the Fourteenth Amendment.

A. An Originalist Interpretation of *Per Se* Abortion Rights

For a textualist or an originalist, a right to be free from abortion restrictions is unlikely to be a privilege or immunity of federal citizenship. Professor McConnell identifies two sources of privileges or immunities for a textualist or specific originalist²⁰—the Privileges and Immunities Clause of Article IV, as non-exhaustively interpreted by *Corfield v. Coryell* and the rights enumerated in the Civil Rights Act of 1866,—and abortion rights are not once mentioned.²¹

A non-specific originalist interpretation requires the same conclusion. Historically, abortion was legally permissible at common law at the opening of the nineteenth century if performed before quickening.²² Through the middle of the century and especially in the years following the Civil War, states enacted legislation restricting abortion, and the cumulative effect was to prohibit abortion from conception.²³ Thus, under McConnell's useful three-pronged test for whether a given right is a privilege or immunity of citizenship,²⁴ a right to be free from abortion restrictions fails, as state legislatures abolished the common law right to abortion before quickening. Therefore, the assumption that a *per se* right to be free from abortion restrictions is not a privilege or immunity of citizenship is sound.

B. The Myth That Life Begins At Conception

Any originalist argument, if not any legal argument, against abortion restrictions requires a consideration of the history of abortion law to determine whether, as a

¹⁹See Rosen, *supra* note 10, at 1242; Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 224 (1987).

²⁰See Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1027-28 (1995).

²¹See U.S. CONST. art. IV, § 2; *Corfield v. Coryell*, 6 F.Cas. 546, 551 (C.C.D.Pa. 1823) (No. 3230); the Civil Rights Act of 1866, Ch. 31, § 1, 14 Stat. 27.

²²See Siegel, *supra* note 6, at 281-82 (1992).

²³*Id.* at 282.

²⁴See McConnell, *supra* note 20, at 1028 (stating that these prongs are: nationally uniform, permanent and stable part of American legal legacy, and legally enforceable as a matter of right rather than discretionary).

constitutional principal, life begins at conception. The text of the Constitution and the Supreme Court prior to *Roe* are silent on the matter. Thus, an examination of the common law and American practice in the nineteenth century, an era when abortion law was in flux is warranted.²⁵ Within the nineteenth century, there were two general phases of abortion law, and neither establishes that, as a constitutional principal, life begins at conception. At most, the evidence as to when life begins is unclear. This history as well as the text of the Fourteenth Amendment bar fetuses from possessing constitutional rights.

1. Phase One: The Common Law at the Opening of the Nineteenth Century

Abortion was legally permissible at common law at the opening of the nineteenth century if performed before quickening, typically in the fourth or fifth month of pregnancy.²⁶ Quickening was the first perception of fetal movement by the pregnant woman.²⁷ As Mohr noted, the common law did not recognize the existence of a fetus until it had quickened, but after it had quickened, the destruction of a fetus was “considered a crime, because the fetus itself had manifested some semblance of a separate existence: the ability to move.”²⁸ In addition, the crime of destroying a fetus “was qualitatively different from the destruction of a human being . . . and punished less harshly.”²⁹

The Massachusetts Supreme Court, establishing the common law in the United States in *Commonwealth v. Bangs*, held that abortions early in pregnancy were beyond the scope of the law, and not a crime.³⁰ *Bangs* was the seminal case on quickening during this first general phase, and various state courts followed it.³¹

2. The Second General Phase: The Movement to Restrict Abortions

During the middle of the nineteenth century and especially in the years following the Civil War, states began to enact various legislative restrictions on abortion so as to prohibit abortion from conception.³² Between 1860 and 1880, states and territories passed forty anti-abortion statutes in different forms and for various reasons,³³ and these statutes generally abolished the common law doctrine of quickening.³⁴

²⁵See JAMES MOHR, *ABORTION IN AMERICA* (1978).

²⁶ Siegel, *supra* note 6, at 281-82.

²⁷MOHR, *supra* note 25, at 3.

²⁸MOHR, *supra* note 25, at 3.

²⁹MOHR, *supra* note 25, at 3.

³⁰9 Mass. 387 (1812).

³¹See *Commonwealth v. Parker*, 50 Mass. 263 (1845); *State v. Smith*, 32 Me. Rep. 369 (1851); *Abrams v. Foshee*, 3 Cole’s Ed. 274 (Iowa 1856); *Smith v. Gaffard*, 31 Ala. 45 (1857); and *Mitchell v. Commonwealth*, 78 Ky. 204 (1879).

³²Siegel, *supra* note 6, at 282.

³³See MOHR, *supra* note 25, at 200-25.

³⁴See Siegel, *supra* note 6, at 282.

In the national political movement to ban abortion, many reasons were cited to justify an abandonment of the old common law doctrine of quickening. The political movement and subsequent transformation in abortion law “occurred at the behest of the nation’s physicians.”³⁵ Doctors’ opposition to abortion was “partly ideological, partly scientific, partly moral, and partly practical.”³⁶ Scientifically and morally, the doctors argued that human development was “continuous from the point of conception,” and that abortion at any stage of pregnancy was therefore an unjustified destruction of human life.³⁷ Practically, the doctors were attempting to establish the medical profession as a profession, and, by opposing abortion, they sought to distinguish themselves from popular practitioners “in method and commitment” by opposing abortion.³⁸

The Ohio legislative record is representative of this national campaign against abortion and provides much evidence of the doctors’ role in lobbying state legislators for criminal abortion statutes.³⁹ A special legislative committee submitted a proposal for banning abortion in Ohio along with a formal report on abortion in Ohio, which “clearly demonstrated the influence of the national physicians’ crusade at the state level.”⁴⁰ The special committee attributed its understanding of abortion to the American Medical Association and acknowledged that its report recited many of the facts that were listed in the anti-abortion tract of Horatio Storer, a prominent leader in the anti-abortion movement and former Harvard professor of obstetrics and gynecology.⁴¹

The committee’s report mentioned that abortions frequently occurred, and that middle class women aborted most often.⁴² The report also contended that abortion was murder, and a danger to women because abortion violated “nature’s laws.”⁴³ The report condemned women who resisted motherhood, and warned married women who were avoiding their marital obligations.⁴⁴ The report’s conclusion indicated that the Ohio legislators were concerned about the demographic failure of the American family.⁴⁵

³⁵*Id.*

³⁶MOHR, *supra* note 25, at 34-35.

³⁷Siegel, *supra* note 6, at 282.

³⁸Siegel, *supra* note 6, at 283.

³⁹Siegel, *supra* note 6, at 315.

⁴⁰MOHR, *supra* note 25, at 206-07 (citing 1867 Ohio Senate J. App., 233-35).

⁴¹Siegel, *supra* note 6, at 316 (citing Ohio Senate J. App., at 233, 235; HORATIO ROBINSON STORER, WHY NOT? A BOOK FOR EVERY WOMAN (1866)).

⁴²See MOHR, *supra* note 25, at 207.

⁴³Siegel, *supra* note 6, at 316 (citing 1867 Ohio Senate J. App. 234).

⁴⁴Siegel, *supra* note 6, at 316-17 (citing 1867 Ohio Senate J. App. 235).

⁴⁵MOHR, *supra* note 25, at 208.

Subsequently, the Ohio legislature criminalized the destruction of the fetus, and nullified the common law of quickening.⁴⁶ The criminal statute, however, did not punish abortion as murder, and instead classified abortion at any stage of gestation as a “high misdemeanor.”⁴⁷ Thus, as Professor Siegel argued, the Ohio criminal abortion statute “was enacted out of a confluence of concerns, reflecting an interest in enforcing women’s adherence to marital roles, in preserving the hegemony of [the middle class,] and in protecting unborn life.”⁴⁸ To add to this confluence, the Ohio law was also pro-physician special interest legislation, enacted against the wishes of the people of Ohio.⁴⁹

Not only did this confluence of reasons motivate the Ohio legislature aside from protecting the unborn, but not even in the legislature’s desire to protect the unborn did it premise that life begins at conception. Protecting unborn life is not synonymous with the proposition that life begins at conception, as reflected in the Ohio legislature’s failure to classify abortion as murder. Similarly, the North Carolina Supreme Court in *State v. Slagle* held that “it is not the murder of a living child that constitutes the offense, but the destruction of gestation by wicked means and against nature,”⁵⁰ a result that was affirmed by the North Carolina legislature in 1881.⁵¹ Thus, states may have nullified the common law doctrine of quickening as a legal mechanism to permit abortions, but the nullification was not so extensive so as to establish that life begins at conception.

In addition, the flux in abortion law itself bars establishment of a principal or tenet of American social context that life begins at conception. Abortion restrictions were not hoary laws with hoary premises and underpinnings; they were the product of a national political movement without precedent in the history of abortion law. If McConnell’s three-prong test is adapted to determine if a principal of social context can affect a constitutional interpretation of a privilege or immunity, the post-Civil War movement fails to justify a constitutional principal that life begins at conception.⁵² Abortion restrictions and their underlying premises were not uniform, were varied from state to state, were not a permanent and stable part of the American legal legacy, and were necessarily subject to the vicissitudes of legislative policy.

II. THERE ARE NO CONSTITUTIONAL FETAL RIGHTS

Textually, the Privileges or Immunities Clause of the Fourteenth Amendment protects only citizens of the United States.⁵³ To be a citizen of the United States, persons must be “born or naturalized in the United States,” a requirement that a fetus

⁴⁶Siegel, *supra* note 6, at 315 n. 223 (citing Act of Apr. 13, 1867, Ohio Laws 135-136, repealed by Amended Substitute House Bill No. 511, 1972 Ohio Laws 2032 (Vol. 134)).

⁴⁷Siegel, *supra* note 6, at 317 (citing Act of Apr. 13, 1867, Ohio Laws 135-136).

⁴⁸*Id.*

⁴⁹See 1867 OHIO SENATE J. APP. 233-35 (acknowledging that public opinion tolerated abortion and the common law doctrine of quickening and deriding quackery).

⁵⁰82 N.C. 653 (1880).

⁵¹MOHR, *supra* note 25, at 227 (citing North Carolina Session Laws 1881).

⁵²See McConnell, *supra* note 20, at 1028.

⁵³See U.S. CONST. amend. XIV, § 1.

cannot satisfy.⁵⁴ The Equal Protection Clause and Due Process Clause extend protection to “any person.”⁵⁵ The Court in *Roe v. Wade*, after examining the prevailing abortion practices in the nineteenth century and reviewing all references to “person” in the Constitution, found as a textual and historical matter that “person,” as used in the Fourteenth Amendment, does not include the unborn.⁵⁶ Therefore, and consistent with the common law doctrine of quickening and the intent and purposes of abortion restrictions as discussed above, fetuses are not entitled to constitutional protection.

As a result, an examination of whether abortion restrictions violate the Privileges or Immunities Clause need not examine the principal that life begins at conception, as, at minimum, it was never established, and, more likely, was never truly accepted. Indeed, one could plausibly argue that abortion restrictions, in redistributing money to the American Medical Association and away from “quacks,” were unconstitutional class legislation in the nineteenth century. Moreover, a woman’s liberty to contract and liberty to engage in the common occupations do not compete with a fetus’s rights, as the latter are non-existent.

III. THE FOURTEENTH AMENDMENT⁵⁷ ENCOMPASSES WOMEN

Textually, Section One of the Fourteenth Amendment does not distinguish between men and women, instead referring to a “person,” “persons,” and “citizens.”⁵⁸ This textual understanding forecloses a contrary specific originalist understanding that limits the Amendment’s applicability to men.⁵⁹

A. *Originalism and the Theoretical Liberty to Contract*

The Civil Rights Act of 1866 “encompassed the principal civil rights directly contemplated by the framers of the Fourteenth Amendment.”⁶⁰ Among these civil

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Roe v. Wade*, 410 U.S. 113, 157 (1973).

⁵⁷U.S. CONST. amend. XIV, § 1 provides that [a]ll 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. 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.

⁵⁸*See* U.S. CONST. amend. XIV, § 1. *See also* Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL’Y 465, 467 (1995) (arguing that the Fourteenth Amendment was textually designed to give all persons certain civil rights, but not political rights).

⁵⁹*But see* Amar, *supra* note 58, at 469 (arguing contrary to Farnsworth’s view that women are in some ways at the center of Section One of the Fourteenth Amendment).

⁶⁰McConnell, *supra* note 20, at 1027.

rights designated by the 1866 Act was the liberty to contract⁶¹. . . . While the existence of the liberty to contract is not disputed,⁶² the actual scope of the liberty is a matter of debate, and thus an examination of the Supreme Court's interpretation of the liberty to contract is necessary.

In *Barbier v. Connolly*,⁶³ the Supreme Court broadly interpreted the original intent of the liberty to contract and in so doing displayed hostility to class legislation.⁶⁴ The Court held that the Fourteenth Amendment "undoubtedly intended" that "no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."⁶⁵ The *Barbier* Court also recognized that the liberty to contract is not unlimited, because the Fourteenth Amendment was not designed to interfere with the power of the state "to prescribe regulations to promote the health, peace, morals, education and good order of the people."⁶⁶

*Holden v. Hardy*⁶⁷ was the Court's first examination of the liberty to contract with respect to labor legislation. The *Holden* Court assessed for its constitutionality a Utah statutory provision that placed a ceiling on the number of hours men may work each day in underground mines.⁶⁸ The Court sustained the statutory provision, holding that it did not violate the Fourteenth Amendment on the basis that the Utah legislature reasonably found the occupation of mining to be "detrimental to the health of the employees."⁶⁹ The Court carefully distinguished the Utah statute from a general maximum hours statute, observing that the statute "does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals."⁷⁰ Thus, the *Holden*

⁶¹The Civil Rights Act of 1866, § 1 provides in pertinent part that "[a]ll persons within the jurisdiction of United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.

⁶²See Howard Gillman, *The Constitution Besieged; Roscoe Pound, Liberty of Contract*, 18 YALE L.J. 454 (1909).

⁶³113 U.S. 27 (1884).

⁶⁴See Gillman, *supra* note 62, at 201 (arguing that long-standing features of nineteenth century police powers jurisprudence are "an emphasis on market liberty, the belief that market liberty could be interfered with if legislation promoted a valid public purpose, and the suggestion that valid public-purpose legislation was distinct from laws that merely promoted the interests of some classes at the expense of others").

⁶⁵113 U.S. at 31.

⁶⁶*Id.* See also *Lawton v. Steele*, 152 U.S. 133, 137 (1894) (holding that for the State justifiably to interpose its authority, "it must appear--First that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals").

⁶⁷*Holden v. Hardy*, 169 U.S. 366 (1898).

⁶⁸*Id.* at 380.

⁶⁹*Id.* at 395.

⁷⁰*Id.*

Court's justificatory basis for the Utah statute or, more broadly, the scope of a state's proper exercise of its police powers, is predicated on the dangerousness of a given occupation.⁷¹ The Court additionally evinced a scepticism as to the constitutionality of a general maximum hours statute, where such dangerousness is unlikely to be reasonably found, a scepticism that was later confirmed in *Lochner v. New York*.⁷²

The Court acknowledged the Utah legislature's finding that the owners of mines and their employees "do not stand upon an equality, and that their interests are, to a certain extent, conflicting."⁷³ Nevertheless the Court held that a disparity of bargaining power does not by itself justify a state's interference with market relations, but that a disparity entailing a neglect of laborers' health and safety, would be sufficient justification.⁷⁴ The Court's approach in *Holden* indicates that a state's interference on behalf of exploited workers is consistent with its general police powers.⁷⁵ The Court's position in *Holden* may be regarded as a restriction on an employee's liberty to contract, but only insofar as the employee, laboring in an inherently hazardous occupation like mining, is "protected against himself,"⁷⁶ a setting where a state's interest in the general welfare of its citizens is implicated and competes with the individual's Fourteenth Amendment civil rights.

Holden stands for the proposition that "police powers could be used not only to promote the general well-being of the community but also the specific well-being of a class of workers who were not in a position to make contracts favorable to their health and safety."⁷⁷ This latter instance, an expansion of the police powers which describes the position of the miners in *Holden* and which appeared to the *Holden* Court as anomalous, "is now disclosed to be of far wider and deeper application" in light of industrialization.⁷⁸

IV. THE COMMON OCCUPATIONS OF LIFE

Another privilege or immunity protected by the Fourteenth Amendment is the right to follow any of the common occupations. Justice Bradley reported that "[t]he right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase 'pursuit of happiness' in the declaration of

⁷¹See Gillman, *supra* note 62 at 122-25.

⁷²198 U.S. 45 (1905) (invalidating a maximum hours law for bakers as violative of the Fourteenth Amendment on the bases that the act abridged the liberty to contract and that the state intervention was not authorized, because baking is not an unhealthy occupation).

⁷³*Holden*, 169 U.S. at 397.

⁷⁴See *id.* See also HOWARD GILLMAN, THE CONSTITUTION BESIEGED 123 (clarifying this point in light of what Gillman views as Justice Brown's ambiguous drafting of the opinion).

⁷⁵See *id.* (emphasizing that "[t]he whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer").

⁷⁶*Id.*

⁷⁷Gillman, *supra* note 62, at 125 (citing Fowler Vincent Harper, *Due Process of Law in State Labor Legislation*, 26 MICH. L. REV. 599, 620-21 (1928)).

⁷⁸See Gillman, *supra* note 62, at 142 (citing *Bunting v. Oregon*, 243 U.S. 426, 431-33 (1917) (Felix Frankfurter et al, for defendants in error)).

independence.”⁷⁹ Justice Bradley, expressing his dissatisfaction with the Court’s evisceration of the Privileges or Immunities Clause⁸⁰ in the *Slaughter-House Cases*⁸¹ and approval of *Corfield v. Coryell*,⁸² again asserted that this right is “one of the privileges of a citizen of the United States.”⁸³ The Supreme Court later expressly adopted Justice Bradley’s view that the right to follow any of the common occupations is protected by the Fourteenth Amendment in *Allgeyer v. Louisiana*.⁸⁴

The Court most famously invoked this right in *Yick Wo v. Hopkins* where it ruled that the disparate administration of a municipal licensing ordinance violated the Equal Protection Clause on the basis that “[n]o reason whatever, except the will of the supervisors, is assigned why [200 Chinese] should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood.”⁸⁵ Similarly, the Court in *Truax v. Raich* held that an Arizona statute requiring eighty percent of every employer’s laborers to be qualified electors or native-born citizens violated the right to follow any of the common occupations of life and constituted a denial of equal protection, because “[n]o special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment.”⁸⁶ As a proof construct, *Truax* alluded to a disparate impact standard, inasmuch as “[t]he purpose of an act must be found its natural operation and effect.”⁸⁷

⁷⁹*Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring). *See id.* (where Justice Bradley described this right as “a large ingredient in the civil liberty of the citizen”).

⁸⁰*See* U.S. CONST. amend. XIV, § 1.

⁸¹83 U.S. (16 Wall.) 36 (1872).

⁸²6 F.Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

⁸³*Butchers’ Union*, 111 U.S. at 764 (Bradley, J., concurring).

⁸⁴165 U.S. 578, 589-90 (1897). *See also* *Adams v. Tanner*, 244 U.S. 590, 595 (1917).

⁸⁵118 U.S. 356, 374 (1886). The *Yick Wo* Court’s use of “will of the supervisors” must not be confused with the modern intentional discrimination standard, but rather as a proscription against “the play and action of purely personal and arbitrary power.” *See id.* at 370. *See also* Richard Kay, *The Equal Protection Clause in the Supreme Court, 1873-1903*, 29 BUFF. L. REV. 667, 695-96 (1980) (arguing that the *Yick Wo* Court’s standard was “not the presence of race but the absence of justification”).

⁸⁶239 U.S. 33, 43 (1915). In justifying its invocation of the right to follow the common occupations, the *Truax* Court cited, *inter alia*, Justice Bradley’s concurrence in *Butchers’ Union*, *Allgeyer*, and *Yick Wo*. *See Truax*, 239 U.S. at 41. *See also* *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 527-28 (1926) (invalidating the Philippine legislature’s Chinese Bookkeeping Act, which forbid the keeping of accounting records in any language other than Spanish, English, or a local dialect, violated the right to follow any of the common occupations, as applied to Chinese merchants of the Philippines and citing *Truax*).

⁸⁷239 U.S. at 40 (citing *Henderson v. New York*, 92 U.S. 259, 268 (1875) and *Bailey v. Alabama*, 219 U.S. 219, 244 (1911)).

V. WOMEN'S LIBERTY TO CONTRACT

The Supreme Court has acknowledged that women's liberty to contract is theoretically equal to that of men.⁸⁸ Notwithstanding this formal equality, the Supreme Court determined that when women's physiological differences are implicated, men and women are not "under like circumstances"⁸⁹ such that they may be treated differently, but not disadvantageously, while retaining the semblance of formal equality.⁹⁰

Two cases that discuss the scope of a woman's liberty to contract are *Muller v. Oregon*⁹¹ and *Adkins v. Children's Hospital*.⁹²

The Court in *Muller v. Oregon*⁹³ considered whether an Oregon statute providing that "no female (shall) be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day"⁹⁴ violated the Fourteenth Amendment.⁹⁵ Despite women's formal equality in the liberty to contract,⁹⁶ the Court reviewed the statute, which facially abridged the liberty to contract, by examining the liberty to contract and, hence, the state's interest largely in physiological terms.⁹⁷ The *Muller* Court brandished a sympathy for the "widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."⁹⁸ Consistent with this belief, the Court emphasized the disadvantageousness of women's "physical structure and the performance of maternal functions in . . . the struggle for subsistence," especially when fulfilling the maternal role.⁹⁹ The Court also acknowledged that women were deprived of educational and economic opportunities¹⁰⁰ such that an economic disparity existed between men and women.¹⁰¹ From these physiological-sociological pronouncements,¹⁰² the Court concluded that

⁸⁸See *Muller v. Oregon*, 208 U.S. 412, 418 (1908) (holding that with respect to the liberty to contract, women "stand on the same plane as the other sex"); *Adkins v. Children's Hospital*, 261 U.S. 525, 553 (1923) (holding that "it cannot except the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty to contract which could not be lawfully imposed in the case of men under similar circumstances").

⁸⁹See *Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

⁹⁰208 U.S. at 421-22.

⁹¹*Id.* at 412.

⁹²261 U.S. 525 (1923).

⁹³208 U.S. 412 (1908).

⁹⁴*Id.* at 416 (parentheses in original).

⁹⁵*Id.* at 417.

⁹⁶*Id.* at 418.

⁹⁷See Siegel, *supra* note 6, at 266 (noting that the *Muller* Court used physiological reasoning to justify the protective maximum hours law).

⁹⁸*Muller*, 208 U.S. at 420-21.

⁹⁹*Id.* at 421.

¹⁰⁰*Id.* at 421-22.

[t]hough limitations upon . . . contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.¹⁰³

The Court accordingly held that women are “properly placed” in their own class such that “legislation designed for her may be sustained, even when like legislation is not necessary for men, and could not be sustained.”¹⁰⁴

The Court held that the statute did not violate the Fourteenth Amendment, notwithstanding its restriction of women’s liberty to contract, because the statute protected women from “the greed as well as the passion of man”¹⁰⁵ and protected “her physical structure and a proper discharge of her maternal functions.”¹⁰⁶ Additionally, the Court construed the statute as in the general interest, because of the necessity of women’s “vigorous health upon the future well-being of the race.”¹⁰⁷

In *Adkins v. Children’s Hospital*, the Court addressed the question of whether a general minimum wages law for women in the District of Columbia unconstitutionally abridged the liberty to contract.¹⁰⁸ The Court again emphasized that women possess a liberty to contract theoretically equal to that of men.¹⁰⁹ The Court also re-affirmed its observation in *Muller* that women are physiologically unequal, and that “the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account.”¹¹⁰ Nevertheless, the *Adkins* Court ruled that the minimum wages law did

¹⁰¹*Id.* at 422.

¹⁰²*See also id.* at 421 (demonstrating a notably egregious form of misogyny in noting that men established control over women “at the outset” through “superior physical strength” such that “woman has always been dependent upon man,” a misogyny that is not central to the Court’s legal analysis, despite animating the opinion). As will be discussed *infra*, this brand of paternalism or misogyny loses constitutional significance after the ratification of the Nineteenth Amendment.

¹⁰³*Muller*, 208 U.S. at 422.

¹⁰⁴*Id.* at 422. Thus for the Oregon hours law, women and men are not “under like circumstances.” *See Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

¹⁰⁵*Muller*, 208 U.S. at 422.

¹⁰⁶*Id.* at 422.

¹⁰⁷*Id.* at 422.

¹⁰⁸*Adkins v. Children’s Hospital*, 261 U.S. 525, 545 (1923) (addressing the question under the Fifth Amendment’s Due Process Clause as Congress enacted the District of Columbia statute).

¹⁰⁹*Id.* at 553.

¹¹⁰*Id.* The Court also stated without explanation that non-physical inequality between women and men has “continued with diminishing intensity” after the ratification of the Nineteenth Amendment. *Id.* Aside from the issue of political rights, the Court’s statement is unclear in light of continued economic inequality between women and men.

not implicate and could not rely upon women's physiological differences.¹¹¹ The *Adkins* Court invalidated the minimum wages law, on the ground that it was unlawful class legislation, i.e., it was "simply and exclusively a price-fixing law, confined to adult women" who retain the same legal right to contract as men.¹¹²

VI. THE "GRAVITATIONAL FORCE" OF THE NINETEENTH AMENDMENT¹¹³

The ratification on the Nineteenth Amendment modified the understanding of the Fourteenth Amendment. Lawrence Lessig argues that "often the effect of an amendment is indirect, felt beyond the text it modifies, imposing, in Dworkin's sense, a 'gravitational force' on other parts of the text read."¹¹⁴ Along these lines, Akhil Amar argues that the Nineteenth Amendment indirectly affects a reading of the Fourteenth Amendment inasmuch as the Nineteenth Amendment "can be understood as establishing a kind of a fortiori argument: if women have equal political rights, a fortiori they should have equal civil rights."¹¹⁵

Professor Amar's view is the same as that of the *Adkins* Court.¹¹⁶ *Adkins* held "the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller Case* . . . has continued 'with diminished intensity.'"¹¹⁷ The Court added that

"[i]n view of the great—not to say revolutionary—changes which have taken place . . . in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these difference have now come almost, if not quite, to the vanishing point."

The Fourteenth Amendment, as indirectly modified by the Nineteenth Amendment, then proscribes from judicial or legislative consideration differences in the social expectations of women, but must recognize in accordance with *Muller*

¹¹¹*See id.* at 550 (holding that the state does not invariably maintain an interest in its population's strength and robustness so as to vindicate any law on the basis of being a health law, because noting that "[s]carcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the Legislature).

¹¹²*Adkins*, 261 U.S. at 554.

¹¹³U.S. CONST. amend. XIX provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

¹¹⁴*See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 407 (1995) (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 111 (1978)).

¹¹⁵*See* Amar, *supra* note 58, at 471. *Cf.* Akhil Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul* 106 HARV. L. REV. 124 (1992) (criticizing the R.A.V. Court's opinions for failing to consider the effect of the Fourteenth Amendment on the First Amendment in examining a municipal hate speech ordinance); Jeffrey Rosen, *Translating the Privileges and Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1248 (1998) (arguing that the Sixteenth Amendment provides a textual basis for discarding anti-redistributivism as a constitutional principle).

¹¹⁶*See Adkins*, 261 U.S. at 553; Amar, *supra* note 58, at 471.

¹¹⁷*Adkins*, 261 U.S. at 553.

“physical differences . . . in appropriate cases.”¹¹⁸ An example of a judicial opinion that is rendered nugatory by *Adkins* is Justice Bradley’s statement in *Bradwell v. Illinois*¹¹⁹ that “[m]an is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”¹²⁰ Such social considerations are impermissible after the ratification of the Nineteenth Amendment.

VII. THE SOCIAL CONTEXT UNDERLYING *MULLER*¹²¹

In examining women’s physiology, the *Lochner*-era Court determined that women and men are not “under like circumstances.”¹²² The primary physiological difference is women’s performance of maternal functions.¹²³ The Court recognized that the performance of maternal functions places women “at a disadvantage in the struggle for subsistence,” particularly “when the burdens of motherhood are upon her.”¹²⁴ The Court justified protective legislation for women on the basis of these physiological assumptions.¹²⁵

A. Section Five of the Fourteenth Amendment: An Interpretive Mechanism

When Congress enacts “appropriate legislation”¹²⁶ pursuant to Section Five of the Fourteenth Amendment, Congress exercises its powers under a specific originalist understanding of the Fourteenth Amendment, not to create substantive rights or circumvent the amendment process of Article Five, but to interpret or to fashion the Amendment.¹²⁷

¹¹⁸*Id.*

¹¹⁹83 U.S. (16 Wall.) 130 (1873).

¹²⁰*Bradwell*, 83 U.S. at 141 (Bradley, J. concurring). See also *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (whose social statement that “[i]t is impossible to close one’s eyes to the fact that she still looks to her brother and depends upon him” would also appear to be rendered nugatory by *Adkins*).

¹²¹“Social context” will be defined *infra*, in the section on methodology. The term refers to economic realities and social attitudes prevalent in American society and the Supreme Court’s and Congress’ treatment and understanding of them.

¹²²*Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

¹²³See *Muller*, 208 U.S. at 421-22 (noting that other differences include “the amount of physical strength” and “the capacity for long continued labor”).

¹²⁴*Id.* at 421.

¹²⁵See *Muller v. Oregon*, 208 U.S. 412 (1908). See also Siegel, *supra* note 6, at 266 (arguing that the “physiological argument” played an important role in justifying the protective legislation upheld in *Muller v. Oregon*).

¹²⁶U.S. CONST. amend. XIV § 5.

¹²⁷See Michael McConnell, Comment, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 173-74 (1997) (arguing that to conclude that interpretation is indistinguishable from amendment is to descend into postmodern deconstructionism).

B. Congress' Section Five Powers Are Textually Unclear

Section One of the Fourteenth Amendment prohibits states from making or enforcing laws that “abridge the privileges or immunities of citizens of the United States.”¹²⁸ Section Five of the Fourteenth Amendment provides: “The Congress shall have power to enforce, by appropriate legislation, the provisions of the article.”¹²⁹ The nature and scope of Congress’ powers under the Enforcement Clause are textually unclear,¹³⁰ and so an examination of the original understanding becomes necessary.

C. The Original Understanding of Congress' Powers under Section Five: The Framers' Debates

In February, 1866, Representative John Bingham proposed a version of the Fourteenth Amendment to the Joint Committee on Reconstruction which provided that Congress

“shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in he rights of life, liberty, and property.”¹³¹

Bingham’s draft encountered immediate opposition on the basis that the draft authorized Congress “to intrude into traditional areas of state responsibility, a power inconsistent with federal design.”¹³² In April, 1866, Bingham submitted a revised draft, providing that:

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.

....

The Congress shall have power to enforce, by appropriate legislation, the provisions of the Article.¹³³

¹²⁸U.S. CONST. amend. XIV, § 1.

¹²⁹U.S. CONST. amend. XIV, § 5.

¹³⁰*See* McConnell, *supra* note 127, at 170 (arguing that substantive, remedial, and interpretive powers are the three logical interpretations of the text of Section Five that “stand out”). *But see*, Saikrishna Prakash, *A Comment on Congressional Enforcement*, 32 IND. L. REV. 193 (1998) (arguing that Congress’ enforcement powers are textually limited to the authority to enact penalties for Fourteenth Amendment violations and to create federal institutions to enforce the Fourteenth Amendment).

¹³¹CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

¹³²*City of Boerne v. Flores*, 521 U.S. 507, 521 (1997) (citing the statements of Representatives Hale and Hotchkiss, and Senator Stewart at CONG. GLOBE, 39th Cong., 1st Sess. 1063-65, 1082, 1095 (1866)).

¹³³CONG. GLOBE 39th Cong., 1st Sess. 2286 (1866), cited in McConnell, *supra* note 127, at 177 n. 148.

This draft, after other revisions that are not pertinent here, was ratified in July, 1868 as the Fourteenth Amendment.¹³⁴

In comparing the February and April drafts, the change of breaking the concept of “equal protection in the rights of life, liberty, and property” into two clauses,¹³⁵ a prohibition of the denial of “equal protection of the laws” and a prohibition against depriving “any person of life, liberty, or property, without due process of law,” was critical “to relieving the concerns expressed by moderate Republicans about the February proposal.”¹³⁶ While Bingham insisted that the February proposal “meant only that Congress could protect preexisting rights,”¹³⁷ McConnell noted that “many members of Congress, including Republicans, feared that it would invest Congress with the power to pass legislation directly regarding life, liberty, and property.”¹³⁸ This criticism was “directed exclusively” to the equal protection provision of the February proposal.¹³⁹ Thus, the April proposal stripped Congress of “any power it might have under the February draft to provide direct protection of life, liberty, and property,”¹⁴⁰ and Congress’s power to enforce preexisting constitutional rights, such as the liberty to contract,¹⁴¹ “was not affected by this change.”¹⁴² The Fourteenth Amendment’s history indicates that Congressional power was limited to an enforcement of rights established by the Amendment itself, which “was an important protection for the states, because it ensured that neither Congress nor the Courts could go beyond the rights enshrined in the Constitution itself.”¹⁴³

¹³⁴See *Boerne*, 521 U.S. at 523.

¹³⁵McConnell, *supra* note 127, at 179 n. 159.

¹³⁶McConnell, *supra* note 127, at 179 n. 159 (citing EARL MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869* 56-60, 100-01 (1990)).

¹³⁷McConnell, *supra* note 127, at 179 n. 159 (citing CONG. GLOBE, 39th Cong., 1st Sess. 157-58, 1089-90 (1866)).

¹³⁸McConnell, *supra* note 127, at 179 n. 159.

¹³⁹Cong. Globe 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale), cited in McConnell, *supra* note 127, at 180. See Cong. Globe 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale); Cong. Globe 39th Cong., 1st Sess. 1095 (statement of Rep. Hotchkiss) (1866) (Hale and Hotchkiss both expressly stated that their criticism did not apply to the Privileges or Immunities Clause, the expected vehicle for the incorporation of the liberty to contract).

¹⁴⁰McConnell, *supra* note 127, at 180.

¹⁴¹See Gillman, *supra* note 62, at 27-28 (observing that the liberty to contract is rooted in the common law and that Alexander Hamilton and Thomas Jefferson subscribed to the theory that government ought to promote and protect the market rather than intrude “into the conflicts that were a natural feature of the opportunities it had to offer”); McConnell, *supra* note 127, at 180 (arguing that the “Privileges or Immunities Clause was unobjectionable because it referred to a fixed set of rights defined by some combination of the Bill of Rights and longstanding practice (usually common law”).

¹⁴²*Id.*

¹⁴³*Id.* at 181 (arguing that Congress could not establish, for example, ordinary tort or contract laws under the guise of equal protection).

Additionally, the original understanding of Section Five was animated by the concern that the Supreme Court would undermine Reconstruction by narrowly interpreting congressional power.¹⁴⁴ Republicans, who drafted and adopted the Fourteenth Amendment, were not enthralled with the Supreme Court, which ten years prior to the ratification of the Amendment pronounced its decision in *Dred Scott v. Sandford*.¹⁴⁵ John Bingham “goaded his fellow members of Congress to vote for the proposal by reminding them of the ‘horrid blasphemy’ of *Dred Scott*.”¹⁴⁶ Republican Senator Oliver Morton explained that “the remedy for the violation of the Fourteenth and Fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on part of Congress.”¹⁴⁷ Therefore, Section Five of the Fourteenth Amendment intended that Congress is obliged and authorized to interpret the preexisting constitutional rights.¹⁴⁸

D. A Few Methodological Points

Section Five of the Fourteenth Amendment establishes a constitutional mechanism for Congress to interpret civil rights protected by the Privileges or Immunities Clause¹⁴⁹ and enact “appropriate legislation”¹⁵⁰ or legislative remedies to prevent abridgments of civil rights.¹⁵¹ In providing a legislative remedy, Congress necessarily evaluates and reacts to social context, e.g., economic realities and social attitudes. To argue to the contrary is to subscribe to the absurd view that Congress provides legislative remedies to constitutional violations arbitrarily, in a vacuum and without reference to the Constitution or to realities of American life. As the mechanism by which Congress evaluates and recognizes economic realities and social attitudes and treats these realities and attitudes, i.e., Section Five, is of a constitutionally interpretive nature, recognized and treated realities and attitudes are constitutionally significant insofar as they modify or extend prior social context affecting interpretation of civil rights.¹⁵²

¹⁴⁴*Id.* at 182.

¹⁴⁵60 U.S. 393 (1856).

¹⁴⁶McConnell, *supra* note 127, at 182 (citing Cong. Globe, 40th Cong., 2d Sess. 483 (1868)).

¹⁴⁷Cong. Globe, 42d Cong., 2d Sess. 525 (1872).

¹⁴⁸McConnell, *supra* note 127, at 183. *See also* The Civil Rights Cases, 109 U.S. 3, 11-12 (holding that legislation enacted pursuant to Section Five of the Fourteenth Amendment “must necessarily be predicated upon supposed state laws or state proceedings, and be directed to the correction of their operation and effect”).

¹⁴⁹McConnell, *supra* note 127, at 176.

¹⁵⁰U.S. CONST. amend. XIV, § 5.

¹⁵¹McConnell, *supra* note 127, at 183.

¹⁵²Congress’ recognition and treatment of these realities and attitudes as well as the realities and attitudes themselves, once recognized, have, in Dworkin’s sense, “gravitational force” upon the pre-existing social context accompanying the privileges or immunities, and thus, indirectly, the interpretation of the privileges or immunities. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1978).

Section Five is thus a specific originalist mechanism for translation in that it permits Congress to account for foreground and background changes in American life, a principal tenet of translation theory.¹⁵³ Essentially, this article is an attempt to account for such changes and Congress' treatment and understanding of these changes through an examination of legislation enacted pursuant to Section Five.¹⁵⁴ In a sense, this method of translation is a variation of Professor Lessig's concept of synthesis as a mechanism of translation,¹⁵⁵ the only difference being that Section Five legislation imposes the gravitational force rather than constitutional amendment.

VIII. THE SOCIAL CONTEXT OF *MULLER* AND THE "NEW" SOCIAL CONTEXT: SECTION FIVE LEGISLATION AND THE CONSTITUTIONALITY OF ABORTION RESTRICTIONS

The enactments of the Family and Medical Leave Act (FMLA) and Pregnancy Discrimination Act (PDA) constitute an extended social context from the social context in *Muller* and *Adkins*. This extension is emblematic of a revolutionary change in women's role in the labor force and a new congressional understanding of the economic consequences on women's reproductive role.

A. *The Pregnancy Discrimination Act*

Congress, in providing in the PDA that "because of sex" or "on the basis of sex" includes "because of or on the basis of pregnancy,"¹⁵⁶ concurred with the *Muller* Court's premise that women's primary physiological difference is the performance of maternal functions.¹⁵⁷ Congress thus determined that the notion of pregnancy is subsumed into the notion of sex.¹⁵⁸ Moreover, as the Education and Labor Committee noted, the PDA "unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy."¹⁵⁹

The PDA is also evidence of Congress' evincement of an understanding that pregnancy adversely affects the economic lives of women. The House Report accompanying the PDA and compiled by the Education and Labor Committee, explained that "the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the

¹⁵³See, e.g., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

¹⁵⁴In this article, these changes and the Congressional understanding accompanying them will be termed "social context."

¹⁵⁵Lessig, *supra* note 153, at 407 (arguing that "often the effect of an amendment is indirect, felt beyond the text it modifies, imposing . . . a 'gravitational force' on other parts of the text read. This is the effect tracked by the changed reading I call synthesis").

¹⁵⁶Pub. L. 95-5, codified at 42 U.S.C. § 2000e(k).

¹⁵⁷*Muller v. Oregon*, 208 U.S. 421 (1908).

¹⁵⁸H.R. Rep. 95-948, 95th Cong. (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4750 (stating that "it is the capacity to become pregnant which primarily differentiates the female from the male.")

¹⁵⁹H.R. REP. No. 95-948, 95th Cong. (1978), reprinted in 1978 U.S.C.C.A.N. 4744, 4751.

discriminatory practices which keep women in low-paying and deadend jobs.”¹⁶⁰ This understanding is emblematic of a continuity with the social context in *Muller* that women’s reproductive role places women “at a disadvantage in the struggle for subsistence,” especially when the “burdens of motherhood are upon her.”¹⁶¹

The PDA, as Section Five legislation and thus interpretive for Fourteenth Amendment purposes, subsumed the notion of pregnancy into the notion of a woman. Thus, Congress, in enacting the PDA, nullified the distinction in *Geduldig v. Aiello*¹⁶² between pregnant and nonpregnant women.¹⁶³

B. The Family And Medical Leave Act

The principal congressional recognition in the FMLA is that “due to the nature of the roles of men and women in our society, the primary responsibility of family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”¹⁶⁴ In addition, Congress recognized the recent, but revolutionary trend that the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly.¹⁶⁵

¹⁶⁰H.R. REP. No. 95-948, 95th Cong. (1978), reprinted in 1978 U.S.C.C.A.N. 4744, 4751.

¹⁶¹*Muller*, 208 U.S. at 421.

¹⁶²417 U.S. 484 (1974) (ruling that the State of California’s exclusion of pregnancy benefits from its insurance program did not violate the Equal Protection Clause). In the following section, the proof construct of *Geduldig* will be addressed extensively.

¹⁶³*Geduldig*, 417 U.S. 484, 496 n.20 (basing this distinction on the contention that nonpregnant persons include members of both sexes, while pregnant persons are exclusively women). See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1042 n.205 (1991) (asserting that Congress reversed *Geduldig* by enacting the PDA).

¹⁶⁴29 U.S.C. § 2601(a)(5). See also S. REP. No. 103-3, 103d Cong. (1993), reprinted in 1993 U.S.C.C.A.N. 3, 10, stating that

Many new parents have no guarantee that their jobs will be protected either when they are unable to work due to pregnancy, childbirth, or related medical conditions, or after childbirth or placement for adoption . . . when they need to stay home to care for their infants A television anchor from Portland, OR told the subcommittee of being forced to choose between her job and her newborn child. Ms. Rebecca Webb initially had an agreement with her employer for a 3-month leave after childbirth. However, 7 months into her pregnancy, the leave previously granted was rescinded. The company claimed that they did not want to set a precedent for maternity leave because there were four other pregnant women working at the time. With the maternity leave no longer available, Ms. Webb was forced to quit her job.

¹⁶⁵29 U.S.C. § 2601(a)(1) (1993). See also S. REP. No. 103-3 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 10, stating that

The General Accounting Office reports that, over the past 40 years, the female civilian labor force has increased by about a million workers each year. By 1990, nearly 57 million women were working or looking for work—more than a 200 percent increase since 1950 Today, according to the Bureau of Labor Statistics . . . [t]he participation of women in the workforce was 19 percent in 1900; today 74 percent of women aged 25-54 are in the labor force The Census Bureau reports that single parents accounted for 27 percent of all family groups with children under 18 years old

Thus, the Labor and Human Resources Committee found in its Senate Report that “‘mothers’ employment is often critical in keeping their families above the poverty line.”¹⁶⁶ A continuity therefore exists between the *Muller* Court’s statement about women’s “struggle for subsistence” and Congress’ understanding that women’s reproductive role is economically disadvantageous.¹⁶⁷ The only change is that the disadvantage is much greater today in light of women’s increasingly critical economic role.

IX. THE TRANSLATION IS STRICTLY OF SOCIAL CONTEXT

The legal framework guiding the jurisprudence of the liberty to contract and the liberty to engage in any of the common occupations is not modified or translated despite the changed social context. Thus when women and men are “under like circumstances,”¹⁶⁸ the state may still not abridge women’s liberty to contract when the same restriction could not be constitutionally extended to men.¹⁶⁹ When women and men are not under like circumstances, legislation exclusive to women may still be sustained in order “to secure a real equality of right.”¹⁷⁰ Thus, while the legal frameworks of *Muller* and *Adkins* remain intact, the PDA and the FMLA expand the realm of the economic analysis of women’s reproductive role.

X. ABORTION RESTRICTIONS VIOLATE THE FOURTEENTH AMENDMENT

Under either the *Adkins* framework or the *Muller* framework, and as a consequence of the extended social understanding, abortion restrictions are unlawful class legislation, violative of the liberty to contract. And for similar reasons, abortion restrictions violate the right to follow any of the common occupations.¹⁷¹

A. *The Muller Framework*

The *Muller* Court determined that when women are economically burdened by their reproductive role, women are not capable of fully asserting their liberty to

in 1988, more than twice the 1970 proportion. Divorce, separation, and out-of-wedlock births have left millions of women to struggle as single heads of households to support themselves and their children. These women often cannot keep their families above poverty line. In 1987, 20 percent of all children under age 6 lived with single mothers. The poverty rate among these young children was 61.4 percent, more than five times the poverty rate of 11.6 percent among children living in two-parent families.

¹⁶⁶See S. REP. No. 103-3 (1993), 1993 U.S.C.C.A.N. at 8.

¹⁶⁷In addition, the FMLA may be treated as analogous to the Oregon maximum hours law for women at issue in *Muller*. Both statutes are remedial and maximum hours laws, which serve to protect women’s reproductive capacity and economic well-being.

¹⁶⁸*Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

¹⁶⁹See *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

¹⁷⁰*Muller v. Oregon*, 208 U.S. 412, 422 (1908). To reiterate, this form of legislation, typified by its protective effect, allows women to be treated equally, despite not being under like circumstances.

¹⁷¹See, e.g., *Butchers’ Union v. Crescent City*, 111 U.S. 746, 762 (Bradley, J., concurring) (describing this right).

contract, and thus are not under like circumstances with men.¹⁷² The Court held that despite women's formal equality under the Fourteenth Amendment,¹⁷³ "[s]he will still be where some legislation to protect her seems necessary to secure a real equality of right" and hence protective legislation for women may be sustained, even when identical legislation for men would be unnecessary and unsustainable.¹⁷⁴

As a matter of social context, Congress recognized in enacting the FMLA that women's maternal role constitutes an economic burden, and that this burden is a result of the societal roles of men and women.¹⁷⁵ In addition, Congress recognized in its enactment of the PDA that the concept of a woman incorporates the concept of pregnancy, because women's reproductive capacity is the primary difference between men and women.¹⁷⁶ Accordingly, the notion of an abortion may not be conceptually separated or removed from the notion of a pregnancy.¹⁷⁷ In addition, as abortion affects only women, just as pregnancy affects only women, abortion cannot be removed from the notion of a woman that appears in the PDA. Therefore, the constitutional notion of a woman, as appearing in *Muller* and the PDA, incorporates the notion of abortion.

Abortion restrictions have adverse economic consequences on women. Reva Siegel argues that "state action compelling motherhood injures women in predictable ways."¹⁷⁸ She asserts that

Both the work of childbearing and the work of childrearing compromise women's opportunities in education and employment; neither the work of childbearing nor the work of childrearing produces any material compensation for women; most often the work of childbearing and the work of childrearing entangle women in relations of emotional and economic dependency—to men, extended family, or the state.¹⁷⁹

¹⁷²*Muller*, 208 U.S. at 422.

¹⁷³*Id.* at 418.

¹⁷⁴*Id.* at 422.

¹⁷⁵See 29 U.S.C. § 2601(a)(5) (1993) (stating that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.") See also *Muller*, 208 U.S. at 421 (recognizing that "women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her.")

¹⁷⁶42 U.S.C. § 2000e(k) (treating sex discrimination as inclusive of pregnancy discrimination); H.R. REP. 95-948 ("it is the capacity to become pregnant which primarily differentiates the female from the male."). See also *Muller*, 208 U.S. at 420-22 (holding that women and men are not under like circumstances, because of the performance of maternal functions).

¹⁷⁷See, e.g., WEBSTER'S COLLEGE DICTIONARY 4 (1998) defining "abortion" as: "(1) the removal of an embryo or fetus in order to end a pregnancy, (2) any of various procedures for terminating a pregnancy."

¹⁷⁸Siegel, *supra* note 6, at 377.

¹⁷⁹*Id.* at 377-78.

Catharine MacKinnon observes, identically to the social context established in the FMLA, that “[a]fter childbirth, women tend to be the ones who are primarily responsible for the intimate care of offspring—their own and those of others.”¹⁸⁰ She additionally argues that when “there is not enough money for another child or for an abortion, it is a woman who is forced to have a child she cannot responsibly care for. When a single parent is impoverished as a result of childbearing, usually that parent is female. When someone must care for the children, it is almost always a woman who does it, without her work being viewed in terms of money.”¹⁸¹

Congress essentially rehearsed the observations of MacKinnon and Siegel in its enactment of the FMLA,¹⁸² and the conclusion of MacKinnon and Siegel is no different than the Labor and Human Resources Committee’s statement that “‘mothers’ employment is often critical in keeping their families above the poverty line.”¹⁸³ Moreover, Congress, as a matter of social context, implicitly recognized the urgency of MacKinnon’s observations by finding that “the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly.”¹⁸⁴

Abortion restrictions have adverse economic consequences that exacerbate the preexisting economic disparity between women and men. In addition, Congress, consistent with *Muller*, in enacting the FMLA and PDA, has treated women’s reproductive role from an economic perspective as a matter of social context.¹⁸⁵ Thus, abortion restrictions may be examined from an economic perspective and treated as labor legislation. However, *Muller* requires labor legislation for women to be remedial in order to “secure a real equality of right.”¹⁸⁶ As abortion restrictions are economically punitive, and not remedial, they abridge the liberty to contract and are unlawful class legislation in violation of the Privileges or Immunities Clause.¹⁸⁷

B. *The Adkins-Yick Wo Framework*

The Supreme Court, consistent with a textualist interpretation of Section One of the Fourteenth Amendment, held that women’s liberty to contract is formally equal

¹⁸⁰MacKinnon, *supra* note 6, at 1312.

¹⁸¹MacKinnon, *supra* note 6, at 1313.

¹⁸²*See* 29 U.S.C. § 2601(a)(1)-(2), (5) (1993).

¹⁸³S. REP. 103-3, 1993 U.S.C.C.A.N. at 8.

¹⁸⁴29 U.S.C. § 2601(a)(1). *See also* S. REP. 103-3, 1993 U.S.C.C.A.N. at 8 (finding as of 1993, the date of Congress’ enactment of the FMLA, that 74 percent of women between the ages of 25 and 54 were in the labor force, as compared with 19 percent in 1900, and that by 1995, two-thirds of women with pre-school children and three-quarters of the women with school-age children will be in the labor force.).

¹⁸⁵The FMLA and PDA were routed through the Labor Committees of the House and Senate.

¹⁸⁶*Muller v. Oregon*, 208 U.S. 412, 422 (1908).

¹⁸⁷*Cf. Truax v. Raich*, 239 U.S. 33, 40 (1915) (holding that “[t]he purpose of an act must be found in its natural operation and effect”).

to men's liberty to contract, and women's "rights in these respects can no more be infringed than the equal rights of their brothers."¹⁸⁸

In addition, *Yick Wo* proscribes "the play and action of purely personal and arbitrary power."¹⁸⁹ Hence, *Yick Wo* permits a broader interpretation of *Adkins* to encompass the proposition that women may not be subjected to restrictions upon their liberty to contract, which are justified on the basis of a physiological distinction, although in actuality labor legislation, and cannot physiologically be imposed on men under similar circumstances, when physiology is not a valid basis for distinction.¹⁹⁰ Such restrictions are arbitrarily imposed as was the disparate administration of the ordinance in *Yick Wo*.¹⁹¹ If women and men are assumed to be under like circumstances,¹⁹² and abortion restrictions are considered labor legislation, as consistent with an originalist conception of Section Five of the Fourteenth Amendment, the economically arbitrary nature of abortion restrictions and the manner in which they economically injure women permit a conclusion that abortion restrictions are unlawful class legislation in violation of the Equal Protection Clause, as interpreted by *Adkins* and *Yick Wo*.

C. Abortion Restrictions Violate the Right to Follow Any of the Common Occupations

Yick Wo devised a framework for determining whether a certain state action violates the right to follow any of the common occupations: if the state has acted arbitrarily in denying some persons the right "to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood," but not other persons under like circumstances, the state action violates the Fourteenth Amendment.¹⁹³ Identical to the argument that abortion restrictions violate *Adkins* if women and men are under like circumstances, abortion restrictions, which are economic legislation and punitive to women only, are an arbitrary exercise of

¹⁸⁸*Muller*, 208 U.S. at 418; *Adkins v. Children's Hospital*, 261 U.S. 525, 554 (1923) (holding that women "are legally as capable of contracting for themselves as men."). *See also id.* at 553 (accordingly rejecting the contention that women "may be subjected to restrictions upon their liberty to contract which could not lawfully be imposed in the case of men under similar circumstances").

¹⁸⁹*Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

¹⁹⁰*See also Truax*, 239 U.S. at 40 (stating that "[t]he purpose of an act must be found in its natural operation and effect").

¹⁹¹*See also Barbier*, 113 U.S. at 31 (holding that the Fourteenth Amendment "undoubtedly intended . . . that no greater burdens should be laid upon one than are laid upon others in the same calling or condition").

¹⁹²This assumption may be justified as a matter of social context as established by the FMLA, but originating in *Adkins* and the ratification of the Nineteenth Amendment. This social context is the congressional recognition of the revolutionary rise of the number of women in the labor force, and their economic requirements as compounded by the economic burdens of the maternal role, often and increasingly in single-parent households. Hence, women may be seen as having the same economic needs as men, for example, as the primary providers for their families such that from an economic perspective, women and men are under like circumstances.

¹⁹³*See Yick Wo*, 118 U.S. at 373-74.

legislative power. They moreover inhibit women's ability to participate in the labor force, such participation being increasingly critical to their livelihood. Abortion restrictions, therefore, violate the right to follow any of the common occupations.

1. The Fourteenth Amendment and the Disparate Impact Proof Construct

The disparate impact proof construct presented in the preceding section, a proof construct that is ultimately rooted in the Maltzian notion of "limited absolute equality,"¹⁹⁴ and reflected in Lochnerian jurisprudence, obviates the requirement of a demonstration of purposeful discrimination, the trademark of the modern equal protection doctrine and embodied in *Geduldig* and *Personnel Administrator v. Feeney*.¹⁹⁵ The Lochnerian Fourteenth Amendment proscribed state action redistributing wealth, i.e., class legislation.¹⁹⁶ Therefore, the Court, in determining whether a given state action constituted economic discrimination against some and in favor of others, used the obvious and sensible proof construct of an economic disparate impact. In light of the Lochnerian Supreme Court's focus on economics and anti-redistributivism, it never considered the requirement of purposeful discrimination that is currently required by the Equal Protection Clause. Purposeful discrimination might govern claims of caste legislation, a second theory of impermissible classification also rooted in the original understanding of the Fourteenth Amendment.¹⁹⁷ But for claims of redistributive class legislation, the economic impact standard would seem to apply whether brought, as in this thought experiment, under the Privileges or Immunities Clause or under the modern Equal Protection Clause.

2. Originalism and the Continued Constitutionality of the New Deal

The Supreme Court's decisions in *Home Building & Loan Association v. Blaisdell*¹⁹⁸ and *West Coast Hotel Company v. Parrish*¹⁹⁹ signified the end of the *Lochner* regime and the demise of class legislation theory. The "familiar story," as recounted by Professor Rosen, is that "the economic reality of the Depression had dislodged the nineteenth-century assumptions about the equal bargaining power of labor and capital in the common occupations of life."²⁰⁰

¹⁹⁴See Maltz, *supra* note 19, at 224.

¹⁹⁵442 U.S. 256 (1979).

¹⁹⁶See, e.g., *Barbier*, 113 U.S. at 32.

¹⁹⁷See Rosen, *supra* note 10, at 1266. Charles Sumner defined "caste" as "the principle of separation on the ground of hereditary inferiority." See Cong. Globe, 42d Cong., 2d Sess. 383 (1872) (statement of Rep. Sumner).

¹⁹⁸290 U.S. 398 (1934).

¹⁹⁹300 U.S. 379 (1937) (sustaining a Washington minimum wages statute for women and distinguishing *Adkins*).

²⁰⁰Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 HARV. J.L. & PUB. POL'Y 181, 189 (1997) (arguing that in *Blaisdell*, "the progressives . . . were able to present a barrage of economic facts to argue that a Minnesota debtor relief statute was not a form of class legislation benefiting debtors and burdening creditors, but was instead, as the Court held, a 'reasonable means to safeguard the economic structure upon which the good of all depends.'" See also Lawrence Lessig, *Understanding Changed Readings: Fidelity*

XI. ACCOUNTING FOR THE DEMISE OF LOCHNERISM AND THE NEW DEAL

The Fourteenth Amendment, in its original context, was designed to secure “limited absolute equality” for civil rights,²⁰¹ i.e., that “all men, whatever their condition or attributes, were entitled to a certain minimum level of rights.”²⁰² This textual context is embodied by *Lochner* and its vision of radically limited government power animated by classical economics.²⁰³ A translation, especially of economic rights, must account for the collapse of classical economic theory in light of marginalist and progressive critiques after the turn of the century,²⁰⁴ and subsequent rise of progressive economics.²⁰⁵

The argument that abortion restrictions are unlawful class legislation does not require a selection of an underlying premise of classical economics or of progressive economics, the precise constitutional violation is of the Maltzian notion of “limited absolute equality.” Specifically, an invalidation of abortion restrictions is simply an abolishment of a state’s conferral of an arbitrary economic disadvantage on women and is thus required by either economic approach. An examination of abortion restrictions in light of the *West Coast Hotel* Court’s overturning of *Adkins* will clarify this claim.

The *West Coast Hotel* Court rehearsed its earlier recognition in *Muller* that “the performance of maternal functions place her at a disadvantage in the struggle for subsistence.”²⁰⁶ The Court also reaffirmed the *Muller* Court’s determination that men and women are not under like circumstances and authorization of constitutional protective legislation for women.²⁰⁷

and *Theory*, 47 STAN. L. REV. 395, 457-58 (1995) (discussing the demise of the wage fund theory).

²⁰¹Rosen, *supra* note 10, at 1242 (citing Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221, 224 (1987)). See also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (agreeing with Earl Maltz).

²⁰²Maltz, *supra* note 19, at 224. As seen *supra*, a textual basis exists for extending “limited absolute equality” to women.

²⁰³Rosen, *supra* note 10, at 1248.

²⁰⁴Rosen, *supra* note 10, at 1248. See *Lochner v. New York*, 198 U.S. at 45, 75 (1905) (Holmes, J., dissenting) (arguing that *Lochner* was “decided upon an economic theory which a large part of the country does not entertain).

²⁰⁵See Rosen, *supra* note 10, at 1248-49 (but defining the problem of *Lochnerism* more narrowly, as a judicial failure to defer in the face of contestability).

²⁰⁶*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 394 (1937) (citing *Muller*, 208 U.S. at 421).

²⁰⁷See *West Coast Hotel*, 300 U.S. at 395 (and holding that there is that in her disposition and habits of life which will operate against a full assertion of those [contractual] rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right.’ Hence she was ‘properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.’).

The *West Coast Hotel* Court also considered the Depression and its effects on the health and well-being of exploited laborers.²⁰⁸ This consideration, dethroning *Lochner* in its approval of economically remedial action, casts additional doubt on the constitutionality of abortion restrictions, because this subscription to progressive economic theory *a fortiori* forbids state action, like abortion restrictions, that exacerbates the exploitation of women, who are not only exploited workers subsisting in the Depression, but who also face the additional economic burden of the reproductive role and still require some protective legislation to secure a real equality of right.²⁰⁹

Thus, a right to be free from abortion restrictions is not grounded in any particular economics, but rather in “limited absolute equality.”²¹⁰ The variation is that Congress may interpret the notion of “limited absolute equality” pursuant to its interpretive powers under Section Five. Abortion restrictions may be seen as invalid class legislation insofar as they arbitrarily relegate women to a lower economic status. Therefore, if the argument is reliant upon the Maltzian notion, then it is necessarily consistent with the progressive economics of the New Deal.

XII. MULLER, HOLDEN AND THE “NEW” DEAL

A. *West Coast Hotel*

West Coast Hotel does not nullify the liberty to contract; nor does the suggested “resurrection” of the liberty to contract overturn the post-New Deal administrative state. Rather, *West Coast Hotel* assailed the liberty to contract’s importance. It expanded the realm of *Muller* so as to increase the importance and usage of the police powers in response to the economic reality of the Depression. *West Coast Hotel* accordingly consigned the liberty to contract to a dominion where its jurisdiction is limited to an enforcement of the requirements of “limited absolute equality,” as interpreted by Congress pursuant to Section Five.²¹¹ In addition, *West Coast Hotel* recognized that the exploitation and plight of laborers during the Depression was akin to the exploitation and plight of the *Holden* miners such that the *Holden* exception swallowed the *Lochner* rule.

The Court in *West Coast Hotel* revisited *Adkins* and the constitutionality of a minimum wages statute for women.²¹² The Court rehearsed the premise in *Muller* that women were economically burdened by their reproductive role and determined that women and men were not under like circumstances such that “some legislation

²⁰⁸*See id.* at 399 (holding that there is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.)

²⁰⁹*Id.* at 395; *Muller*, 208 U.S. at 422.

²¹⁰Insofar as classical economics is wedded to the Maltzian notion, the right to be free from abortion restriction premises classical economics.

²¹¹One of these requirements, if not the only one is a prohibition of foundational, economically punitive legislation such as abortion restrictions.

²¹²*West Coast Hotel*, 300 U.S. at 386.

to protect her seems necessary to secure a real equality of right.”²¹³ The *West Coast Hotel* Court, abandoning *Adkins*, characterized the wages law as like “hundreds of so-called police laws that have been upheld”²¹⁴ and ruled that no distinction between a maximum hours law and a minimum wages law exists.²¹⁵ This permitted invocation of the police powers did not constitute a negation of the liberty to contract; it merely granted states more power to act in order to secure a real equality of right for women.

The *West Coast Hotel* Court’s sustainment of the wages law was predicated on the Great Depression and the exploited workers left defenseless against the denial of a living wage, and thus imperiled their health and well-being.²¹⁶ This predicate, justifying state intervention, is precisely analogous to *Holden*, where the Court held that the state may act where “public health demands that one party to a contract be protected against himself.”²¹⁷ In both *West Coast Hotel* and *Holden*, the Court emphasized that the plight of exploited workers, whose health was compromised, implicated the interest of the state.²¹⁸ *West Coast Hotel* then, adjudicated in the midst of the Great Depression, only confirms the increasing significance and prescience of Felix Frankfurter’s view in 1917 that what appeared to the *Holden* Court as

a specific, and apparently, exceptional instance—the poisoning of the human system through long hours of labor in mines, and the implications of this evil to the general welfare—is now disclosed to be of far wider and deeper application. It is now demonstrable that the considerations that were patent to miners in 1898 are to-day operative . . . throughout the industrial system.²¹⁹

West Coast Hotel and the New Deal then do not represent a nullification of the liberty to contract, but only its increasing irrelevancy in the Depression, an irrelevancy borne by the Depression where economic despondency and imperiled health touched the multitudes, not simply miners in Utah. As conditions for workers increasingly deteriorated, the opportunity for state intervention increased, and the

²¹³*Id.* at 394-95 (citing *Muller*, 208 U.S. at 421-22).

²¹⁴*Id.* at 397 (citing *Adkins*, 261 U.S. at 570 (Holmes, J., dissenting)).

²¹⁵See *West Coast Hotel*, 300 U.S. at 398 (rhetorically asking that “if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end”).

²¹⁶*Id.* at 399.

²¹⁷*Holden v. Hardy*, 169 U.S. 366, 397 (1898). See *West Coast Hotel*, 300 U.S. at 394 (rehearsing *Holden*).

²¹⁸See *West Coast Hotel*, 300 U.S. at 399-400; *Holden*, 169 U.S. at 396-97.

²¹⁹Felix Frankfurter, et al. for defendant in error, reproduced in *Bunting v. Oregon*, 243 U.S. 426, 431-33 (1917). See also Lawrence Lessig, *Understanding Changed Readings: Fidelity And Theory*, 47 STAN. L. REV. 395, 460 (1995) (arguing that “the Court points to the facts learned during the recent Depression, to facts the court can take ‘judicial notice’ of, to facts that reveal the public interest affected by this legislation, which under traditional police power notions preserves the state power to regulate”).

reign of the contract right's importance ended. But as its existence in 1898 was unchallenged, its existence in 1937 and beyond must too remain unchallenged.

B. The FMLA: Extending Muller to Men

Congress, in enacting the FMLA and consistent with its interpretive powers pursuant to Section Five, not only affirmed *Muller*, but applied its social logic to men. Congress found that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender."²²⁰ In doing so, Congress did not proscribe such standards and recognized the continued constitutional validity of *Muller*.

With *Muller* as a foundation, Congress, in its enactment of the FMLA, understood that men are also economically burdened by women's reproductive role and accordingly placed men under the umbrella of *Muller*.²²¹ Specifically, Congress found that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting."²²² Congress accordingly entitled men qua employees "to take reasonable leave . . . for the birth or adoption of a child, and for the care of a child . . . who has a serious health condition."²²³

CONCLUSION

The Fourteenth Amendment was originally intended to forbid the states from playing a role in the economy, i.e., from enacting economic effects unless the intervention was consistent with the police powers. This principle was the hallmark of *Lochner*. Separately, Congress has developed a greater understanding of women's economic role and has recognized that a woman's maternal role constitutes a substantial economic burden. Abortion restrictions too constitute an economic burden, and Congress is permitted to alleviate this burden through Section Five legislation; similarly, the Court could invalidate abortion restrictions on this ground.

After viability, fetal rights do appear to compete with women's constitutional economic rights. As there is no obvious or coherent constitutional notion of when life begins, the claim in this article must be limited to *Casey's* confinement of a women's right to choose to the pre-viability stage of pregnancy.

EPILOGUE: *SAENZ V. ROE*²²⁴

The Supreme Court recently invalidated a California welfare statute that limited maximum welfare benefits available to newly arrived residents.²²⁵ The Court held

²²⁰29 U.S.C. § 2601(a)(6) (1994).

²²¹See *Muller*, 208 U.S. at 422 (holding that "[s]he will still be where some legislation to protect her seems necessary to secure a real equality of right.")

²²²29 U.S.C. § 2601(a)(3) (1994).

²²³29 U.S.C. § 2601(b)(2) (1998).

²²⁴119 S. Ct. 1518 (1999).

²²⁵See *Saenz v. Roe*, 119 S.Ct. 1518 (1999). The California statutory scheme linked the amount payable to a family residing in California for less than 12 months to the amount payable by the State of the family's prior residence. *Id.* at 1521.

that the statute violated the Privileges or Immunities Clause of the Fourteenth Amendment, a holding that, as Justice Rehnquist noted in dissent, “breathes new life into the previously dormant Privileges or Immunities Clause . . . a Clause relied upon by this court in only one other decision”²²⁶ Thus, *Saenz* represents at least the potential for a major turning point in Fourteenth Amendment jurisprudence.

The attractiveness of the Privileges or Immunities Clause is that it restores the historical foundation of the Fourteenth Amendment, and demands an analytical rigor that the Equal Protection Clause and Due Process Clause do not, such that a greater sense of definiteness can be obtained.²²⁷ However, when the Court adjudicates on the basis of the Privileges or Immunities Clause and does not do so with the appropriate rigor, the Court cannot achieve its goal of historical consistency and clarity and thus vitiates the entire allure and objective of originalism. *Saenz v. Roe* is, unfortunately, an example of adjudication without rigor.

The Court in *Saenz* participates in an exercise very similar to the thought experiment undertaken in this article. The Court attempts to link a state welfare benefit to the right to travel, a privilege or immunity of national citizenship.²²⁸ Similarly, we attempt to link the modern abortion right to two privileges or immunities of national citizenship, the liberty to contract and the liberty to engage in the common occupations.²²⁹

However, while we use Section Five legislation to treat abortion restrictions as economic legislation, the *Saenz* majority merely states that a United States citizen may become a citizen of any state, with the same rights of the citizens of that state, and that “the right to travel embraces the citizen’s right to be treated *equally* in her new state of residence”²³⁰ The Court’s notion of “right to be treated equally” is ill-defined, and as it subsumes a state welfare benefit into the category of protected privileges or immunities under the auspices of the right to travel, the Court’s notion of “equally” is painted at an abstraction from the notion of limited absolute equality animating the Fourteenth Amendment.²³¹ Similarly, Justice Thomas, also dissenting, correctly states that “at the time the Fourteenth Amendment was adopted, people understood that ‘privileges or immunities of citizens’ were fundamental rights, rather than every public benefit established by positive law.”²³² But to protect a welfare benefit as a privilege or immunity, a link must be supplied through some constitutionally proper source or rigorous translation. In *Saenz*, the Court failed to provide such a link or translation.

²²⁶*Id.* at 1530 (Rehnquist, J. dissenting) (citing *Colgate v. Harvey*, 296 U.S. 404 (1935) and *Madden v. Kentucky*, 309 U.S. 83 (1940) (overruling *Colgate*)).

²²⁷*See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).

²²⁸*See Saenz*, 119 S. Ct. at 1526 (asserting that the California law implicates the “third aspect of the right to travel - the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state”).

²²⁹One difference worth noting is that the right to travel, at least some form of it, is mentioned in both the majority and dissenting opinions of the *Slaughter-House Cases*, while this article assumes that the majority opinion is wrong.

²³⁰*See Saenz*, 119 S. Ct. at 1526, 1527.

²³¹*See Rosen, supra* note 10, at 1242.

²³²*See Saenz*, 119 S. Ct. at 1538 (Thomas, J., dissenting).

Thus for the California welfare law to violate the Privileges or Immunities Clause, it must be linked in the constitutional sense to the right to travel.²³³ Specifically, the right to travel must function as an umbrella right, where a constitutional right to welfare can exist. A link can arise through the enactment of Section Five legislation, facially interpretive of the privileges or immunities or of constitutionally significant social context. The other side of this coin is that the Supreme Court too has a role in interpreting social context, although a role accompanied by murky boundaries. Justice Thomas is correct to view the *Saenz* decision with scepticism, because of the Court's unpersuasive linking of a state welfare benefit with the right to travel. In short, the majority's concern for "the right to be treated equally" sounds like the actual and independent ground for the welfare law's constitutional invalidity, though not a privilege or immunity, nor animating the Privileges or Immunities Clause.²³⁴

The Court must, as Justice Thomas notes, ascertain the historical underpinnings of the Privileges or Immunities Clause and place in constitutional jurisprudence.²³⁵ The Court did not do so and failed to understand or even to identify its precise role as interpreter of the privileges or immunities. Thus, the *Saenz* decision must be regarded as rash and taken without the proper cogitation needed on such a delicate issue.²³⁶ The only connection between the welfare law and the right to travel so as to constitutionalize the welfare law is the Court's word, although if the Court has not escaped the bounds of its judicial role, the Court's word is probably sufficient.

²³³See also Akhil Reed Amar, *Lost Clause The New Republic*, June 14, 1999 at 15 (arguing that the "bigger question" for the *Saenz* Court was "whether maintaining somebody's welfare payments at a preexisting level for a year is really a 'penalty' on interstate movement.").

²³⁴See *Saenz*, 119 S. Ct. at 1527. The "right to be treated equally" resembles modern Equal Protection Doctrine in its governance of all state action, not the fundamental right-driven Privileges or Immunities Clause.

²³⁵*Id.* at 1538 (Thomas, J. dissenting).

²³⁶See also Amar, *supra* note 231, at 16 (wondering, with regard to the issue of general judicial role, whether "will the Court in future cases insist on claiming all this territory for itself, or will it prove more willing to share authority with Congress. . . [i]n these respects, *Saenz* raises as many questions as it answers").