



Short Article

# The Birthright of Economic Liberty

Dick M. Carpenter II

Institute for Justice, Arlington, Virginia

[dcarpenter@ij.org](mailto:dcarpenter@ij.org)

## Article Information

---

### Article history:

Received 6 July 2021  
Accepted 17 September 2021  
Available online 11 December 2021

### Keywords:

Economic liberty  
Presumption of liberty  
Right to earn a living

### DOI:

<https://doi.org/10.53095/13582001>

### URL:

<https://institutodelibertadeconomica.org/programs/education/economic-liberty/the-birthright-of-economic-liberty/>

### Citation:

---

Carpenter II, D. M. (2021, December 11). *The birthright of economic liberty*. Instituto de Libertad Económica. <https://doi.org/10.53095/13582001>

## Abstract

---

Economic liberty—the right to earn an honest living—is one of the most important rights of free people. Over time, this has been restricted by unnecessary laws and regulations. Legislators should govern from a presumption of liberty. Applied practically, this means legislators should presume individuals have the right to practice their chosen occupations free from government regulation unless and until systematic evidence shows this right must be curtailed to protect the public.

## Takeaways

---

Economic liberty—the right to earn an honest living—is one of the most important rights of free people.

Legislators should govern from a presumption of liberty.

Individuals should have the right to practice their occupations free from government regulation, until systematic evidence shows this right must be curtailed to protect the public.

## Article

---

### Introduction

From the founding of the United States, the birthright of economic liberty—the right to earn an honest living free from onerous and unnecessary government intrusion—was a cherished one.<sup>1</sup> As U.S. Supreme Court Justice Stephen Johnson Field explained:

And when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others.<sup>2</sup>

Likewise, according to Justice William O. Douglas, “the right to work . . . [is] the most precious liberty that man possesses.”<sup>3</sup>

Yet, over many years, legislatures have adopted increasing numbers of regulations, such as occupational licenses, that restrict economic liberty.<sup>4</sup> Courts have approved of many of them.<sup>5</sup> Through it all, an important principle has been largely lost—the presumption of liberty.

### The Presumption of Liberty

According to noted Georgetown University professor of law Randy Barnett, the presumption of liberty “requires the government to justify its restriction on liberty, instead of requiring the citizen to establish the liberty being exercised is somehow ‘fundamental,’” and not a gift they enjoy at the government’s pleasure.<sup>6</sup>

---

<sup>1</sup> C. Neily, (2005), No such thing: Litigating under the rational basis test, *N.Y.U. Journal of Law and Liberty*, 1(2), 897–913; T. Sandefur, (2003), The right to earn a living, *Chapman Law Review*, 6(1), 207–277.

<sup>2</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 105 (1873) (Field, J., dissenting).

<sup>3</sup> *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

<sup>4</sup> M. M. Kleiner, (2006), *Licensing occupations: Ensuring quality or restricting competition*, Upjohn Institute.

<sup>5</sup> C. Neily, 2005; T. Sandefur, (2006), Is economic exclusion a legitimate state interest? Four recent cases test the boundaries, *William and Mary Bill of Rights Journal*, 14(3), 1023–1062.

<sup>6</sup> R. Barnett, (2003, July 10), Kennedy’s libertarian revolution, *National Review Online*, <http://www.nationalreview.com/article/207453/kennedys-libertarian-revolution-randy-barnett>. See also R. E. Barnett, (1991), Foreword: Unenumerated constitutional rights and the rule of law, *Harvard Journal of Law and Public Policy*, 14(3), 615–643; G. F. Will, (2011, December 16), Testing the waters of economic liberty, *The Washington Post*, [http://www.washingtonpost.com/opinions/testing-the-waters-of-economic-liberty/2011/12/15/gIQAP0NDzO\\_story.html](http://www.washingtonpost.com/opinions/testing-the-waters-of-economic-liberty/2011/12/15/gIQAP0NDzO_story.html).

Or, as Virginia’s statutes put it:

The right of every person to engage in any lawful profession, trade, or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when (i) it is clearly found that such abridgment is necessary for the preservation of the health, safety, and welfare of the public and (ii) such abridgment is no greater than necessary to protect or preserve the public health, safety, and welfare.<sup>7</sup>

Applied practically, this means, for example, when considering new regulations that would impinge upon economic liberty, the starting point should be freedom of practice. Legislators should presume individuals have the right to practice their chosen occupation free from government regulation unless and until systematic evidence shows this right must be curtailed to protect the public.

### Restoring the “First Object of Government”

This is more than an economic argument. It is also about creating a just society.

In 1787, James Madison wrote the protection of property rights “is the first object of government.”<sup>8</sup> To Madison, property rights extended to much more than real estate and personal belongings. He saw them as covering “everything to which a man may attach a value and have a right,” including “opinions and the free communication of them” and “the free use of his faculties and free choice of the objects on which to employ them.”<sup>9</sup> His inclusion of economic liberty under the rubric of property rights was unequivocal:

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. . . . That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.<sup>10</sup>

In fulfilling Madison’s call for a just government and executing the “first object of government,” elected officials today should protect the property rights of the citizens they serve, including economic liberty and

---

<sup>7</sup> Va. Code Ann. § 54.1-100.

<sup>8</sup> J. Madison, (1787, November 23), The same subject continued: The Union as a safeguard against domestic faction and insurrection, *The New York Packet*, [https://avalon.law.yale.edu/18th\\_century/fed10.asp](https://avalon.law.yale.edu/18th_century/fed10.asp).

<sup>9</sup> J. Madison, (1962), Property, in W. T. Hutchison et al. (Eds.), *The Papers of James Madison* (Vol 1), University of Chicago Press, (original work published March 29, 1792), <https://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.

<sup>10</sup> Madison, 1962.

freedom of practice. In so doing, they should govern from a presumption of liberty. The need to do so is more essential and urgent today than ever.

© 2021 Dick M. Carpenter II. Published by Instituto de Libertad Económica. This is an open access article under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International license (<https://creativecommons.org/licenses/by-nc-sa/4.0/>).

OPEN  ACCESS

