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ABSTRACT

This article explores the basis and contours of municipal police power through a critical review of recent restrictions proposed in Columbia, Missouri and elsewhere on drink specials. These restrictions are an attempt at benefit-shifting, which would impose an economic burden on restaurant and bar proprietors in exchange for an expected public benefit in reduced late-night nuisances and safety hazards. The article argues that municipal authority pursuant to the police power should be subject to a more exacting level of judicial scrutiny to ensure reasonable and well-considered regulation. Finally, this article suggests a more effective and less burdensome way to address the community's concerns regarding liquor sales without punishing a small group of individuals.

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I. INTRODUCTION

Early in 2019 the Columbia City Council received a report and recommendations from staff members and interested parties which detailed public safety concerns in the Missouri city regarding widespread intoxication, especially during late night hours.[1] Under consideration by the council was an ordinance similar to those adopted by other college towns including Iowa City, Baton Rouge, and Athens.[2] This ordinance sought to address underage and excessive alcohol consumption by placing restrictions on bar and restaurant specials, including a ban of "bottomless cups."[3] In support of the proposed ordinance, the City Council provided a list of state-imposed happy hour restrictions in force across the country.[4]

Past attempts to curb sales of cheap drinks have failed.[5] Specifically, Missouri statutes and regulations prohibiting alcohol producers, distributors, and retailers from advertising specials on alcoholic beverages outside their establishments have been struck down on First Amendment grounds.[6] Although states have unique power to regulate alcohol under the Twenty-First Amendment, this authority is limited by the requirement that such regulation does not otherwise "violate rights secured by the Constitution of the United States."[7] States are unable to use Twenty-First Amendment authority to infringe upon other Constitutional protections.[8]

This article explores municipal authority to regulate economic activity such drink specials. Section I addresses differing forms of state grants of authority to cities and townships. Section II explores the police power as it is understood among courts, a broad and mercurial power through which this kind of state and municipality regulation is enacted. A critical eye is cast upon the requirement that the means adopted by a state or municipality in effecting the police power be merely reasonable and not arbitrary in pursuit of a valid government objective. The inquiry specifically reviews application of the police power to drink specials and whether an ordinance adopted to this end can and should pass muster as valid. This article concludes by analyzing other available means to address safety concerns regarding alcohol consumption that constitute a lesser burden on alcohol retailers and distributors in the affected communities and promises a more concrete and beneficial solution.

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1. Runjie Wang, *The push to restrict drink specials is gaining momentum in Columbia*, COLUMBIA MISSOURIAN (Mar. 11, 2019), https://www.columbiamissourian.com/news/local/the-push-to-restrict-drink-specials-is-gaining-momentum-in/article_ff0c8828-437e-11e9-a01d-2b4ce5954d21.html.

2. *Id.*

3. Philip Joens, *City looks at ban on drink specials*, COLUMBIA DAILY TRIBUNE (Jul. 28, 2019) https://www.columbiatribune.com/news/20190728/city-looks-at-ban-on-drink-specials.

4. *State Happy Hour Restrictions – Exhibit A*, COLUMBIA CITY COUNCIL https://www.como.gov/health/wp-content/uploads/sites/13/2019/06/State-Happy-Hour-Restrictions-Exhibit-A-1-1.pdf (last visited November 30, 2020).

5. *Federal Judge Rules Missouri Alcohol Advertising Restrictions Unconstitutional,* MO. BROADCASTERS ASSOC. (Nov. 25, 2019, 11:57 AM), https://www.mbaweb.org/federal-judge-rules-missouri-alcohol-advertising-restrictions-unconstitutional/.

6. *See* Missouri Broadcasters Ass'n v. Schmitt, 946 F.3d 453, 460-62 (8th Cir. 2020).

7. Mugler v. Kansas, 123 U.S. 623, 659 (1887).

8. 44 Liquormart v. Rhode Island, 517 U.S. 484, 516 (1996).

II. MUNICIPAL AUTHORITY

Whereas previous attempts at advertising restrictions have been enacted at a statewide level,[9] the proposed ordinance limiting drink specials would be imposed by the Columbia City Council.[10] Missouri charter cities, such as Columbia,[11] are able to regulate local activity if the ordinance does not violate applicable constitutional or statutory law.[12] Unlike the federal government, which enjoys supremacy within their constitutional realms of authority,[13] states retain the historic police power over objects within state purview.[14] Namely, this police power allows states to regulate for the "protection of the public health, safety, morals or welfare."[15] State legislatures are able to confer that power to cities and townships.[16] As initially envisioned, federalism would operate in such a manner that federal jurisdiction would "exten[d] to certain enumerated objects only, and leav[e] to the several States a residuary and inviolable sovereignty over all other objects."[17] Of course, such a restrained power-sharing dynamic has not existed in practice.[18] Still, states retain autonomy in certain fields, including public education and enforcement of state criminal law.[19]

The power local governments may exercise is exclusively that which is delegated by states.[20] The scope of authority depends on the state and the characteristics of the municipality.[21] A municipality's power is determined according to whether the municipality's grant of authority is characterized under "home rule" or "Dillon's rule."[22] Dillon's rule holds that local governments have only the powers specifically enumerated by state statute or constitution, greatly restricting the power and discretion of these localities.[23] Most states,[24] including Missouri,[25] have bestowed "home rule" authority upon certain municipalities, which allows exercise of power even absent a specific grant from the state constitution or legislature.[26] In fact, Missouri

9. *See* Missouri Broadcasters Ass'n, 946 F.3d at 457.

10. *Council Memo*, COLUMBIA CITY COUNCIL (FEB. 4, 2019), https://www.como.gov/health/wp-content/uploads/sites/13/2019/06/Council-Memo-3-1-1.pdf.

11. Daniel Cailler, *Charter is 'power to the people*', COLUMBIA DAILY TRIBUNE (Mar. 14, 2010 12:01AM), https://www.columbiatribune.com/cce2fbad-1559-5c6b-a223-b02de3d05c5c.html.

12. State ex inf. Hannah ex rel. Christ v. City of St. Charles, 676 S.W.2d 508, 511-12 (Mo. 1984).

13. *See* Arizona v. United States, 567 U.S. 387, 399 (2012) ("[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.").

14. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

15. State ex rel. Kansas City v. Pub. Serv. Comm'n, 524 S.W.2d 855, 862 (Mo. 1975).

16. Miller v. City of Town & Country, 62 S.W.3d 431, 437 (Mo. Ct. App. 2001).

17. THE FEDERALIST No. 39 (James Madison).

18. Stephen R. McAllister, *IS THERE A JUDICIALLY ENFORCEABLE LIMIT TO CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE?*, 44 U. KAN. L. REV 217, 221-22 (1996).

19. Robert G. Natelson, *More News on Powers Reserved Exclusively to the States*, 20 FEDERALIST SOC' REV. 92, 98 (2019).

20. Frayda S. Bluestein, *Do North Carolina Governments Need Home Rule?*, 84 N.C. L. Rev. 1984, 1984-85 (2006).

21. *See Id.*

22. *Id.*

23. STEWART E. STERK, ET. AL, LAND USE REGULATION 23 (2d ed. 2016).

24. Bluestein, *supra* note 20, at 1989.

25. *The Missouri Roster*, MISSOURI SECRETARY OF STATE 158 (2019), https://www.sos.mo.gov/CMSImages/Publications/2019-2020_MO_Roster.pdf.

26. STERK, *supra* note 23.

became the first state to recognize "home rule" authority in its constitution in 1875.[27] In Missouri, this authority is provided only to charter cities, and allows them to exercise "all powers which the general assembly of the state of Missouri has authority to confer upon any city."[28] In other words, municipalities may exercise any power the state legislature *is capable* of delegating, even if they have not done so, absent an express disallowance. This framework is typical of home rule power across the nation, and shields home rule municipalities from legislative meddling with respect to "matters of local concern."[29]

Unlike the majority of cities and townships in Missouri, Columbia enjoys charter city status with home rule authority.[30] The question of whether Columbia has the ability to forbid certain drink specials is thus largely dependent upon whether the general assembly has the authority to do so.[31] The state legislature cannot delegate a power it does not have.

The Due Process Clause of the Fourteenth Amendment contains a substantive dimension demanding all legislation serve a "legitimate governmental purpose," but the Supreme Court takes a lenient approach to this end.[32] The Court in modern times has followed the principle that states may "legislate against what are found to be injurious practices in their internal commercial and business affairs," provided the legislation does not violate federal constitutional prohibition or statute.[33]

State courts have often been more demanding.[34] For example, the Supreme Court of Pennsylvania has offered less latitude to the police power,[35]holding:

a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have *a real and substantial relation to the objects sought to be attained.* Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.[36]

Under this framework, whether a provision is sufficiently related to the public good and reasonable in its means is left to the final judgment of the judiciary.[37]

III. THE POLICE POWER

Under the power-sharing arrangement in the federal system discussed above, states enjoy authority to exercise the general police power, empowering them to regulate for the furtherance of the public health, welfare, and morals.[38] Missouri courts have long defined the police power as "the power inherent in a government

27. Cailler, *supra* note 11.
28. MO. CONST. art. VI § 19(a).
29. Bluestein, *supra* note 20, at 1990.
30. *The Missouri Roster, supra* note 25, at 162.
31. MO. CONST. art. VI § 19(a).
32. DANIEL R. MANDELKER ET. AL, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 40 (6th ed. 2006).
33. Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co. 335 U.S. 525, 536 (1949); *see also* MANDELKER, *supra* note 32.
34. MANDELKER, *supra* note 32.
35. *Id.*
36. Gambone v. Com., 101 A.2d 634, 637 (Pa. 1954) (emphasis added).
37. *Id.*
38. California v. LaRue, 409 U.S. 109, 114 (1972).

to enact laws, within constitutional limits, to promote the order, safety, health, morals and general welfare of society."[39] General welfare is treated as "comprehensive."[40] Subject to the restrictions stated above, the Supreme Court has construed the Twenty-First Amendment to confer an enlarged police power with respect to the sale of intoxicating liquors and the "bacchanalian revelries"[41] the trade may entail.[42]

Despite the broad judicial deference enjoyed by the state and municipal police power, it is still subject to the condition that it be exercised reasonably.[43] Any exercise of police power "must necessarily involve a study of the reasonableness and appropriateness of the means employed to accomplish the public object."[44] However, courts take varying approaches to this reasonableness analysis. For example, a California appellate court has determined maintaining a "dignified and respectful environment" sufficiently implicates the general welfare to support regulatory action.[45] The court was careful to note that these facts did not indicate "personal antipathy" toward the regulated industry.[46]

To pass the reasonableness test, a court must be satisfied that the activity facing proposed regulation "presents a reasonable necessity for the imposition of restraint" in furtherance of permissible police power objectives and that the restrictions "bear a reasonable relation" to the objective.[47] Laws interfering with use and enjoyment of property must be supported by some sort of public necessity.[48] Still, even a minimal connection will suffice: to find an ordinance unconstitutional, it must be clearly arbitrary or unreasonable,[49] having no relation to public health, morals, safety, or general welfare.[50]

IV. APPLYING THE POLICE POWER

A. Due Process Concerns

A potential challenge to the drinking special regulation proposed to the Columbia City Council could arise under constitutional due process. The Supreme Court of Missouri has upheld restrictions on alcohol sales against such challenges, characterizing prohibitions on inducements including dancing, games, and "free lunches" incident to selling beer and liquor as "fairly referable to the police power."[51] Years prior to that decision, the Missouri high court had already held:

39. State ex rel. Carpenter v. City of St. Louis 2 S.W.2d 713, 722 (Mo. 1928).
40. *Id.*
41. California, 409 U.S. 109 at 118.
42. California v. LaRue, 409 U.S. 109, 114 (1972).
43. SP Star Enterprises, Inc. v. City of Los Angeles, 173 Cal. App. 4th 459, 473 (2009).
44. Samuel M. Soref, *The Doctrine of Reasonableness in the Police Power*, 15 MARQ. L. REV. 3, 6 (1930).
45. SP Star Enterprises, Inc., 173 Cal. App. 4th at 475-76 (denying issuance of a conditional use permit to serve alcohol).
46. *See Id*. at 473.
47. State ex rel., Carter v. Harper, 196 N.W. 451, 453 (Wis. 1923).
48. *Id.*
49. Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11, 16 (Mo. 1974).
50. Ex parte Williams, 139 S.W.2d 485, 488 (Mo. 1940).
51. Zinn v. City of Steelville, 173 S.W.2d 398, 400-402 (Mo. 1943).

[A] statute or a municipal ordinance, which is fairly referable to the police power of the state or municipality, and which discloses upon its face, or which may be shown aliunde, to have been enacted for the protection, and in furtherance, of the peace, comfort, safety, health, morality, and general welfare of the inhabitants of the state or municipality, does not contravene or infringe the several sections of the state and federal Constitutions invoked by the appellants herein, and cannot be held invalid as wrongfully depriving the appellants of any right or privilege guaranteed by the Constitution, state or federal; the reason and basis underlying such decisions being that the personal and property rights of the individual are subservient and subordinate to the general welfare of society, and of the community at large, and that a statute or ordinance which is fairly referable to the police power has for its object the "greatest good of the greatest number."[52]

Accordingly, to satisfy due process, the question upon which a challenged ordinance's viability turns is whether the ordinance is "fairly referable to the police power of the respondent municipality" and whether it bears a "substantial and rational relation to the health, safety, peace, comfort, and general welfare" of the community.[53] If this question is answered affirmatively, the ordinance will not be found to infringe upon due process "unless it well can be said that the ordinance 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.'"[54]

The bar to a successful due process challenge is raised by a presumption of reasonableness.[55] The challenger carries the burden of demonstrating unreasonableness, unless the ordinance is found facially unreasonable.[56] Mere deprivation of some use and enjoyment of a challenger's property is not enough.[57] Instead, local governments are empowered to subjugate personal autonomy in the interest of the general welfare:[58]

It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. [59]

B. Police Power and The Takings Clause

Another possible challenge to a regulation restricting an individual's ability to sell a product at a price of her choosing could arise under the Takings Clause. The Fifth Amendment, in relevant part, provides that "No person shall […] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[60] While local governments are given a wide berth when exercising the police power, this does not exempt them

52. Bellerive Inv. Co. v. Kansas City, 13 S.W.2d 628, 634 (Mo.1929) (collecting cases).
53. *Id.*
54. *Id.* (*quoting* Purity Extract Co. v. Lynch, 226 U.S. 192, 204 (1912)).
55. *Id.*
56. *Id.*
57. Bellerive Inv. Co. v. Kansas City, 13 S.W.2d 628, 634 (Mo. 1929).
58. *See* State ex rel., Carter v. Harper, 196 N.W. 451, 453 (Wis. 1923).
59. *Id.*
60. U.S. CONST. amend. V.

from paying just compensation when this constitutional requirement is triggered.[61] When "justness and fairness require," a landowner must be compensated for economic injuries caused by government actions, rather than forcing a small group of citizens to support the welfare of the community at large.[62] However, interference with private property is not always a taking.[63]

A taking is rather easily identified when the challenged government action consists of a "straightforward, physical appropriation of land for a public use . . . ."[64] The task can be more difficult when an alleged taking stems from a benefit-shifting regulation.[65] A categorical taking is generally a permanent physical invasion of private property, no matter how small, by the government.[66] A categorical taking is not confined to actual physical appropriation but also extends to total deprivation of a property's use, regardless of whether title has been taken.[67] Regulations may exact such a burden upon a landowner as to constitute a taking, under the maxim that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[68] In addition to categorical taking analysis, a regulatory taking may also be found under an ad hoc analysis utilizing *Penn Central* balancing, which looks to a number of factors to determine whether a compensable taking has occurred, including: the economic impact of the regulation, the character of the government action, and (most importantly) whether the action has interfered with a landowner's distinct investment-backed expectations.[69]

As applied to drink specials, whether a takings challenge may succeed against the proposed ban may depend upon the outcome of the police power reasonableness inquiry itself. Government action resulting in economic harm, without more, does not constitute a taking.[70] Rather, the action must interfere with "interests that [are] sufficiently bound up with the *reasonable* expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[71] If a regulation enacted to curb public nuisance and safety hazards is found to be a reasonable exercise of the police power, it is unlikely the regulation could be found to interfere with a burdened proprietor's distinct investment-backed expectations. Landowners and business owners, of course, have notice that their property rights and activities are subject to reasonable restraints pursuant to the police power.[72]

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61. Clay Cty. ex rel. Cty. Comm'n of Clay Cty. v. Harley & Susie Bogue, Inc., 988 S.W.2d 102, 106 (Mo. Ct. App. 1999) ("A regulatory taking occurs when a regulation enacted under the police power of the government goes too far.").
62. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
63. *See* Home Sav. of Am., F.A. v. State, 817 S.W.2d 518, 520 (Mo. Ct. App. 1991).
64. F. Patrick Hubbard*, Palazzolo, Lucas, and Penn Central: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 466 (2001).
65. *See Id.*
66. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).
67. *See* Mugler v. Kansas 123 U.S. 623, 667-69 (1887).
68. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
69. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
70. *Id.* at 124-25.
71. *Id.* (emphasis added).
72. Marshall v. Kansas City, 355 S.W.2d 877, 881 (Mo. 1962).

C. Applicability of the Police Power to Drink Specials

Muted constitutional restraints have allowed municipalities to successfully invoke police power authority in a number of situations.[73] For example, state courts have found community aesthetics to be a valid police power objective.[74] The Supreme Court has held:

[T]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[75]

It is not in dispute that liquor sales are within the scope of the police power.[76] When exercised properly, a state (and by delegation, municipalities) may enact measures to protect the public, judging for itself "the necessity or expediency of the means adopted."[77] One U.S. District Court has held, "[a]s a matter of common sense, specials such as 'all you can drink' and 'beat the clock,' and the selling of cheap drinks all promote excessive drinking." [78] Such a characterization of drink specials brings them squarely within the scope of the police power if it can be reasonably assumed that excessive drinking leads to problems implicating public health, safety, and the general welfare.

Therefore, the critical question regarding the validity of Columbia's proposed ordinance is whether the means adopted to carry out the permissible objective of curtailing excessive drinking are appropriately tailored to that end.[79] The appropriateness of the means of enforcement is critical to a valid exercise of the police power,[80] as those means must not be unreasonable or arbitrary.[81]

V. POLICING THE POLICE POWER

Based on the forgoing, it is likely the Columbia City Council will be granted wide latitude in regulating excessive drinking. To ensure that business owners who stand to bear the weight of these proposed regulations are properly protected, it may be necessary to police the police power itself rather than advance an argument that the police power does not apply or does not provide the requisite authority. This can be difficult, in no small part because this power eludes a satisfactory definition.[82] As a Missouri appellate court has described this problem:

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73. *See generally* Modjeska Sign Studios, Inc. v. Berle, 373 N.E.2d 255, 258-59 (N.Y. 1977).

74. *Id.* at 260-261 ("aesthetics, in itself, constitutes a valid basis for the exercise of the police power just as safety does."); *see also* City of Independence v. Richards 666 S.W.2d 1, 6 (Mo. Ct. App. 1983).

75. Berman v. Parker, 348 U.S. 26, 33 (1954).

76. Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 201 (1912) (collecting cases) ("That the state, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is undoubted.").

77. *Id.* at 203-04.

78. Habash v. City of Salisbury, 618 F. Supp. 2d 434, 443–44 (D. Md. 2009)

79. Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954) ("an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.").

80. Soref, *supra* note 44.

81. Marshall v. Kansas City, 355 S.W.2d 877, 884 (Mo. 1962).

82. *See* Damon v. City of Kansas City, 419 S.W.3d 162, 184 (Mo. Ct. App. 2013) ("Such power is incapable of exact definition, but the existence of it is essential to every well ordered government.").

This [difficulty in defining the police power] is so for the reason that the police power of a state is that power which is necessary for its preservation and without which it cannot serve the purpose for which it was formed. As has been well said, the police power of a state may be shortly defined to be the power of the legislature to make such regulations relating to personal and property rights as appertain to the public health, the public safety, and the public morals. These principles are so well known that it is unnecessary to cite the authorities.[83]

This expansive definition offers little clarity and much opportunity for legislation by fiat, because "[w]hen it comes to the power of states over their people, the issue has always been shrouded in doubt."[84] The resultant views on state power differ between a conceptualization of fearsome state power fettered only by express prohibition by the U.S. Constitution and one that demands limits to prevent state despotism.[85]

In terms of prohibition by the Federal Constitution, statutes enacted pursuant to the police power have been struck down for infringing upon the Constitutional principle of "liberty," protected by the Fourteenth Amendment, even without a finding that the right in question was fundamental.[86] In this line of cases, the Court inquired into whether individuals were "free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause."[87]

The Court in *Lawrence* struck down laws forbidding sodomy between same-sex couples pursuant to a vague substantive due process protection of liberty and privacy including, "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[88] Although this principle is usually invoked in cases concerning more serious matters, such as the facts in *Lawrence*, the principle could be expanded to all kinds of private, adult activity. Unlike the Court-recognized rights to privacy and freedom from "unwarranted governmental intrusion" in the familial sphere,[89] the right of an individual to buy or sell liquor at a bargain price does not enjoy such protection. If the "right to privacy" enjoys constitutional protection on account of the notion that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,"[90] surely other decisions one makes in ordering their affairs could enjoy this protection.

Part of this distinction is owed to the comparatively dismissive treatment of economic liberties by the Court.[91] This modern trend against enforcing commercial rights is largely owed to criticism of "Lochnerism," era philosophy in which the Court more readily substituted its judgment for that of Congress.[92] In *Lochner*, the court struck down an ordinance upon a finding that it lacked a sufficient justification

83. *Id.* (quoting City of Kansas City v. Jordan, 174 S.W.3d 25, 40 (Mo. Ct. App. 2005)).

84. Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 429 (2004).

85. *See Id*. at 429-30

86. Lawrence v. Texas, 539 U.S. 558, 564 (2003).

87. *Id.*

88. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

89. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

90. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

91. *See Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1367 (1990) ("By 1937, economic due process was dead.").

92. Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 527 (2015) ("For a very long time, it has been an article of faith among liberals and conservatives alike that Lochner v. New York was obviously and irredeemably wrong.").

to impede "freedom of contract." Similar to the justification for modern privacy jurisprudence, freedom of contract was held (for a time) to be supported by the constitutional guarantee of "liberty."[93] Since *Lochner* (and the Great Depression), the Court has distanced itself from strict scrutiny of legislative judgments concerning economic regulation that does not implicate privacy or personal interests.[94]

The Court departed from *Lochner* in *Nebbia v. New York*, upholding New York's controls on milk prices despite a questionable tailoring of means employed to the end sought,[95] on the basis that the general right of an individual to use his property is subject to the restriction that the property cannot be used to the detriment of the public.[96] Diminishing the reach of substantive due process, the *Nebbia* Court held that this protection "demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[97] Rather than allowing for meaningful restriction on state policymaking, the Court clarified that "[I]n the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . ."[98] In short, due process (regarding non-fundamental rights) is satisfied if the law bears a "reasonable relation to a proper legislative purpose" and is not arbitrary or discriminatory and not specifically prohibited by the Constitution.[99] Courts are without authority to inquire into the wisdom or efficacy of the action.[100] Elsewhere, the Court distanced itself from *Lochner* in holding that the freedom of contract, rather than an absolute aspect of liberty protected by the Fourteenth Amendment,[101] is a right subject to community protection from "evils which menace the health, safety, morals, and welfare of the people."[102]

Despite enshrining the extra-textual right to "privacy," the *West Coast Hotel* Court dismissed an absolute freedom of contract, asking, "[w]hat is this freedom? The Constitution does not speak of freedom of contract."[103] Liberty, in the Court's summation, is subject to due process restrictions including the welfare of the community, especially, it seems, when the individual freedom the public good is weighed against the freedom of contract.[104] As a result, "economic legislation" is subject to rational basis review rather than strict scrutiny.[105]

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93. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.").

94. *See generally* Nebbia v. People of New York, 291 U.S. 502, 524-25 (1934).

95. *See generally Id*. at 557-58.

96. *Id.* at 523. ("[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.").

97. *Id.* at 525.

98. *Id.* at 525.

99. Nebbia v. People of New York, 291 U.S. 502, 537 (1934).

100. *Id.*

101. Lochner v. New York, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.").

102. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

103. *Id.*

104. *See Id*. at 391-92.

105. Fust v. Attorney Gen. for the State of Mo., 947 S.W.2d 424, 432 (Mo. 1997).

In *Carolene Products*, the Court solidified its protection of rights "individual" in nature rather than economic.[106] In a final departure from *Lochner* that ushered in what can be fairly referred to as the *Carolene Products* era,[107] the Court held "[T]hat economic regulation would be subject to rational basis tests while legislation affecting discrete and insular minorities or otherwise impacting upon Bill of Rights protections, would be subject to a higher level of scrutiny."[108] This was effectively a reversal of the Court's stance in the *Lochner*-era.[109]

In the well-known fourth footnote to the *Carolene Products* opinion, the Court suggested what is understood in modern times to be a "political process" theory of review, applying strict scrutiny only to those legislative decisions that traditional political pressure has not properly policed on its own.[110] However, the notion that rights can be policed by political processes alone has often been a catastrophic failure in practice, perhaps most poignantly in post-*Carolene Products* instances where "the Court failed to extend protection to the Japanese or to communists."[111]

Concerns that the political economy may fail to protect individual fundamental rights are validly based. A judicial refusal to demand legitimate economic policy-making raises similar concerns. Heightened judicial protection of fundamental individual rights is rooted in advances in civil rights and personal privacy,[112] while less stringent protection of economic liberty owes to a history of deference to the New Deal.[113] Skeptical views characterize this dissonance as also rooted in bias.[114] As one observer explains, "[t]he laissez-faire assumptions behind *Lochner* naturally were an anathema to scholars and judges favoring government intervention in the economy and redistribution of wealth."[115] As a result, challenges to legislation encroaching upon property rights have been relegated to inferior status in constitutional adjudication.[116] The difference between protections for economic and civil liberties has become "one of the most enduring dichotomies in constitutional jurisprudence."[117]

Judicial second-guessing of economic legislation need not be discarded as unconstitutional. Rather than vilifying *Lochner* as a judicial usurpation of legislative power,[118] intervention from the bench can instead be characterized as the kind of protection of economic liberties and property rights envisioned by the

106. *See* Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 169 (2004).
107. David Schultz*, Scalia, Property, and Dolan v. Tigard: The Emergence of A Post*-Carolene Products *Jurisprudence*, 29 AKRON L. REV. 1, 3 (1995).
108. *Id.*
109. *Id.*
110. Gilman, *supra* note 106, at 163, 173.
111. *Id*. at 180.
112. *See* Ambers-Phillips v. SSM DePaul Health Ctr., 459 S.W.3d 901, 912 (Mo. 2015) ("A history of discrimination entitles individuals of that class to extraordinary protection.").
113. *See* James W. Ely, Jr., *Economic Due Process Revisited* 44 VAND. L. REV. 213, 218 (1991) (reviewing PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK (1990)).
114. *See* Ely, *supra* note 112, at 213.
115. *Id.*
116. *See Id.* at 218.
117. Schultz, *supra* note 107, at 20.
118. *See Id.*

Constitution's Framers.[119] Even more readily than one can identify constitutional penumbras creating a zone of privacy, one can demonstrate constitutional protections of economic liberties.[120] Many of these provisions were specifically tailored to restrict government power over economic activity, perhaps none more important than the Contract Clause found in Art. I.[121]

Additionally, *Lochner* found the freedom to contract in relation with an individual's own business is enshrined within the concept of liberty protected by the Fourteenth Amendment.[122] Under this since-discarded reasoning, the police power would have to be held to a higher standard which demands genuine reasonableness, rather than allowing the power to grow into "mere pretext."[123]

The *Lochner* Court warned against what is now reality: if legislation in any way "was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be."[124] States and municipalities have taken advantage of this authority that is as broad and unforgiving as it is vague.[125]

VI. CONCLUSION

To return this discussion to its initial inquiry, an informed reading of police power jurisprudence suggests that the ban on drink specials proposed by the Columbia City Council would stand. As discussed above, similar measures have stood across the country.[126] This is of grave concern because regulation by city council fiat is capable of producing profound encroachments upon American life and liberties.[127] Unless legislation discriminates impermissibly against a protected class, the restrictive regulations will likely stand.[128]

The Supreme Court had it right during the *Lochner* era of demanding judicial review.[129] Although the judiciary must respect the separation of powers and the superior role of the legislature in identifying and remedying ills, courts must be willing and able to step in and nullify regulations which do no more than abstractly promote "the public welfare" while imposing real burdens on citizens—in particular businesses and homeowners. Until then, courts may struggle to enforce their own demands that police power exercises "not be unreasonable, arbitrary, unduly

119. James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 708 (2008) ("The Framers crafted the provisions in the Constitution and Bill of Rights to guarantee economic rights.").
120. *Id.*at 699.
121. *Id.*
122. Lochner v. New York, 198 U.S. 45, 53 (1905).
123. *Id*. at 56.
124. *Id.*
125. *See* M.S., *Where growing too many vegetables is illegal,* THE ECONOMIST (Oct. 3, 2010) https://www.economist.com/democracy-in-america/2010/10/03/where-growing-too-many-vegetables-is-illegal.
126. *See supra* Section I.
127. *See generally* Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 506 (1977) (striking down a municipal ordinance which allowed cohabitation only by members of a strictly defined notion of "family").
128. *See supra* Section III.
129. *See supra* Section IV.

oppressive or patently beyond the necessities of the case and the means employed must have a real and substantial relation to the object sought to be obtained."[130]

Fortunately, there is evidence that property rights may be on the path to renewed first class status. Even if economic rights continue to lag behind individual and privacy rights in judicial favor, some scholars suggest adding teeth to rational basis review.[131] Indeed, the current standard of review with respect to economic rights is sometimes so weak that the Court "abandons the effort altogether and accepts any justifying rationale advanced by the state in litigation."[132] A "rational basis with bite" analysis promises to reinvigorate economic liberty in our post-Depression times, and is gaining popularity amid "growing public disapproval of rent-seeking and special-interest legislation."[133] Additionally, the might of well-organized special interest groups undermines the strength of the Court's argument in *Carolene Products* that political processes can adequately protect economic rights without court intervention.[134]

There has been movement in the field of takings law as well. *Dolan*, a seminal takings case of the 1990s was a strong point in the Court's review of regulatory takings.[135] The *Dolan* majority struck down municipal requirements that certain property owners relinquish portions of their property for public goods, such as bike paths, in exchange for permission to make uses of other segments of their property.[136] In doing so, the Court looked for more than a simple "public good" justification.[137] More recently, the Court eliminated a significant procedural barrier to federal takings challenges, terminating the requirement that a landowner first exhaust his state remedies, holding that the petitioner's claim was ripe the moment the state took his property.[138]

This is a positive trend, but property rights will be truly vindicated only once reasonableness review becomes more demanding. A rational basis review that meaningfully assesses the benefit and burden of a state or municipality's action will strike the proper balance between legislative prerogative and the economic liberty. Absent this tightened leash, municipalities are free to enact regulations which create significant burdens on business owners without a legitimate public benefit in return. A view of economic rights as less than "fundamental" has led to a "minimal scrutiny standard" which allows burdensome and poorly considered economic legislation to stand.[139] Courts demand only a plausible connection to the public good, and often supply their own, rather than striking down a law as arbitrary.[140]

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130. Borden Co. v. Thomason, 353 S.W.2d 735, 755 (Mo. 1962).
131. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972) (This standard "would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture.").
132. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 316 n.38 (1993).
133. Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 NYU J.L. & LIBERTY 1055, 1086 (2014).
134. *See Id.* at 1086-89.
135. Schultz, *supra* note 107, at 1-2.
136. *See generally* Dolan v. City of Tigard, 512 U.S. 374, 380, 383, 396 (1994).
137. Schultz, *supra* note 107, at 1.
138. *See generally* Knick v. Twp. of Scott, Pennsylvania, 139 S. Ct. 2162, 2177-78 (2019).
139. Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 783 (1987).
140. *Id.*

Under a more useful standard than "rational basis" review and the *Carolene Products* progeny, courts could defer to legitimate legislation while protecting economic liberties that Americans were promised by Article I and the Fourteenth Amendment.

Short of a watershed change in constitutional law, the Columbia City Council should, at the very least, consider a less targeted regime than the ordinance proposed. The Council has sought to restrict the ability of business owners to set their own prices, in the dubious hope that more costly drinks will significantly curtail the nuisances and hazards presented by excessive intoxication. Rather than asking this small group to bear the cost of a broad public benefit, the Council could instead invest community tax revenue into public transportation or promote education reinforcing safe drinking practices. The economic burden would be more fairly distributed across the parties who stand to benefit. Instead, the council has chosen to leave bar proprietors out to dry, hoping higher drink costs will have an effect other than simply forcing patrons deeper into their pockets.