

[DRAFT]

## The Right to Earn a Living in Pennsylvania

Joshua Windham\*

### Abstract

Article I, Section 1 of the Pennsylvania Constitution protects each individual’s right to “enjoy[] . . . life and liberty,” “acquir[e] . . . property,” and “pursu[e] their own happiness.” The Pennsylvania Supreme Court has held that this text secures the right to earn a living. Yet the Court has also treated that right as non-fundamental and has faced recurring calls, particularly from Justice David Wecht, to abandon the heightened rational basis test from *Gambone v. Commonwealth* in favor of the federal “conceivable basis” test. This article argues that, if the Court must choose between *Gambone* and the conceivability test, *Gambone* is more faithful to Section 1’s text and historical origins in Pennsylvania’s 1776 Declaration of Rights. When Section 1 was first adopted, Pennsylvanians would have understood it to secure a natural right—in the Lockean sense—to engage in productive labor and to trade the fruits of that labor with others. Because the right to earn a living is fundamental under Section 1, *Gambone*’s heightened rational basis test is better suited to securing it than the federal conceivability test.

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\* Senior Attorney, Institute for Justice. JD 2016, University of North Carolina School of Law. Thanks to Daniel Nelson for assisting with some of the historical research for this article. This draft article has not yet been subject to a final proof or cite-check.

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## Introduction

When a law restricts a right that courts deem important, courts typically apply “strict scrutiny.” That means the law is presumed invalid unless the government proves the law is narrowly tailored to serve a compelling end. By contrast, when a law restricts a right that courts deem unimportant, courts typically apply “rational basis review.” That means the law is presumed valid unless a citizen proves it lacks a rational relationship to any legitimate end. As one legal pundit quips, “Strict scrutiny, the plaintiff wins. Rational basis, the government wins.”<sup>1</sup> An oversimplification, of course, but one that flags a real dynamic: The way courts view a right—as important or unimportant, “fundamental” or “non-fundamental” (formally)—stacks the legal deck in a way that is often dispositive.

This system of “tiered scrutiny” stems from early 20th century federal law. And, by and large, state courts have reflexively followed it under their own constitutions. But there are exceptions. Some state courts do not apply tiered scrutiny at all. Others apply it, but break from federal law on particulars like how to classify a right (fundamental or not?) or how the rational basis test works (do facts matter?). Pennsylvania is one such state. As the U.S. Supreme Court’s version of the rational basis test became ever-more deferential across the 20th century, the Pennsylvania Supreme Court stayed the course and retained what it now calls a “heightened rational basis test.”<sup>2</sup> This article is about why that test, at least in cases involving the *right to earn a living*, better suits the Pennsylvania Constitution than its federal counterpart.

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<sup>1</sup> Sarah Isgur, *Must and May*, Advisory Opinions, 9:20–25, <https://podcasts.apple.com/us/podcast/must-and-may/id1490993194?i=1000745266181>.

<sup>2</sup> *Ladd v. Real Est. Comm’n*, 230 A.3d 1096, 1098 (2020). A disclosure that I represented Sally Ladd and was the lead attorney at every stage of her case.

After laying some basic groundwork on Pennsylvania’s heightened test and its leading critic (Section I), this article defends the test on textual, historical, and doctrinal grounds (Section II). First, when a right is textually enumerated in a constitution, courts typically deem that right “fundamental.” And that is what the Pennsylvania Constitution does: Article I, Section 1, whose language dates to the original 1776 Declaration of Rights, expressly protects “inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property . . . and of pursuing . . . happiness.”<sup>3</sup> Second, at the time that language was adopted, Pennsylvanians would have understood it to include a natural right—in the Lockean tradition—to engage in productive labor and to trade the fruits of that labor with others. Last, because the right to earn a living is “inherent and inalienable” in Pennsylvania, there is no doctrinal basis for replacing Pennsylvania’s test with the most tepid form of federal rational basis review.

### **I. Overview of Pennsylvania’s heightened test.**

First some context. Through the turn of the 20th century, the U.S. Supreme Court deemed the right to earn a living important and meaningfully protected it. But over time, the Court chipped away at those protections with an increasingly tepid rational basis test—one that, at its worst, treated evidence of irrationality as irrelevant. (Part A). Early on, the Pennsylvania Supreme Court followed the U.S. Supreme Court’s test for laws restricting the right to earn a living. But as the federal test took a nosedive, Pennsylvania’s test stayed put—consistently treating evidence of irrationality as dispositive. (Part B). Pennsylvania’s

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<sup>3</sup> Pa. Const. art. I, § 1.

“heightened” test has received sharp criticism from Justice David Wecht, who argues the test lacks any textual, historical, or doctrinal support. (Part C). Section II disagrees.

*A. The weak federal test.*

The Fourteenth Amendment to the federal Constitution forbids state laws that “deprive any person of life, liberty, or property, without due process of law.”<sup>4</sup> For many years after ratification, the U.S. Supreme Court held that “the word ‘liberty’ as used in the amendment” includes “the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property,” and also “the right to make all proper contracts in in relation thereto.”<sup>5</sup> These economic rights, the Court wrote, are both “the means of living” and “essential to the enjoyment of life.”<sup>6</sup> Every American, the Court affirmed, has the right “to earn a livelihood.”<sup>7</sup>

During this period, the U.S. Supreme Court protected economic freedom chiefly by keeping state “police powers” within their proper scope. Although states have inherent authority to enact laws “appropriate or needful for the protection of the public morals, the public health, or the public safety,” the Court held, “[i]t does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state.”<sup>8</sup> This makes intuitive sense. It makes sense that the right to earn a living would include production and trade, but not fraud and theft.

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<sup>4</sup> U.S. Const. amend. XIV; *see also* U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

<sup>5</sup> *Allgeyer v. Louisiana*, 165 U.S. 578, 590–91 (1897).

<sup>6</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>7</sup> *Truax v. Raich*, 239 U.S. 33, 38 (1915).

<sup>8</sup> *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

And it makes sense that the police power would include the power to prevent fraud and theft, but not the power to needlessly restrict production and trade.

The Court's early cases reflect this intuition. They held that, in order to uphold a law purportedly "essential to the public safety, health, and morals,"

it must appear . . . that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations . . . .<sup>9</sup>

That is, courts must "look to the substance of things," and if a "statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."<sup>10</sup>

A key feature of this early approach is that facts mattered. It mattered whether, in the real world, a law meaningfully protected the public or needlessly burdened the right to earn a living. And because it mattered, the Court relied on evidence to assess whether an economic law was a valid use of the police power. A classic example is *Yick Wo v. Hopkins* (1886).<sup>11</sup> There, the Court struck down an ordinance that granted a local board absolute discretion to deny permits to run a laundry business, purportedly to prevent fires, where "the facts disclosed in the record" showed the board was denying permits even to people who had passed fire inspections and posed no threat.<sup>12</sup> In practice, the ordinance did not protect the public—it merely made applicants "tenants at will, under the [board], of their

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<sup>9</sup> *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

<sup>10</sup> *Id.*

<sup>11</sup> *Yick Wo*, 118 U.S. 356.

<sup>12</sup> 118 U.S. at 365–67, 374; 6 S. Ct. 1064, 1065–67 (syllabus facts).

means of living,” and allowed the board to discriminate against Chinese businesses.<sup>13</sup> That was not a valid use of the police power.

Over time, however, the Supreme Court chipped away at its early protections for the right to earn a living. That shift has been well-covered,<sup>14</sup> but here are the basics. First, in *Nebbia v. New York* (1934), the Court adopted the rational basis test. It held that “[w]ith the wisdom of the policy adopted, with the adequacy or practicality of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.”<sup>15</sup> And, since courts are purportedly so hapless, they must leave “state[s] . . . free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”<sup>16</sup>

Next, in *United States v. Carolene Products* (1938), the Court established a system of tiered scrutiny that treats the right to earn a living as less important than other rights. Laws “affecting ordinary commercial transactions,” the Court held, would be presumed constitutional unless a party could prove it lacked any “rational basis.”<sup>17</sup> Laws restricting rights “within a specific prohibition of the Constitution” or those of “discrete and insular minorities,” by contrast, would receive “more exacting judicial scrutiny.”<sup>18</sup> The result is

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<sup>13</sup> 118 U.S. at 368; 6 S. Ct. at 1066–67 (syllabus facts).

<sup>14</sup> See, e.g., *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J., concurring); Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J. L. & Pub. Pol’y 373, 374–76 (2016); Andrew Ward, *The Rational-Basis Test Violates Due Process*, 8 NYU J.L. & Liberty 714, 717–21 (2014).

<sup>15</sup> *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

<sup>16</sup> *Id.*

<sup>17</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 (1938).

<sup>18</sup> *Id.* at 152 n.4.

that federal courts now “privilege a broad swath of non-economic human activities, while leaving economic activities out in the cold.”<sup>19</sup>

Then, in *Williamson v. Lee Optical* (1954), the Court jettisoned evidence from the rational basis test. Prior decisions held that a law’s rationality “may be assailed by proof of facts tending to show” that the conditions originally justifying it “have ceased to exist” or that the law’s particular application “is without support in reason.”<sup>20</sup> And that is the rule the district court applied in *Lee Optical*.<sup>21</sup> But on appeal, the Supreme Court rejected even that modest protection. The rational basis test, the Court held, turns merely on what “the legislature *might have concluded*,” which means “[i]t is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it.”<sup>22</sup>

*Lee Optical* produced a half-century of extreme deference toward economic laws.<sup>23</sup> That deference reached its nadir in *F.C.C. v. Beach Communications* (1993), which framed the rational basis test as “a paradigm of judicial restraint.”<sup>24</sup> Under that test, an economic law “comes to us bearing a strong presumption of validity,” and a party has “the burden to negative every conceivable basis which might support it.”<sup>25</sup> What’s more, “a legislative

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<sup>19</sup> *Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi*, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring); see also, e.g., *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (“we have expressly stated that a standard less than strict scrutiny ‘has consistently been applied to state legislation restricting the availability of employment opportunities’” (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970))).

<sup>20</sup> *Id.* at 153–54.

<sup>21</sup> See *Lee Optical v. Williamson*, 120 F. Supp. 128, 134–37 (W.D. Okla. 1954) (citing Supreme Court’s earlier “reasonably necessary” test and relying repeatedly on what “[t]he evidence indicates”).

<sup>22</sup> *Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955) (emphasis added).

<sup>23</sup> See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *City of New Orleans v. Duke*, 427 U.S. 297 (1976).

<sup>24</sup> *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993).

<sup>25</sup> *Id.* at 314–15 (cleaned up).

choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”<sup>26</sup> This “conceivable state of facts” standard, if taken literally, is what one concurring justice called “tantamount to no review at all”<sup>27</sup>— a far fall from the age of *Yick Wo*.<sup>28</sup>

*B. The strong state test.*

The Pennsylvania Supreme Court has long refused to apply the most tepid form of federal rational basis review under Article I, Section 1 of the Pennsylvania Constitution. It instead applies “a heightened rational basis review” when the government “exercise[s] its police powers to curtail a non-fundamental right.”<sup>29</sup> That is not to say the tests are wholly distinct. The state test starts from the same premise as the federal test: tiered scrutiny. It treats some rights as “fundamental” and protects them with “strict scrutiny,” and it treats other rights as “non-fundamental” and protects them only with “rational basis review.”<sup>30</sup> The state test also categorizes the right to earn a living in the same way as the federal test: “not fundamental.”<sup>31</sup> The key difference, however, is that “[t]he rational basis test under Pennsylvania law is less deferential to the legislature than its federal counterpart.”<sup>32</sup>

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<sup>26</sup> *Id.* at 315 (cleaned up).

<sup>27</sup> *Id.* at 323 n.3 (Stevens, J., concurring).

<sup>28</sup> Despite the U.S. Supreme Court’s tepid *description* of the federal rational basis test in cases challenging economic laws, federal courts in *practice* sometimes still apply a more meaningful, fact-based version of that test. See Berliner, *supra* n.14, at 382, 388–390 (collecting cases). This article is focused on the contrast between Pennsylvania’s heightened test and the formally *described* version of the federal test.

<sup>29</sup> *Ladd*, 230 A.3d at 1110.

<sup>30</sup> *Id.* at 1108.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

The canonical case is *Gambone v. Commonwealth* (1954). There, a statute banned gas stations from posting fuel prices on signs over a certain size.<sup>33</sup> A gas station challenged the law under the Fourteenth Amendment and Section 1, and the government responded by asserting the law was adopted to prevent “fraudulent advertising of prices” and “price cutting.”<sup>34</sup> But the Pennsylvania Supreme Court held that these assertions, without more, did not shield the law from further scrutiny. Instead, citing “a host of authorities, Federal and State alike,” the Court wrote that “the [police] power is not unrestricted” and that “[u]nder 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.”<sup>35</sup> To honor those limits,

a law which purports to be an exercise of the police power must [1] not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and [2] the means which it employs must have a real and substantial relation to the objects sought to be attained.<sup>36</sup>

That is not the federal rational basis test adopted in *Nebbia*, watered down in *Lee Optical*, and gutted in *Beach*. Instead, *Gambone* drew directly on the U.S. Supreme Court’s *original* police powers doctrine.<sup>37</sup>

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<sup>33</sup> *Gambone v. Commonwealth*, 101 A.2d 634, 636 (1954).

<sup>34</sup> *Id.* at 637.

<sup>35</sup> *Id.* (citing *Mugler v. State of Kansas*, 123 U.S. 623, 661 (1887), *Lawton v. Steele*, 152 U.S. 133, 137 (1894); *Dobbins v. City of Los Angeles*, 195 U.S. 223, 236 (1904); *Welch v. Swasey*, 214 U.S. 91, 105 (1909); *Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924); *Weaver v. Palmer Brothers Co.*, 270 U.S. 402, 415 (1926); *Liggett Co. v. Baldrige*, 278 U.S. 105, 113 (1928); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932); *Bryan v. City of Chester*, 212 Pa. 259 (1905); *Manorville Borough v. Flenner*, 286 Pa. 103 (1926); *White’s Appeal*, 287 Pa. 259, 264, 265, 268, 269 (1926); *Harris v. State Board of Optometrical Exam’rs*, 287 Pa. 531, 536 (1926); *Breinig v. Allegheny County*, 332 Pa. 474, 483 (1938); *Commonwealth v. Zasloff*, 338 Pa. 457, 460 (1940); *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 46–48 (1948); *Otto Milk Co. v. Washington City*, 363 Pa. 243, 252, 253 (1949); *Pittsburgh Poster Advertising Co. v. Swissvale Borough*, 70 Pa. Super. 224 (1918); *Prospect Park Borough v. McClaskey*, 151 Pa. Super. 467, 471, 472 (1943)).

<sup>36</sup> *Id.*

<sup>37</sup> *Supra* n.35 (citing *Gambone* collecting early federal police powers cases on which it relied).

Applying that doctrine, the Pennsylvania Supreme Court held that neither of the government's justifications held up. The size of a sign was wholly unrelated to whether the sign was fraudulent, and in any case, fraud was already illegal under a separate law, so a ban on large signs was pointless.<sup>38</sup> As for price-cutting, offering the public better prices is neither "in fact or in law, really an evil," and even if it were, the law had an "utter lack of connection" to that (fake) harm because, large sign or small sign, gas stations could still charge whatever prices they pleased.<sup>39</sup> So pointless a restriction, the Court held, was not a valid use of the police power and was thus "null and avoid."<sup>40</sup>

The Pennsylvania Supreme Court has applied the *Gambone* test under Section 1 for nearly a century. Three features of that test bear emphasis here, because they show how that test is "heightened" above, or "more restrictive than," the conceivability test.<sup>41</sup>

*First*, the Pennsylvania Supreme Court has repeatedly applied the *Gambone* test (or similar language) to laws that burdened the right to earn a living. And in many of these cases, the Court held that the law did not pass the test. Since 1940, for example, the Court has struck down restrictions on selling goods below-cost,<sup>42</sup> selling oleomargarine,<sup>43</sup> renting out cars,<sup>44</sup> taking photographs,<sup>45</sup> selling ice milk,<sup>46</sup> selling soda,<sup>47</sup> renting out apartments,<sup>48</sup>

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<sup>38</sup> See *Gambone*, 101 A.2d at 637.

<sup>39</sup> *Id.* at 637-38.

<sup>40</sup> *Id.* at 638.

<sup>41</sup> *Ladd*, 230 A.3d at 187, 189.

<sup>42</sup> *Commonwealth v. Zasloff*, 13 A.2d 67 (Pa. 1940).

<sup>43</sup> *Flynn v. Horst*, 51 A.2d 54 (Pa. 1947).

<sup>44</sup> *Hertz Drivurself Stations v. Higgins*, 58 A.2d 464 (Pa. 1948).

<sup>45</sup> *Olan Mills, Inc. v. City of Sharon*, 92 A.2d 222 (Pa. 1952).

<sup>46</sup> *Commonwealth ex rel. Woodside v. Sun Ray Drug Co.*, 116 A.2d 833 (Pa. 1955).

<sup>47</sup> *Cott Beverage Corp. v. Horst*, 110 A.2d 405 (Pa. 1955).

<sup>48</sup> *Warren v. City of Philadelphia*, 127 A.2d 703 (1956).

collecting trash,<sup>49</sup> advertising drugs,<sup>50</sup> running gas wells,<sup>51</sup> and caring for elders.<sup>52</sup> These cases affirm that, even if the right to earn a living is not quite fundamental under Section 1, it remains “undeniably important” in Pennsylvania.<sup>53</sup>

*Second*, unlike the federal conceivability test, the *Gambone* rational basis test is fact-based.<sup>54</sup> According to the Pennsylvania Supreme Court, the police power is confined to its “raison d’etre”—its reason for being—and so if a law is enacted to address a public threat, its “validity depends on the truth of [that threat].”<sup>55</sup> What’s more, even when that threat exists, “[t]he measure of [the] police power must square with the measure of public necessity.”<sup>56</sup> Because “truth” and “measure” are issues of fact, the Court’s precedents have often turned on whether the evidentiary record undercut a law’s connection to its purported end (*Gambone* prong 1) or proved the law was an excessive way to further that end (*Gambone* prong 2).<sup>57</sup> *Commonwealth v. Nixon* (2003), is a good example. In that case, the plaintiffs challenged a law that barred them from working in older-adult facilities based

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<sup>49</sup> *Lutz v. Armour*, 151 A.2d 108 (Pa. 1959).

<sup>50</sup> *Pa. State Board of Pharm. v. Pastor*, 272 A.2d 487 (Pa. 1971).

<sup>51</sup> *Mahony v. Township of Hampton*, 651 A.2d 525 (Pa. 1994).

<sup>52</sup> *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003).

<sup>53</sup> *Ladd*, 230 A.3d at 1108 (quoting *Nixon*, 839 A.3d at 287).

<sup>54</sup> *See Shoul*, 173 A.3d at 677 (explaining that the *Gambone* test affords less “deference” to the government than the federal conceivability test, under which a plaintiff must “‘negative every conceivable basis which might support [a law], whether it not the basis has a foundation in the record’”) (quoting *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (emphasis added)).

<sup>55</sup> *Flynn*, 51 A.2d at 60.

<sup>56</sup> *Id.* at 59.

<sup>57</sup> *See, e.g., Mahony*, 651 A.2d at 527 (city’s bases for restriction on private gas-well operators were “not supported by the record”); *Pastor*, 272 A.2d at 493 (state “produced no evidence” justifying ban on drug-price advertising); *Lutz*, 151 A.2d 108, 111 (Pa. 1959) (record was “barren of any evidence” justifying restriction on private trash collectors); *Warren*, 127 A.2d at 705–06 (plaintiffs “adduced . . . evidence sufficient to overcome the presumption that the alleged emergency conditions” justifying rent-control ordinance actually existed); *Sun Ray Drug Co.*, 116 A.2d at 840 (“no evidence in this record” supporting state’s bases for banning milkshake ingredient).

on their past crimes.<sup>58</sup> The Commonwealth invoked its “crucial interest” in protecting the elderly from abuse.<sup>59</sup> But that wasn’t sufficient. The record showed that the plaintiffs had “essentially rehabilitated themselves,” and so the law, at least as applied to them, did “not bear a real and substantial relationship” to protecting the elderly.<sup>60</sup> That looks a lot more like *Yick Wo* (the early federal approach) than *Lee Optical* (the later departure).<sup>61</sup>

*Third*, also unlike the federal conceivability test, the *Gambone* rational basis test takes needless burdens into consideration. *Gambone*’s first prong is essentially the federal rational basis test with some bite. *Gambone*’s second prong adds a second layer of analysis: A law must not be “unreasonable, unduly oppressive, or patently beyond the necessities of the case.”<sup>62</sup> That’s one reason the Court struck down the law in *Gambone*: Banning large signs (the burden) was not a reasonable way to prevent fraud when a separate law already banned fraud (showing the burden was needless).<sup>63</sup> Or consider *Shoul v. Commonwealth* (2017). The plaintiff challenged a law that barred him from getting a commercial driver’s license, for life, based on a past drug crime.<sup>64</sup> That law’s “severity” (a lifetime ban) was not a reasonable way to promote highway safety, the Court held, given that other crimes “plainly more dangerous, injurious, or fatal to motorists” (e.g., traffic violations, DUI,

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<sup>58</sup> *Nixon*, 839 A.2d at 279–82.

<sup>59</sup> *Id.* at 288–90.

<sup>60</sup> *Id.* at 289–90.

<sup>61</sup> *Shoul*, 173 A.3d at 677 (explaining that *Gambone* affords less “deference . . . to legislative judgement” than the federal conceivability test, under which a plaintiff must “‘negative every conceivable basis which might support it, *whether or not the basis has a foundation in the record.*’” *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (emphasis added)).

<sup>62</sup> *Gambone*, 101 A.2d at 637.

<sup>63</sup> *Gambone*, 101 A.2d at 637.

<sup>64</sup> *Shoul v. Commonwealth*, 173 A.3d 699 (Pa. 2017).

vehicular homicide) triggered “significantly shorter-term disqualifications.”<sup>65</sup> Under the *Gambone* test, laws can’t impose gravely disproportionate burdens on the right to earn a living—they can’t be overkill.<sup>66</sup>

### C. *The leading critique.*

The Pennsylvania Supreme Court has never expressed any interest in overruling the *Gambone* test under Article I, Section 1 of the Pennsylvania Constitution. But in the past decade, Justice David Wecht has written four separate opinions urging the Court to do so.<sup>67</sup> These opinions demand an answer, and that is what this article—with a focus on Section 1’s origins in the 1776 Declaration of Rights—provides. First, though, it is worth walking through Justice Wecht’s central critiques of the *Gambone* test. There are three.

*First*, Justice Wecht argues that the *Gambone* test does not flow from any specific Section 1 right. “Under our precedent,” he says, “Pennsylvania courts are free to question the necessity and reasonableness of all laws—or any ‘exercise of the police power,’ as the *Gambone* Court put it—under the guise of substantive due process.”<sup>68</sup> That is a problem, in Justice Wecht’s view, because “no due process clause exists under our Constitution.”<sup>69</sup> Nor, in his view, is there any real support for the idea “that the Constitution—somewhere

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<sup>65</sup> *Id.* at 680 (observing that the lifetime ban for drug crimes “quizzically sanctions perhaps the least risky conduct (relative to highway safety) it regulates with the greatest severity, suggesting it is either harsh for no reason, or for some ulterior reason”); *but see id.* at 681 (holding that even though highway safety could not justify the ban, an interest in deterring drug crimes was a separate and sufficient basis for upholding the law).

<sup>66</sup> *See, e.g., Shoul*, 173 A.3d at 680 (test rejects laws “which plainly[] go too far allegedly in pursuit of some legitimate purpose”); *Mahony*, 651 A.2d at 528 (test rejects laws that impose heavy burdens where “less drastic and intrusive alternative[s]” exist); *Zasloff*, 13 A.2d at 70 (test rejects laws “obviously unnecessary in their severity and comprehensiveness”).

<sup>67</sup> *See Shoul*, 173 A.3d at 688–94 (Wecht, J., concurring); *Ladd*, 230 A.3d at 1116–23 (Wecht, J., dissenting); *PennDOT v. Middaugh*, 244 A.3d 426, 444–47 (Pa. 2021) (Wecht, J., concurring and dissenting); *Ferguson v. Dep’t of Transp.*, 340 A.3d 278, 289–97 (Pa. 2025) (Wecht, J., concurring).

<sup>68</sup> *Ladd*, 230 A.3d at 1120.

<sup>69</sup> *Ferguson*, 340 A.3d at 293.

within its secret repository of unenumerated rights—guarantees [people] the freedom to operate [a chosen business].”<sup>70</sup> Accordingly, Justice Wecht contends “[t]here is absolutely nothing in the text of history of our Constitution that sanctions [*Gambone*’s] judicial second-guessing of legislation.”<sup>71</sup>

*Second*, Justice Wecht argues that there is no doctrinal basis under Section 1 for applying *Gambone* rather than the modern federal rational basis test. For one, he contends, even though the U.S. Supreme Court applied something like the *Gambone* test during the “*Lochner* era,” *Gambone*’s reliance on those decisions “failed to recognize that federal due process jurisprudence was undergoing a dramatic transformation”<sup>72</sup> that “shifted toward [the U.S. Supreme Court’s] modern, deferential approach to substantive due process.”<sup>73</sup> For another, he says, even though *Lee Optical* “interred *Lochner*’s economic substantive due process doctrine” one year after *Gambone* was decided, the Pennsylvania Supreme Court has never fully explained its “adherence to the outdated and overbroad language of

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<sup>70</sup> *Ladd*, 230 A.3d at 1222 (Wecht, J., dissenting). For the full context that supports the bracketed portions added to quote above, compare *id.* at 1108 (“Our case law explains that, included within the right to possess property and pursue happiness, is the right to pursue a chosen occupation.”), with *id.* at 1222 (Wecht, J., dissenting) (“In my view, the Commonwealth Court correctly rejected Ladd’s claim that the Constitution—somewhere within its secret repository of unenumerated rights—guarantees her the freedom to operate as an unlicensed real estate broker.”); see also *id.* at 1116, 1120 (critiquing *Gambone* as a “relic of an era when the United States Supreme Court insisted that the Constitution forbids lawmakers from interfering with ‘economic liberty’ and the ‘freedom of contract’” and questioning that “dubious premise”).

<sup>71</sup> *Ladd*, 230 A.3d at 1119.

<sup>72</sup> *Id.* at 1118–19 (Wecht, J., dissenting).

<sup>73</sup> *Shoul*, 173 A.3d at 690 n.4 (Wecht, J., concurring); see also *Middaugh*, 244 A.3d at 445 n.33 (Wecht, J., concurring and dissenting) (arguing “this Court has reified the *Gambone* doctrine for a half century past the expiration of the shelf life of the cases that nourished”).

*Gambone*.”<sup>74</sup> In short, Justice Wecht considers *Gambone* “an historical relic”<sup>75</sup> that lacked support when it was decided and has not been sufficiently justified since.

*Third*, Justice Wecht argues that the *Gambone* test invites judicial “legislating,”<sup>76</sup> in which courts are neither allowed nor qualified to engage. Specifically, because *Gambone* is “rooted in concepts of reasonableness and necessity,” it requires courts to “weigh[] the pros and cons” of economic laws and to “balance” competing interests,<sup>77</sup> which he argues “usurp[s] the legislative role.”<sup>78</sup> Granting such “broad judicial discretion,” Justice Wecht adds, “readily invite[s] arbitrariness,”<sup>79</sup> or at least “inconsistent application.”<sup>80</sup> In the end, for all these reasons, he believes the Court should “abandon [*Gambone*] . . . and embrace the federal rule that Justice Holmes foreshadowed more than a century ago.”<sup>81</sup> To Justice Wecht, Holmes captured the federal rule well in a 1920 letter: “If my fellow citizens want to go to Hell I will help them. It’s my job.”<sup>82</sup> The rest of this article shows that *Gambone* rightly rejected Holmes’s approach and is worth retaining today.

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<sup>74</sup> *Shoul*, 173 A.3d at 690–93 (Wecht, J., concurring); see also *Ladd*, 230 A.3d at 1119 n.6 (Wecht, J., dissenting) (arguing “[t]he closest this Court has come to offering a justification for the heightened rational basis standard” was in a 1971 decision observing that the Court has authority and is better-positioned than the U.S. Supreme Court to decide what test works best locally (citing *Pastor*, 272 A.2d at 490)).

<sup>75</sup> *Ladd*, 230 A.3d at 1119 (Wecht, J., dissenting).

<sup>76</sup> *Id.* at 1123.

<sup>77</sup> *Id.* at 1120, 1123.

<sup>78</sup> *Shoul*, 173 A.3d at 692 (Wecht, J., concurring).

<sup>79</sup> *Middaugh*, 244 A.3d at 446 n.34.

<sup>80</sup> *Shoul*, 173 A.3d at 688 (Wecht, J., concurring); see also *Ladd*, 230 A.3d at 1120 (Wecht, J., dissenting (arguing *Gambone* “is so nebulous that it cannot possibly be applied consistently throughout different cases and among different courts”)).

<sup>81</sup> *Shoul*, 173 A.3d at 694 (Wecht, J., concurring).

<sup>82</sup> *Shoul*, 173 A.3d at 693 n.7 (Wecht, J., concurring) (quoting Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski, (Mar. 4, 1920), in *Holmes–Laski Letters*, at 249 (Mark DeWolfe Howe ed., vol. 1) (1953)).

## II. Support for Pennsylvania’s heightened test.

The *Gambone* test is a better fit, when laws restrict the right to earn a living under Article I, Section 1 of the Pennsylvania Constitution, than the most tepid form of federal rational basis review. Justice Wecht’s critique rests on the premise that economic liberty is an unenumerated right that deserves little, if any, judicial protection. But when Section 1’s text was originally adopted, in 1776, Pennsylvanians would have understood it to include a natural right—in the Lockean sense—to engage in productive labor and to trade the fruits of that labor with others. Both the plain text (Part A) and the historical context in which it was adopted (Part B) confirm as much. Because the right to earn a living is enumerated, Justice Wecht’s doctrinal critiques of *Gambone* collapse. (Part C). Far from overstepping, applying *Gambone* is the *least* courts must do to protect economic liberty under Section 1.

### A. Textual support.

The Pennsylvania Supreme Court has long held that it has a duty to “undertake an independent analysis of the Pennsylvania Constitution.”<sup>83</sup> For that analysis, the “ultimate touchstone is the actual language of the Constitution itself,” which must be “interpreted in its popular sense, as understood by the people when they voted on its adoption.”<sup>84</sup> Or, to quote a much older case, constitutional provisions must be given “their plain, popular, obvious, and natural meaning.”<sup>85</sup> The Court takes this historical approach because, to its mind, the text “embodi[es] . . . the will of the voters who adopted it.”<sup>86</sup> Thus, by reading

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<sup>83</sup> *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

<sup>84</sup> *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006) (quotation marks and citation omitted).

<sup>85</sup> *Monongahela Navigation Co. v. Coons*, 6 Watts & Serg. 101, 114 (Pa. 1843).

<sup>86</sup> *Washington v. Dep’t of Pub. Welfare*, 188 A.3d 1135, 1143 (Pa. 2018) (citing *Stilp*, 905 A.2d at 939).

the text “in accordance with its common and approved usage” when it was ratified, the Court honors the people’s will rather than inserting its own.<sup>87</sup>

The Pennsylvania Supreme Court’s interpretive method sheds light on Section 1, which reads: “All men are born equally free and independent, and have certain inherent and infeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.”<sup>88</sup> This text has remained “practically unchanged” since its adoption as part of Pennsylvania’s original 1776 Declaration of Rights.<sup>89</sup> That raises the question: How would Pennsylvanians have understood Section 1’s text in 1776?

There are a few ways to approach that question, all of which point the same way: Pennsylvanians have an enumerated right to earn a living. The first is to assess Section 1’s “plain language.”<sup>90</sup> The Pennsylvania Supreme Court “has found it helpful to consult dictionaries” from “around the time” the provision was adopted or amended.<sup>91</sup> That is useful, because dictionaries published in the years immediately preceding adoption of the 1776 Declaration of Rights answer key textual questions.<sup>92</sup>

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<sup>87</sup> *McLinko v. Dep’t of State*, 279 A.3d 539, 577 (Pa. 2022), *cert. denied sub nom. Bonner v. Chapman*, 143 S. Ct. 573 (2023).

<sup>88</sup> Pa. Const. art I, § 1 (emphasis added).

<sup>89</sup> J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* 147, 259 (Octagon Books 1971) (1936); *see also* Robert E. Woodside, *Pennsylvania Constitutional Law* 114 (1985) (noting that Section 1 has remained almost “identical” since the founding).

<sup>90</sup> *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014) (“As an interpretive matter, the polestar of constitutional analysis undertaken by the Court must be the plain language of the constitutional provisions at issue.”).

<sup>91</sup> *McLinko*, 279 A.3d at 577.

<sup>92</sup> This article relies on Samuel Johnson’s *A Dictionary of the English Language* (4th ed. 1773), John Ash’s *The New and Complete Dictionary of the English Language* (1775), and William Perry’s *The Royal Standard English Dictionary to which is Fixed a Comprehensive Grammar of the English Language* (1775). References will be to “Johnson’s Dictionary,” “Ash’s Dictionary,” and “Perry’s Dictionary,” preceded by the volume number, if applicable.

What did it mean to be “born . . . independent”? *Independent* often meant “Not depending; not supported by any other; not relying on another; not controlled,”<sup>93</sup> or else “Having no dependence on another, free from undue influence, free from controul . . . .”<sup>94</sup> To be born independent, then, was to be autonomous by nature—to come into existence as the sort of being whose nature requires self-sustenance. That is a profound statement about human nature that informs Section 1’s conception of individual rights.

What did it mean to have “inherent and indefeasible rights”? *Right*, as a political concept, often meant “Immunity; privilege,”<sup>95</sup> “a just claim, property, interest, power, prerogative, privilege.”<sup>96</sup> *Inherent* often meant “Existing in something else, so as to be inseparable from it,” or “Naturally conjoined; innate; inborn.”<sup>97</sup> And *indefeasible* often meant “Not to be cut off; not to be vacated; irrevocable,”<sup>98</sup> “Incapable of being defeated, irreversible.”<sup>99</sup> Tying all these definitions together, in view of Section 1’s prefatory clause, to have inherent and indefeasible rights was to have just claims (rights) by virtue of being born independent (inherent) that cannot be taken away (indefeasible).

What did it mean to “enjoy[] . . . life and liberty”? *Enjoy* often meant “To feel or perceive with pleasure; to have a pleasing sense of; to be delighted with,” or “To obtain possession or fruition of.”<sup>100</sup> *Life* often meant “Union and co-operation of soul with body; vitality; animation, opposed to an *inanimate state*,” or more directly the “Enjoyment, or

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<sup>93</sup> 1 Johnson’s Dictionary (entry for “independent”).

<sup>94</sup> 1 Ash’s Dictionary (entry for “independent”).

<sup>95</sup> 2 Johnson’s Dictionary (entry for “right”).

<sup>96</sup> 2 Ash’s Dictionary (entry for “right”).

<sup>97</sup> 1 Johnson’s Dictionary (entry for “inherent”); *see also* 1 Ash’s Dictionary (similar entry for “inherent”).

<sup>98</sup> 1 Johnson’s Dictionary (entry for “indefeasible”).

<sup>99</sup> 1 Ash’s Dictionary (entry for “indefeasible”).

<sup>100</sup> 1 Johnson’s Dictionary (entry for “enjoy”); *see also* Perry’s Dictionary (similar entry for “enjoy”).

possession of existence, as opposed to *death*.”<sup>101</sup> And *liberty* often meant “Freedom, as opposed to slavery,” “Exemption from tyranny or inordinate government,” or broadly “Freedom, as opposed to necessity” (quoting, as illustration, John Locke’s note that “*Liberty* is the power in any agent to do, or forbear, any particular action, according to the determination, or thought of the mind”).<sup>102</sup> To enjoy life and liberty, then, was to sustain and even relish existence (enjoy life) by acting according to one’s own mind (liberty).

What did it mean to “acquir[e], [and] possess[] . . . property”? *Acquire* often meant “To gain by one’s own labor or power,” or simply “To come to; to attain.”<sup>103</sup> *Possess* often meant “To have as an owner; to be master of; to enjoy or occupy actually,” or “To seize; to obtain.”<sup>104</sup> And *property*, in the political sense, often meant a “Right of possession” or “The thing possessed” (quoting, as illustration, John Locke’s note that “*Property*, whose origin[] is from the right a man has to use any of the inferior creatures, for subsistence and comfort, is for the sole advantage of the proprietor, so that he may even destroy the thing that he has *property* in”).<sup>105</sup> To acquire and possess property, then, was for a person to produce (acquire) or control (possess) a thing to which he has a right (property).

Finally, what did it mean for a person to “pursu[e] their own happiness”? *Pursue* often meant “To go on; to proceed,”<sup>106</sup> or “to chase; to prosecute, to continue; to imitate, to follow as an example.”<sup>107</sup> And *happiness*, as a state of being, often meant “Felicity; state

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<sup>101</sup> 2 Johnson’s Dictionary (entry for “life”); *see also* 1 Ash’s Dictionary (similar entry for “life”).

<sup>102</sup> 2 Johnson’s Dictionary (entry for “liberty”); *see also* 1 Ash’s Dictionary (similar entry for “liberty”).

<sup>103</sup> 1 Johnson’s Dictionary (entry for “acquire”); *see also* 1 Ash’s Dictionary (similar entry for “acquire”).

<sup>104</sup> 2 Johnson’s Dictionary (entry for “possess”); *see also* 2 Ash’s Dictionary (similar entry for “possess”).

<sup>105</sup> 2 Johnson’s Dictionary (entry for “property”); *see also* 2 Ash’s Dictionary (similar entry for “property”).

<sup>106</sup> 2 Johnson’s Dictionary (entry for “pursue”).

<sup>107</sup> 2 Ash’s Dictionary (entry for “pursue”).

in which the desires are satisfied.”<sup>108</sup> To pursue happiness, then, was for a person to direct herself toward (pursue) achieving her values or desires (happiness).

Taken together, these definitions paint a coherent picture of how Pennsylvanians would have understood Section 1’s text when it was adopted in 1776. That text starts by recognizing that people are by nature autonomous and self-sustaining (born independent). Section 1 then secures certain rights that flow from that nature and cannot be taken away (inherent and inalienable): the freedom to take the actions (enjoy liberty) and to produce, obtain, and control the objects (acquire and possess property) necessary both to stay alive (life) and to make life worth living (happiness). Section 1’s “plain, popular, obvious, and natural” meaning squarely protects the right to live by productive labor—to earn a living.

### *B. Historical support.*

If Section 1’s ordinary meaning did not resolve the question, the historical context in which it was adopted confirms that the right to earn a living is inherent in Pennsylvania. The Pennsylvania Supreme Court has held that the “untapped history” of a provision can inform its meaning.<sup>109</sup> Three historical points are relevant here: Section 1’s Lockean roots, surrounding text in the original 1776 Declaration of Rights, and the fact that founding-era Pennsylvanians and others commonly referred to property as the product of one’s labor.

*First*, intellectual origins. Section 1 is what scholars have termed a “Lockean Natural Rights Guarantee” (LG).<sup>110</sup> Virginia’s LG, written by George Mason, was the first

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<sup>108</sup> 1 Johnson’s Dictionary (entry for “happiness”); *see also* 1 Ash’s Dictionary (similar entry for “happiness”).

<sup>109</sup> *Edmunds*, 586 A.2d at 896.

<sup>110</sup> *See, e.g.*, Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1303–07 (2015) (coining the label “Lockean Natural Rights Guarantee”); Anthony B. Sanders, *Social Contracts: The State Convention*

one adopted in 1776.<sup>111</sup> And Pennsylvania’s LG, adopted just a few months later, was the second.<sup>112</sup> These provisions are “Lockean” in that their phrasing and understanding can be traced directly back to the work of 17th century English philosopher John Locke.<sup>113</sup> The basic sequence looks like this: Locke’s political writings → George Mason’s first draft of Virginia’s 1776 Declaration of Rights → Pennsylvania’s 1776 Declaration of Rights.

Start with Locke. He famously wrote that people “being once born, have a right to their preservation.”<sup>114</sup> But life does not preserve itself. It “requires labour and materials to work on.”<sup>115</sup> And that requires thought. People must apply “reason to make . . . the best advantage of life, and convenience.”<sup>116</sup> Guided by reason, people can conduct “industry,” “[t]he labour of [their] body, and the work of [their] hands,” to produce “the necessary support of life.”<sup>117</sup> That “introduces private possessions,”<sup>118</sup> which leads to government.<sup>119</sup> According to Locke, people form governments “for the mutual preservation of their lives, liberties and estates . . . property.”<sup>120</sup> Government acts properly, therefore, when it serves

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*Drafting History of the Lockean Natural Rights Guarantees*, 93 UMKC L. Rev. 641, 646 (2025) (agreeing “the appellation of ‘Lockean’ is appropriate”).

<sup>111</sup> Calabresi & Vickery, *supra* n.110, at 1313–17.

<sup>112</sup> *Id.* at 1317–18.

<sup>113</sup> *Id.* at

<sup>114</sup> John Locke, *Second Treatise of Civil Government* § 25 (1690).

<sup>115</sup> *Id.* § 35.

<sup>116</sup> *Id.* § 26.

<sup>117</sup> *Id.* § 27; *see also id.* § 34 (writing that God “gave [earth] to the use of the industrious and rational, (and labour was to be his title to it;”), §§ 37, 46 (similar points).

<sup>118</sup> *Id.* § 35.

<sup>119</sup> *See id.* § 45 (explaining how people, “by compact and agreement, settled the property which labour and industry began”).

<sup>120</sup> *Id.* § 123.

“the great and chief end” of “preserv[ing] [people’s] property” and “honest industry,” and improperly when it “extend[s] farther, than the common good.”<sup>121</sup>

These, in broad strokes, are some of the key concepts in Locke’s political theory. And they had a deep influence on the American founders.<sup>122</sup> George Mason is one salient example. In 1775, he gave a speech steeped in Lockean thought, declaring:

We came equals into this world, and equals shall we go out of it. All men are by nature born equally free and independent. To protect the weaker from the injuries and insults of the stronger were societies first formed; when men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of the thing required. Every society, all government, and every kind of civil compact therefore, is or ought to be, calculated for the general good and safety of the community. Every power, every authority vested in particular men is, or ought to be, ultimately directed to this sole end; and whenever any power or authority whatever extends further, or is of longer duration than is in its nature necessary for these purposes, it may be called government, but it is in fact oppression.<sup>123</sup>

Mason incorporated these ideas the following year in his original draft of the first section in Virginia’s Declaration of Rights, which read:

That all Men are born equally free and independant, and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety.<sup>124</sup>

Mason’s first draft strongly echoes Locke.<sup>125</sup> And, although the draft was later revised to appease Virginia slaveholders, it was widely circulated in the colonies—and that is the

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<sup>121</sup> *Id.* §§ 42, 124, 131, 134.

<sup>122</sup> See, e.g., Jonathan Boucher, *A View of the Causes and Consequences of the American Revolution in Thirteen Discourses* (1797), at 531 (critic of the American Revolution lamenting that “Mr. Locke had the good fortune to enjoy a pre-eminant reputation for political wisdom” and that “[t]ill the American war, he was looked up to as an oracle: and the whole nation implicitly pinned their faith in his politics, on his dogmas”).

<sup>123</sup> Calabresi & Vickery, *supra* n.110, at 1314 (quoting George Mason, *Remarks on Annual Elections for the Fairfax Independent Company* (Apr. 17–26, 1775), in 1 *The Papers of George Mason, 1725–1792*, at 229 (Robert A. Rutland ed., 1970)).

<sup>124</sup> Calabresi & Vickery, *supra* n.110, at 1315 (quoting George Mason, *First Draft of the Virginia Declaration of Rights* (May 20–26, 1776), in 1 *The Papers of George Mason, 1725–1792*, at 276–77 (Robert A. Rutland ed., 1970)).

<sup>125</sup> Calabresi & Vickery, *supra* n.110, at 1316–17.

version Pennsylvania’s framers adopted (with minor revisions) just a few months later.<sup>126</sup>

As the Pennsylvania Supreme Court has recognized, they too were influenced by Locke.<sup>127</sup>

*Second*, constitutional context. The text surrounding Section 1’s adoption evinces a respect for natural rights generally and productive work specifically. At the Constitutional Convention of 1776, Pennsylvanians wrote that they intended to form a government “that would preserve and establish our liberties, and [] transmit them inviolate to posterity.”<sup>128</sup> Their goal, they explained, was to “enable . . . individuals . . . to enjoy their natural rights . . . and to promote their safety and happiness.”<sup>129</sup> And the original frame of government made clear how foundational those natural rights would be: “the Declaration of Rights is hereby declared to be a part of the constitution of this Commonwealth, and ought never to be violated on any pretense whatever.”<sup>130</sup> These Lockean ideas—that people have natural rights and government exists to protect them—were meant to last.

That vision is especially notable given an addition that Benjamin Franklin, editor of the Constitution of 1776, made to the Declaration of Rights. He added “Industry” to the list of “fundamental principles . . . necessary to preserve the Blessings of Liberty, and Keep the Government free,” and to which the people “have a right to exact a due and

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<sup>126</sup> See *id.* at 1315–18 (explaining how Mason’s first draft of Virginia’s LG, before edits were made to appease slaveholders, was circulated and adopted in Pennsylvania).

<sup>127</sup> See *Driscoll v. Corbett*, 69 A.3d 197, 208 (Pa. 2013) (noting “the drafters of the Pennsylvania Constitution of 1776 adhered to the theories of Locke, Montesquieu, ‘and other natural law philosophers’” and that “natural-law/inherent-rights” ideas were part of the “widely-prevailing political philosophy at the time the nation was founded” (quoting *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, A.2d 1331, 1334 (1986)); see also Selsam, *supra* n.89, at 147, 170–76 (explaining that the Pennsylvania Constitution of 1776 was heavily influenced by the writings of John Locke and other prominent natural rights philosophers).

<sup>128</sup> *Proceedings Relative to the Calling of the Conventions of 1776 and 1790*, at 43 (J. S. Wiestling ed. 1825).

<sup>129</sup> *Id.* at 54; see also Pa. Const. of 1776, Declaration of Rights, Preamble (“to enable the individuals who compose it to enjoy their natural rights”).

<sup>130</sup> Pa. Const. of 1776, Frame of Government, § 46

constant regard . . . from their Legislatures . . . in the making and executing such laws as are necessary for the good government of the state.”<sup>131</sup> Say that again: At the founding, “Industry” was declared a “fundamental principle[]” of Pennsylvania law to which the people had a right to demand “due and constant regard.”

And what was industry? To Franklin’s mind, it was to “be always employ’d in something useful[.]”<sup>132</sup> To the ordinary person, it was “Diligence; assiduity; habitual or actual laboriousness.”<sup>133</sup> To Locke, it was the source of “property” and therefore a core liberty for which to “secure protection and encouragement . . . against the oppression of power.”<sup>134</sup> Adding industry to the Declaration of Rights reinforced that, when Section 1 referred to “independent” people with rights to “enjoy . . . life,” “acquir[e] . . . property,” and “pursu[e] their own happiness,” it had productive work—each person’s freedom to earn his own living—front of mind.

*Third*, public discourse. Early Pennsylvanians often described industry and labor as both the source of life and property and a virtue. Nearly a century before the American Revolution, William Penn welcomed “[i]ndustrious husbandmen and day laborers,” and “[l]aborious handicrafts, especially carpenters, masons, smiths, weavers, tailors, tanners, shoemakers, shipwrights, etc.,” to his new land, where they could apply their “ingenious spirits” to pursue their “means of subsisting” and “livelihood.”<sup>135</sup> And after the war, “A

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<sup>131</sup> Pa. Const. of 1776, Declaration of Rights § XIV; Selsam, *supra* n.89, at 164.

<sup>132</sup> Benjamin Franklin, *Autobiography of Benjamin Franklin* 66 (Frank Woodworth Pine ed., 1916).

<sup>133</sup> 1 Johnson’s Dictionary (entry for “industry”).

<sup>134</sup> Locke, *Second Treatise* § 42.

<sup>135</sup> William Penn, *Some Account of the Province of Pennsylvania, in William Penn and the Founding of Pennsylvania: A Documentary History* § 15 (Jean R. Soderlund ed., Univ. of Pennsylvania Press 1983) (1681) (emphasis omitted); *cf. Edmunds*, 586 A.2d at 896 (recognizing that the Constitution of 1776 “reduce[d] to

Farmer” critiqued Pennsylvania “commercial regulations” as “impolitic, oppressive, and unjust” for depriving “the full liberty of our faculties, and the enjoyment of property arising from them.”<sup>136</sup> He added that people cannot “pursue such advantages, to seek pleasure, to avoid pain, to support our existence, and to satisfy our wants by the means of a multitude of productions . . . which we cannot acquire but by the full enjoyment of our faculties and of our labor.”<sup>137</sup>

Speeches made the same point. In 1775, for example, a Pennsylvania newspaper reprinted a speech honoring the Boston Massacre that declared “that personal freedom is the natural right of every man; and that property or an exclusive right to dispose of what he has honestly acquired by his own labor, necessarily arises therefrom, are truths which common sense has placed beyond the reach of contradiction,” and that maligned “the late parliament of Great Britain [for] hav[ing] assumed the power of giving away that property which the Americans have earned by their labor.”<sup>138</sup> In 1778, likewise, Pennsylvanian and signatory to the Declaration of Independence James Wilson gave a Fourth of July speech that praised “industry” and “honest labor” as “among the virtues of a good citizen,” for from industry “each gains from all, and all gain from each.”<sup>139</sup>

All of this historical context—Section 1’s roots in Lockean political thought, the framers’ insistence on securing natural rights, Franklin’s addition of “Industry” as one of the “fundamental principles” in the 1776 Declaration of Rights, and the contemporaneous

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writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn’s charter in 1681”).

<sup>136</sup> A Farmer, *To the Yeomanry of Pennsylvania*, Independent Gazetteer (Aug. 14, 1790), at 2.

<sup>137</sup> *Id.*

<sup>138</sup> Joseph Warren, *An Oration*, The Pennsylvania Evening Post (March 25, 1775), at 1.

<sup>139</sup> James Wilson, *Oration*, The Pennsylvania Gazette (July 9, 1788), at 5–6 (emphasis omitted).

writings and speeches treating productive work as the fountainhead of life and property—confirm what Section 1’s plain text makes clear: It protects the right to earn a living. That is how Pennsylvania’s founding generation would have understood their rights to “enjoy[] . . . life and liberty,” “acquir[e] . . . property,” and “pursu[e] their own happiness.” The alternative—that Section 1 protects these things without protecting the productive labor that is necessary to achieve them—cannot be reconciled with Section 1’s text or history.

### *C. Doctrinal support.*

Recall this article’s central claim: that the *Gambone* rational basis test is a better fit for the right to earn a living under Section 1 than the federal conceivability test from cases like *Lee Optical*. As a doctrinal matter, that conclusion necessarily follows from the textual and historical findings above.

The Pennsylvania Supreme Court has declared rights listed in the Declaration of Rights to be “fundamental.”<sup>140</sup> That includes all of the “inherent and inalienable rights” listed in Section 1.<sup>141</sup> The Court has recognized that “included within the right to possess property and pursue happiness, is the right to pursue a chosen occupation.”<sup>142</sup> And it has described that right as “undeniably important”<sup>143</sup> and as “a distinguishing feature of our

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<sup>140</sup> See *Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 947 (2013) (describing the “rights reserved to the people in Article I of our Constitution” as “fundamental”); see also *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 607 (2002) (referring to “the fundamental rights guaranteed by the Pennsylvania Declaration of Rights”).

<sup>141</sup> See, e.g., *T.G.A. v. Dep’t of Educ.*, 348 A.3d 1043, 1068 (Pa. 2025) (holding that the right to “reputation” listed in Section 1 is “fundamental”).

<sup>142</sup> *Ladd*, 230 A.3d at 1108 (citing *Nixon*, 839 A.2d at 288, *Adler v. Montefiore Hosp. Ass’n of W. Pa.*, 311 A.2d 634, 640–41 (Pa. 1973), and *Gambone*, 101 A.2d at 646–37); see also, e.g., *Com. ex rel. Woodruff v. Humphrey*, 136 A. 213, 216 (Pa. 1927) (“Does this classification unwarrantably interfere with the equality of opportunity of ‘acquiring, possessing and protecting property’ (section 1, article 1, of our state Constitution), by pursuing one’s business of profession, guaranteed by the Constitution?”).

<sup>143</sup> *Nixon*, 839 A.2d at 287.

way of life in this country.”<sup>144</sup> These statements alone show that the Court is *describing* the right to earn a living the way it would describe a fundamental right, even while continuing to *classify* the right as “not fundamental.”<sup>145</sup>

But why? It’s one thing for the Pennsylvania Supreme Court to incorporate federal tiered scrutiny under Section 1, even though that doctrine was invented 162 years after the 1776 Declaration of Rights was adopted (*Carolene Products*) for a textually distinct federal provision (Due Process Clause).<sup>146</sup> It’s quite another for the Court march in lockstep with the U.S. Supreme Court in leaving the right to earn a living “out in the cold.”<sup>147</sup> After all, the Pennsylvania Supreme Court says that it has a duty to independently analyze the state constitution.<sup>148</sup> Yet the Court has never explained *why* the right to earn a living would not be fundamental under Section 1. Not even once, and not even in majority opinions written by Justice Wecht.<sup>149</sup> That silence, in the face of ample textual and historical evidence that Section 1 protects the right to earn a living, is untenable.

Because the right to earn a living is fundamental in Pennsylvania, it deserves real judicial protection. That typically means strict scrutiny.<sup>150</sup> Perhaps that is warranted, but

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<sup>144</sup> *Moore v. Jamieson*, 306 A.2d 283, 288 (Pa. 1973).

<sup>145</sup> *Ladd*, 230 A.3d at 1108.

<sup>146</sup> *Cf. J.C.D. v. A.L.R.*, 303 A.3d 425, 339–40 (Pa. 2023) (Wecht, J., concurring) (arguing that “Article 1, Section 1 of our Commonwealth’s charter has been repeatedly (but largely unthinkingly) crammed into an interpretive equivalency with the Due Process Clause of the Fourteenth Amendment, notwithstanding the lack of any textual basis for equalizing the procedural rights of the latter with the obviously substantive rights of the former”).

<sup>147</sup> *Golden Glow Tanning Salon, Inc.*, 52 F.4th at 982 (Ho, J., concurring).

<sup>148</sup> *Edmunds*, 586 A.2d at 895.

<sup>149</sup> *See Germantown Cab Co. v. Philadelphia Parking Auth.*, 206 A.3d 1030, 1042–43 (Pa. 2019) (Wecht, J.) (“Because Germantown’s right to operate its fleet of partial taxicabs does not impact a fundamental right, we must apply rational basis review.”).

<sup>150</sup> *See, e.g., T.G.A.*, 348 A.3d at 1068 (right to “reputation” listed in Section 1 was “fundamental” and triggered “strict scrutiny”).

this article need not go that far. The goal here is simply to defend the *Gambone* test over the federal conceivability test that Justice Wecht has urged the Court to adopt. And if that is the choice, *Gambone* is superior. Unlike strict scrutiny, *Gambone* presumes that laws are constitutional and puts the burden on a challenger to prove otherwise. Like strict scrutiny, however, *Gambone* turns on factual evidence and considers whether laws impose needless burdens on the restricted right. These two features ensure that fundamental rights receive robust protection. And the federal conceivability test has neither of them. Accordingly, if the Court must choose between *Gambone*—an engaged test that involves real scrutiny<sup>151</sup>—and the federal conceivability test—a tepid standard that is “tantamount to no review at all”<sup>152</sup>—*Gambone* better reflects the right to earn a living’s status as a fundamental right.

The Court’s decision in *Ladd v. Real Estate Commission* (2020), puts the stakes on full display. There, Sally Ladd ran a small business helping people coordinate short-term rentals online (i.e., helping property owners use sites like Airbnb).<sup>153</sup> But the government wanted Sally to obtain a real estate broker’s license, which would have required her to take over 300 hours of courses devoted to traditional real estate practice, apprentice under a licensed broker for three years, and open a brick and mortar office.<sup>154</sup> In practice, the law would have required Sally to spend years of her life learning about a job she did not want to do, and to spend thousands of dollars maintaining an office she did not need and could not afford.<sup>155</sup> All this, she argued, failed the *Gambone* test as-applied to her.<sup>156</sup>

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<sup>151</sup> See *supra* Section I(B).

<sup>152</sup> *Beach Commc’ns, Inc.*, 508 U.S. 307, 323 n.3 (Stevens, J., concurring).

<sup>153</sup> *Ladd*, 230 A.3d at 1096, 1100–1101.

<sup>154</sup> *Id.* at 1098–1100, 1102.

<sup>155</sup> *Id.* at 1104–06.

<sup>156</sup> *Id.*

The Commonwealth Court dismissed Sally’s case for failure to state a claim. In its view, real estate licensing rationally protects buyers and sellers of real estate from abuse, so Sally’s factual allegations about the law’s personal impact on her were irrelevant.<sup>157</sup> But the Pennsylvania Supreme Court reversed. Perhaps the Commonwealth Court’s analysis would have been correct under the federal conceivability test. *Gambone*, though, is “more restrictive.”<sup>158</sup> Sally’s factual allegations about her “actual business model” mattered, and taking them as true, she had stated a viable claim that forcing her to spend so much time and money learning how to do a different job—especially when comparable services like apartment and duplex managers were exempt from the law—was “unreasonable, unduly oppressive and patently beyond the necessities of the case.”<sup>159</sup> On remand, the case went to trial and Sally built a factual record sufficient to carry her burden under *Gambone*.<sup>160</sup>

*Ladd* is what it looks like when courts consider a right important and give it real protection. Of course, Justice Wecht disagreed. To him, the majority’s application of the *Gambone* test only reinforced that the test is “nebulous” “in the eye of the beholder,” and invites judicial “legislating.”<sup>161</sup> But Justice Wecht does not lodge these critiques when the Court applies strict scrutiny to assess whether a law furthers “a compelling governmental

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<sup>157</sup> See *Ladd v. Real Est. Comm’n of Commonwealth*, 187 A.3d 1070, 1077–78 (Pa. Commw. Ct. 2018).

<sup>158</sup> *Ladd*, 230 A.3d at 1108 & n.14 (distinguishing the federal conceivability test applied in *Heller*, 509 U.S. at 319–21).

<sup>159</sup> *Id.* at 1111–16.

<sup>160</sup> *Ladd v. Real Est. Comm’n*, No. 321 M.D. 2017, 2022 WL 19332047, at \*17 (Pa. Commw. Ct. Oct. 31, 2022) (“The evidence presented in this matter showed that, as applied to Ladd’s short-term vacation property management services, RELRA’s licensing requirements are unreasonable, unduly oppressive, and patently beyond the necessities of the case. Additionally, RELRA’s licensing requirements do not bear a real and substantial relation to protecting the public from harm by Ladd’s short-term vacation property management services.”).

<sup>161</sup> *Ladd*, 230 A.3d at 1120–23 (Wecht, J., dissenting).

interest” in a “narrowly tailored” way,<sup>162</sup> concepts open to all the same concerns he raises about *Gambone*. The difference? Those cases involve rights spelled out in Section 1’s text, whereas the right to earn a living, Justice Wecht contends, is “unenumerated.”<sup>163</sup> With all due respect, he is mistaken.

### Conclusion

The debate over *Gambone* ultimately turns on a basic question: What does Article I, Section 1 protect? Justice Wecht’s critique assumes that the right to earn a living is not really a right at all—that it’s just something judges discover “somewhere within [Section 1’s] secret repository of unenumerated rights” when they dislike an economic law.<sup>164</sup> But Section 1’s text and historical context in the 1776 Declaration of Rights show otherwise: It secured a natural right—in the Lockean sense—to engage in productive labor and to trade the fruits of that labor with others. Because the right to earn a living is fundamental under Section 1, the Pennsylvania Supreme Court was correct to retain *Gambone* even after the U.S. Supreme Court pivoted to the tepid conceivability test in *Lee Optical*. Due respect for Pennsylvania’s independent Constitution demands nothing less.

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<sup>162</sup> See *T.G.A.*, 348 A.3d at 1068 (applying strict scrutiny to protect fundamental right to “reputation” under Section 1 (quoting *Nixon*, 839 A.2d at 287)). Justice Wecht joined this opinion.

<sup>163</sup> *Ladd*, 230 A.3d at 1122 (Wecht, J., dissenting).

<sup>164</sup> *Id.*