



## RATIONAL BASIS WITH ECONOMIC BITE

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### INTRODUCTION

The central thesis of *The Classical Liberal Constitution* is that the normative theory of classical liberalism underlies the Constitution, and indeed “the constitutional provisions with the longest staying power have consistently drawn their strength from classical liberal theory.”<sup>1</sup> It is therefore surprising when Richard Epstein observes that “the due process guarantee has succeeded because its essential

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<sup>1</sup> RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 8-9 (2014). As Epstein explains it, classical liberal theory “starts from the twin pillars of private property and limited government, and seeks to make sure that each and every government action improves the overall welfare of the individuals in the society it governs.” *Id.* at ix.

ingredients map onto the requirements for the rule of law, precisely because its procedural requirements are not tethered to any particular view of substantive law.”<sup>2</sup> Just a few pages later, however, Epstein explains that the scope of the due process guarantee is defined by a Lockean scheme of natural rights.<sup>3</sup> The Due Process Clauses protect “life, liberty, and property,” the phrase being a self-conscious invocation of “John Locke’s famous trio of ‘lives, liberties, and estates,’ the preservation of which explains why men quit the state of nature and put themselves under government.”<sup>4</sup> The Lockean conception of natural rights, of course, is tethered to a particular view of substantive law and excludes competing conceptions.<sup>5</sup> For this reason, Epstein acknowledges “a tight connection between procedural bias and the substantive protection of life, liberty, and property.”<sup>6</sup> So the due process guarantee turns out not to be so substantively neutral.

Moreover, to judge whether a state’s intrusion upon life, liberty, or property might be justified, one must consider the scope of the state’s police power—another concept based upon an “underlying normative theory.”<sup>7</sup> Thus, even if so-called fundamental rights are not at stake, a court applying the “rational basis” standard of review must still determine whether the law serves a legitimate gov-

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<sup>2</sup> *Id.* at 318 (citing LON L. FULLER, *THE MORALITY OF LAW* 39 (1965)).

<sup>3</sup> *Id.* at 322.

<sup>4</sup> *Id.* (quoting JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, ch. IX, § 123 (1690)).

<sup>5</sup> See generally Steven Menashi, *Cain as His Brother’s Keeper: Property Rights and Christian Doctrine in Locke’s Two Treatises of Government*, 42 *SETON HALL L. REV.* 185, 250 (2012) (contrasting Lockean property rights with classical and religious alternatives).

<sup>6</sup> EPSTEIN, *supra* note 1, at 318.

<sup>7</sup> *Id.* at 304.

ernmental purpose.<sup>8</sup> As legal scholars have noted, “the implicit normative premises of rational basis analysis” involve “assumptions about what ends are sensible or legitimate to pursue.”<sup>9</sup>

In most contemporary contexts, however, rational basis review entails “minimal scrutiny in theory and virtually none in fact.”<sup>10</sup> Without a normative framework for distinguishing between legitimate and illegitimate purposes, “the Supreme Court occasionally abandons the effort altogether and accepts any justifying rationale advanced by the state in litigation.”<sup>11</sup>

In his new book, Epstein argues that such a normative framework underlies the Constitution, that the constitutional text must be read “in sync” with that framework,<sup>12</sup> and—most intriguingly—that judges in fact gravitate to a classical liberal framework when

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<sup>8</sup> See Robert W. Bennett, “Mere” Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049, 1070 (1979) (“The rationality requirement . . . does not allow consideration of merely any legislative purpose. It limits the purposes that may be considered to those which are ‘legitimate.’”); see also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 38 (2d ed. 1986) (“[T]he first question must be whether the subject matter to which the executive or legislature, state or federal, has addressed itself can be related to the sphere of action assigned to it.”); H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 228-29 (2011) (noting that rational basis review “flows from a presupposition of American constitutionalism” that “in its dealings with persons, the American government is under a constitutional obligation to act rationally. Rationality in turn requires both that public actions make sense and that they make good sense, that they have some legitimate purpose”).

<sup>9</sup> Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 932 (2010); see also Powell, *supra* note 8, at 229 (“The constitutional law of liberty and equality is, in short, a mode of reasoning about what is rational in the public sphere—and rational in this broad and partly normative sense.”).

<sup>10</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>11</sup> Richard H. Fallon Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 316 n 38 (1993).

<sup>12</sup> EPSTEIN, *supra* note 1, at 53-54.

attempting to give life to constitutional guarantees.<sup>13</sup> If that argument is correct, then courts taking rational basis review seriously should be able to identify some governmental purposes that conflict with the constitutional design.

One area in which the classical liberal constitution seems to be reasserting itself against the contemporary version of rational basis review is in the emerging circuit split over whether in-state economic protectionism is a legitimate state interest and hence a constitutional justification for economic regulation. So far, three circuits have concluded that a state purpose of protecting a local industry from other in-state competitors is illegitimate—and therefore a law with that purpose would be invalid even under the rational basis test. In this article we consider the implications of this position for reinvigoration of the classical liberal constitution. Part I recounts how rational basis review has changed over time. Part II examines the circuits' recent application of that standard to statutes enacted for the purpose of in-state economic protectionism. Part III explores the underlying normative shift that might account for the emergence of this new protection for economic liberty. Part IV considers how the same framework might be extended.

## I

Under the rational basis test, as the Supreme Court put it eighty years ago, “[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor

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<sup>13</sup> See, e.g., *id.* at 9 (“[L]egitimate ambiguity is sometimes unavoidable, and on those matters constitutional text and political theory no longer fall into watertight compartments. At this juncture our basic conception of the proper scope of government action will, and should, influence the resolution of key interpretive questions.”); *id.* at 13, 229 (identifying the dormant Commerce Clause as “a judicial invention that is not easily defensible on narrow originalist grounds” but “is consistent with the original classical liberal synthesis”).

discriminatory, the requirements of due process are satisfied.”<sup>14</sup> The test proceeds from the view that the courts should not “sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.”<sup>15</sup> Thus, “where the legislative judgment is drawn in question,” judicial review “must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.”<sup>16</sup>

Because courts “never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”<sup>17</sup> The legislative choices “may be based on rational speculation unsupported by evidence or empirical data,”<sup>18</sup> and the statutes “will be set aside only if no grounds can be conceived to justify them.”<sup>19</sup> Thus, even if the law’s actual purpose or the state’s articulated justification is insufficient to uphold the rationality of the legislation, a court must seek out other “plausible reasons” for validating it.<sup>20</sup> It follows apodictically that “[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.”<sup>21</sup>

Once a court posits some legitimate but hypothetical purpose the legislation could serve, it does not matter whether the means

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<sup>14</sup> *Nebbia v. People of New York*, 291 U.S. 502, 537 (1934).

<sup>15</sup> *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

<sup>16</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).

<sup>17</sup> *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

<sup>18</sup> *Id.*

<sup>19</sup> *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 809 (1969). *But see Beach Commc’ns*, 508 U.S. at 323 n.3 (Stevens, J., concurring in the judgment) (“Judicial review under the ‘conceivable set of facts’ test is tantamount to no review at all.”).

<sup>20</sup> *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

<sup>21</sup> *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

adopted to achieve that purpose are efficient or narrowly tailored. “[T]he law need not be in every respect logically consistent with its aims to be constitutional. It 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> Except in the most extreme instance, the over- or under-inclusiveness of a statute or regulation—which is fatal when a fundamental right is constrained—does not mean it lacks a rational basis.<sup>23</sup>

In *The Classical Liberal Constitution*, Epstein traces the rational basis test to a “progressive worldview” that, as he understatedly notes, “saw little danger in expanding federal power” and therefore adopted a “strong progressive presumption of constitutionality.”<sup>24</sup>

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<sup>22</sup> *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 487-88 (1955).

<sup>23</sup> *Flemming v. Nestor*, 363 U.S. 603, 612 (1960) (“[I]t is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply.”); *Dukes*, 427 U.S. at 303 (“States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.”); see also *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting) (“The Court holds today that regardless of the arbitrariness of a classification it must be sustained if any state goal can be imagined that is arguably furthered by its effects. This is so even though the classification’s underinclusiveness or overinclusiveness clearly demonstrates that its actual basis is something other than that asserted by the State, and even though the relationship between the classification and the state interests which it purports to serve is so tenuous that it could not seriously be maintained that the classification tends to accomplish the ascribed goals.”). But see *Nordlinger v. Hahn*, 505 U.S. 1, 35 (1992) (“[I]n some cases the underinclusiveness or the overinclusiveness of a classification will be so severe that it cannot be said that the legislative distinction ‘rationally furthers’ the posited state interest.”).

<sup>24</sup> EPSTEIN, *supra* note 1, at 305, 16. See also Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1481 (2008) (“The ‘presumption of constitutionality’ was first used to reverse the scrutiny that the Progressive Era Court had been employing to assess the reasonableness of restrictions on liberty under the Due Process Clauses.”).

That presumption, Epstein argues, conflicts with the constitutional design.<sup>25</sup> As he has written before:

There is no place for rational basis review in evaluating any challenge to any government tax or regulation. In all cases, the specific guarantees of the Constitution are written in categorical form, such that the rational basis test inverts the proper assumption behind our whole system of limited government under a strong constitution, motivated by a strong presumption of distrust of government actors at all levels.<sup>26</sup>

Yet the Supreme Court had invoked rationality review, and even the presumption of constitutionality, long before the New Deal revolution. The canonical formulation was articulated by the first Justice Harlan in *Mugler v. Kansas* in 1887.<sup>27</sup> The plaintiffs in that case argued a law prohibiting the manufacture and sale of liquor for personal use was beyond the police power of the state and therefore violated the Due Process Clause of the Fourteenth Amendment. Justice Harlan explained that it was for the legislative branch “to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.”<sup>28</sup> But, he continued, “[i]t does not at all follow that every statute enacted ostensibly for the promotion of these

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<sup>25</sup> EPSTEIN, *supra* note 1, at 578 (“It takes a certain degree of intellectual ingenuity to convert the Constitution into a doctrine that tolerates all these monopoly interventions. But through two words—rational basis—the progressives have introduced a battering ram.”).

<sup>26</sup> Richard A. Epstein, *Judicial Engagement with the Affordable Care Act: Why Rational Basis Analysis Falls Short*, 19 GEO. MASON L. REV. 931, 931 (2012).

<sup>27</sup> 123 U.S. 623 (1887).

<sup>28</sup> *Id.* at 661.

ends is to be accepted as a legitimate exertion of the police powers of the state.”<sup>29</sup> Although “every possible presumption is to be indulged in favor of the validity of a statute,” the presumption was nonetheless rebuttable:

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, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.<sup>30</sup>

With this formulation, the Court recognized a parity between laws that invade fundamental rights and laws that lack a rational basis in the police power: Both requirements stood upon the same footing.<sup>31</sup> In the event, the Court in *Mugler* held the law had a real relationship to the protection of public safety and was therefore constitutional. More importantly, however, the case gave rise to judicial

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<sup>29</sup> *Id.*

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

<sup>31</sup> See Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 953 (1927) (“In this formula three separate requirements are laid down: (1) the object of the legislature must be permissible; (2) the means must have a substantial relation to the end; and (3) fundamental rights must not be infringed.”); see also Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 426 (2010) (“[I]f the Court determined that either the ends or means chosen exceeded the legislature’s legitimate authority, the law was condemned as a violation of due process.”); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 637 (1994) (“[T]he Court’s approach to the nature and scope of legislative power was essentially categorical—laws either promoted the public interest or they didn’t; it did not involve the modern method of ‘weighing’ or ‘balancing’ the strength of a particular right against the strength of the government’s interest in infringing on the right.”).



review for a rational basis that was deferential but not toothless.<sup>32</sup> Indeed, because the test was applied indifferently to the protection of fundamental rights and to general liberty interests, it could hardly have been otherwise. According to one study, from 1913 to 1927, the Court decided under the Due Process Clause 150 cases “involving substantive legislation of a social or economic character” and held the laws invalid in 22 of them.<sup>33</sup> And, the author pointed out, even

the most liberal members of the bench have concurred in holding certain laws unconstitutional. The Court was unanimous in declaring that a state cannot deprive aliens of the right to work, forbid negroes to live in neighborhoods mainly occupied by whites, provide compulsory arbitration of labor disputes in businesses not ‘affected with a public interest,’ or close all private schools.<sup>34</sup>

It is worth emphasizing that the *Mugler* mode of rational basis analysis incorporated a presumption of constitutionality. As the Court restated the point in 1895:

[I]n determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It is a well-settled rule of constitutional exposition that, if a statute may or may not be, according to circumstances, within the limits of legisla-

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<sup>32</sup> Brown, *supra* note 31, at 953.

<sup>33</sup> *Id.* at 944.

<sup>34</sup> *Id.* at 947 (internal footnotes omitted) (citing *Truax v. Raich*, 239 U.S. 33 (1915); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Chas. Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1923); *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Chas. Wolff Packing Co. v. Industrial Court*, 267 U.S. 552 (1925); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

tive authority, the existence of the circumstances necessary to support it must be presumed.<sup>35</sup>

Again, the presumption was rebuttable.<sup>36</sup> “A challenger could always rebut the presumption of constitutionality by presenting facts showing that the law was not reasonably related to the public welfare, or unreasonably infringed on rights guaranteed by the Constitution.”<sup>37</sup> Thus, while some scholars associate the *Mugler* standard with the protection of liberty of contract exemplified by *Lochner v. New York*,<sup>38</sup> the latter case applied a different presumption. *Lochner* “relied on an analysis of fundamental rights”<sup>39</sup> and

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<sup>35</sup> *Sweet v. Rechel*, 159 U.S. 380, 392-93 (1895); *see also* *Dobbins v. City of Los Angeles*, 195 U.S. 223, 235-36 (1904) (“It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.”); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (“[N]either the [Fourteenth Amendment]—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.”).

<sup>36</sup> *Dobbins v. City of Los Angeles*, 195 U.S. 223, 236 (1904) (“[N]otwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power.”) (citing cases).

<sup>37</sup> Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 507 (2011) (citing cases).

<sup>38</sup> 198 U.S. 45 (1905); *see, e.g.*, Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1798 (2012) (noting that “the *Mugler-Allgeyer-Lochner* line of cases has been repudiated by the Court and is generally regarded as one of the Court’s great mistakes”).

<sup>39</sup> David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 21 (2003).

applied a “presumption in favor of liberty of contract”<sup>40</sup> that distinguishes it from the *Mugler* rationality standard.<sup>41</sup>

In this way, *Lochner* abandoned the parity between the requirement of a rational basis and the protection of fundamental rights. The New Deal Court, in its famous footnote four in *Carolene Products*, endorsed the *Lochner* disparity by suggesting there “may be narrower scope for operation of the presumption of constitutionality” when rights, “such as those of the first ten Amendments,” are infringed.<sup>42</sup> Nevertheless, the Court in *Carolene Products* reaffirmed the rationality requirement, maintaining that “a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.”<sup>43</sup> Indeed, the Court noted that “[w]here the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry.”<sup>44</sup>

There is, then, a formal continuity between *Mugler* and modern rational basis review. The increasing deference to legislation, particularly in the postwar period, results more from the application of the standard than from the standard itself. In principle, rational ba-

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<sup>40</sup> David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 265 (2009).

<sup>41</sup> Jackson, *supra* note 37, at 512 (“[T]he Court in *Lochner* made a crucial change to the calculus: Rather than presume the statute in question to be constitutional, the Court reversed the presumption to favor liberty of contract.”); see also David E. Bernstein, *The Conservative Origins of Strict Scrutiny*, 19 GEO. MASON L. REV. 861, 865 (2012) (“*Lochner v. New York* . . . signaled a shift in judicial focus from class legislation concerns to the protection of individual rights.”); Bernstein, *supra* note 39, at 38 (noting that in *Lochner* “the Justices disagreed about . . . whether there should be a presumption of constitutionality and how strong such a presumption should be”).

<sup>42</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>43</sup> *Id.* at 152.

<sup>44</sup> *Id.* at 153.

sis review could serve as a significant check on legislative power depending upon certain factors: the catalogue of governmental purposes that courts regard as legitimate; how far courts are willing to strain credulity in order to hypothesize a valid purpose behind legislation; and the extent to which a law may be under- or over-inclusive in relation to its purported purpose before the relation may be deemed irrational.<sup>45</sup> Epstein observes that “the phrase ‘police power’ was (at least until modern times) the most ubiquitous phrase in the constitutional lexicon,”<sup>46</sup> which indicates a prior willingness—and equally a present reluctance—to probe the boundaries of legitimate state action.<sup>47</sup>

On occasion, however, when the modern Court has been confident that an improper purpose was at play, rational basis review has been made meaningful again. In particular, where a state appears to have targeted a disfavored group, the Court has employed what commentators have termed “rational basis with bite” to invalidate the law.<sup>48</sup> In those cases, the Court has gone beyond speculat-

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<sup>45</sup> See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1695-96 (1984).

<sup>46</sup> EPSTEIN, *supra* note 1, at 49.

<sup>47</sup> Cf. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987) (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest.’”).

<sup>48</sup> See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”). The term “rational basis with bite” originated with Gerald Gunther. See Gunther, *supra* note 10, at 21 (“Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination.”); G. GUNTHER & K. SULLIVAN, *CONSTITUTIONAL LAW* 486-87 (16th ed., 2007) (discussing rational basis with bite); see also *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (concluding that state law permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting distribution of contraceptives to single persons lacks a rational basis); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (holding that “a bare congressional desire to harm a politically

ing about the plausibility of possible interests and insisted upon evidence that the purported interest was real<sup>49</sup> and that it actually was of concern to the enacting legislature.<sup>50</sup> The Court has been less tolerant of *post hoc* rationalizations<sup>51</sup> and of a poor fit between the

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unpopular group cannot constitute a legitimate governmental interest” and therefore a “purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify the 1971 amendment”); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (“If the State is to deny a discrete group of innocent [undocumented] children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985) (“The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent.”); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“Amendment . . . in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”); *Lawrence*, 539 U.S. at 582 (“Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”).

<sup>49</sup> See, e.g., *Plyler*, 457 U.S. at 228 (“There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State’s economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.”); *id.* at 229 (“[T]he record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State.”).

<sup>50</sup> See, e.g., *Moreno*, 413 U.S. at 534 (“Regrettably, there is little legislative history to illuminate the purposes of the 1971 amendment of § 3(e). The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”).

<sup>51</sup> See, e.g., *Cleburne*, 473 U.S. at 450 (“The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”); *Romer*, 517 U.S. at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).

law and its supposed purpose.<sup>52</sup> The Court has also identified limits to the police power of the state.<sup>53</sup>

These cases suggest rational basis review becomes genuine scrutiny when the Court believes it can detect the actual purpose behind the challenged law or has a principled normative framework for evaluating it. The Court's lack of concern for protecting economic liberty, then, may inhere not in the rational basis standard of review but in the Court's underlying normative views.<sup>54</sup>

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<sup>52</sup> See, e.g., *Eisenstadt*, 405 U.S. at 451 (“[I]f the Massachusetts statute were a health measure, it would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married.”).

<sup>53</sup> Compare *Lawrence*, 539 U.S. at 582 (“Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality.”), with *id.* at 589 (Scalia, J., dissenting) (“Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”); see also *Romer*, 517 U.S. at 634 (holding the “desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); EPSTEIN, *supra* note 1, at 16 (“In an odd reversal of fate, the older and narrower account of the police power has seen a strong resurgence in such areas as race, privacy, abortion, and sexual preferences.”).

<sup>54</sup> See Sunstein, *supra* note 45, at 1697 (suggesting “the theoretical basis of the *Lochner* era foundered on a mounting recognition that the market status quo was itself the product of government choices”); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1454 (2001) (“Social legitimacy is not separate from legal legitimacy, but can spill back upon it.”); cf. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics. . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”); Albert A. Mavrinac, *From Lochner to Brown v. Topeka: The Court and Conflicting Concepts of Political Process*, 52 AM. POL. SCI. REV. 641, 642 (1958) (“*Lochner*, with all its subtleties and complexities, was based on certain assumptions about the way socio-economic relationships in American society should be shaped which proved to reflect the views of the most powerful decision-makers in American economic life.”).

## II

As mentioned before, “rational basis with bite” has reappeared recently in several circuits’ review of statutes infringing economic liberty. Three circuits have applied rational basis review to invalidate laws that, the courts concluded, served only to protect an economic interest group from its would-be in-state competitors. A fourth circuit, perhaps following the modern rational basis line of cases to its logical conclusion, has squarely held that protecting one economic interest group from competition by another, to the detriment of the consuming public, is a legitimate governmental purpose.

In *Craigmiles v. Giles*, the Sixth Circuit considered a challenge under the Due Process and Equal Protection Clauses to the Tennessee Funeral Directors and Embalmers Act, which forbade anyone but a state-licensed “funeral director” from selling caskets.<sup>55</sup> The plaintiffs, who sold caskets and other funeral merchandise but performed no funeral services, argued the licensure requirement served no legitimate purpose and operated arbitrarily to deprive them of their right to pursue their vocation. The requirements for getting a license were substantial, requiring either a two-year apprenticeship with a licensed funeral director or a one-year apprenticeship and year of academic study in such subjects as embalming and “funeral service.” The plaintiffs argued these requirements were unrelated to the sale of caskets and served no purpose other than to restrict competition, for the benefit of licensed funeral homes. The Sixth Circuit agreed: “adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic competition,”<sup>56</sup> and “protect-

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<sup>55</sup> 312 F.3d 220, 222 (6th Cir. 2002).

<sup>56</sup> *Id.* at 225.

ing a discrete interest group from economic competition is not a legitimate governmental purpose.”<sup>57</sup>

In reaching that conclusion, the Sixth Circuit recited the familiar rational basis standard and duly noted a statute that does not implicate fundamental rights or suspect classifications receives “a strong presumption of validity” and must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>58</sup> For these purposes, it is “constitutionally irrelevant” whether the rational basis “in fact underlay the legislative decision,”<sup>59</sup> wherefore “[t]hose seeking to invalidate a statute using rational basis review must ‘negative every conceivable basis that might support it.’”<sup>60</sup>

The Tennessee licensing law might have met that standard because, by requiring casket retailers to become licensed funeral directors, it made those retailers subject to certain consumer protection requirements. The court acknowledged “[t]he state could argue that the Act as a whole applied to the plaintiffs actually provides some legitimate protection for consumers from casket retailers,” but it found “[t]he history of the legislation . . . reveals a different story.”<sup>61</sup>

When the Act was originally passed in 1951, the definition of “funeral directing” did not include the sale of caskets “but was limited to the arranging of funeral ceremonies, burial, cremation, and embalming.”<sup>62</sup> In 1972, the legislature amended the Act to cover the sale of funeral merchandise. At that time, it could simply have ap-

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<sup>57</sup> *Id.* at 224 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978)).

<sup>58</sup> *Id.* (quoting *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001)); *see also* *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

<sup>59</sup> *Craigmiles*, 312 F.3d at 224 (quoting *R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

<sup>60</sup> *Id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

<sup>61</sup> *Id.* at 227.

<sup>62</sup> *Id.* at 222.



plied the consumer protection provisions to casket retailers. Instead, “the legislature specifically brought casket retailers under the coverage of the licensing scheme.”<sup>63</sup> To the court, the purpose of the amendment was manifest: “This specific action of requiring licensure, which had the byproduct of making [a consumer protection provision] applicable, appears directed at protecting licensed funeral directors from retail price competition.”<sup>64</sup> That purpose, the court held, was illegitimate and therefore so was the licensing requirement for casket retailers.

Since the *Craigmiles* decision, two other circuits have agreed that economic protectionism is not a legitimate governmental interest. The Ninth Circuit in *Merrifield v. Lockyer* considered a California licensing requirement for persons engaged in pest control.<sup>65</sup> The plaintiff argued the licensing requirement was designed for pest control using pesticides and therefore applying the requirement to him was irrational because he did not use them.

The California legislature had exempted from the licensing requirement “[p]ersons engaged in the live capture and removal or exclusion of vertebrate pests, bees, or wasps from a structure without the use of pesticides,”<sup>66</sup> but the exemption defined “vertebrate pests” so as “to ensure that persons controlling mice, rats, or pigeons would still need to obtain . . . licenses.”<sup>67</sup> That definition left the plaintiff subject to the licensing law that, he said, treated him

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<sup>63</sup> *Id.* at 227.

<sup>64</sup> *Id.*

<sup>65</sup> 547 F.3d 978 (9th Cir. 2008).

<sup>66</sup> *Id.* at 981-82 (quoting CAL. BUS. & PROF. CODE § 8555(g)).

<sup>67</sup> *Id.* at 982; *see also* CAL. BUS. & PROF. CODE § 8555(g) (“Vertebrate pests’ include, but are not limited to, bats, raccoons, skunks, and squirrels, but do not include mice, rats, or pigeons.”).

differently from others engaged in the non-pesticide removal of vertebrate pests in violation of the Equal Protection Clause.<sup>68</sup>

The court struck down the licensing requirement insofar as it did not exempt persons controlling mice, rats, or pigeons without using pesticides.<sup>69</sup> Like the Sixth Circuit in *Craigmiles*, the Ninth Circuit looked to the history of the statute in question. According to expert testimony presented to the district court, the exemption for certain vertebrate pests but not for mice, rats, or pigeons came in response to complaints from constituents who wanted to exterminate pests with “homemade concoctions” that fell within the licensing requirements but were not purchased as pesticides.<sup>70</sup> In response to these complaints, the legislature decided to exempt the non-pesticidal control of some pests from the licensing requirement but retained the requirement for those engaged in the removal of “the most common structural pests,” viz. mice, rats, and pigeons.<sup>71</sup>

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<sup>68</sup> *Merrifield*, 547 F.3d at 982. The plaintiff also argued that the law arbitrarily denied him the liberty to engage in his chosen profession, in violation of the Due Process Clause. *See id.*; *see also* *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (“[T]his Court has indicated that the liberty component of the Fourteenth Amendment’s Due Process Clause includes some generalized due process right to choose one’s field of private employment, but a right which is nevertheless subject to reasonable government regulation.”). Applying rational basis review, the court rejected the due process claim. The court noted that a state may “require high standards of qualification” for a profession as long as the standards have “a rational connection with the applicant’s fitness or capacity to practice.” *Merrifield*, 547 F.3d at 986 (quoting *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 239 (1957)). Much of the training required for licensure was relevant to the practice of non-pesticide pest control and even “requiring persons who do not use pesticides to learn about the risks of pesticides is rationally related to the government’s interest in public safety because persons like Merrifield work in environments where they may be exposed to pesticides that have been applied previously and left on-site.” *Id.* at 988.

<sup>69</sup> *Merrifield*, 547 F.3d at 992.

<sup>70</sup> *Id.* at 990.

<sup>71</sup> *Id.*

The resulting licensing scheme, the court concluded, was irrational because “those engaging in the non-pesticide control of less common pests are more likely to encounter prior pesticide use or are more likely to recommend that their clients use pesticides rather than their services. In other words, those exempted under the current scheme are more likely to be exposed to pesticides than individuals like [the plaintiff].”<sup>72</sup>

Moreover, the court concluded the evident purpose of the exemption—relieving some constituents of a regulatory burden that applied to others engaged in non-pesticidal extermination—was not a legitimate governmental purpose. “[T]he record highlights that the irrational singling out of three types of vertebrate pests from all other vertebrate animals was designed to favor economically certain constituents at the expense of others similarly situated, such as [the plaintiff],” the court explained.<sup>73</sup> “We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review. . . . [E]conomic protectionism for its own sake, regardless of

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<sup>72</sup> *Id.* at 991. The court held the state to the rationale it offered to justify the licensing law in justifying the exemption:

The possibility that non-pesticide-using pest controllers might interact with pesticides or will need the skill to suggest pesticide use when it would be more effective is the very rationale that government's counsel proffered, and we relied upon, in upholding the requirement that Merrifield obtain a license under due process grounds. We cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold Merrifield's exclusion from the exemption based on a completely contradictory rationale. Needless to say, while a government need not provide a perfectly logical[] solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality.

<sup>73</sup> *Id.*

its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.”<sup>74</sup>

Most recently, the Fifth Circuit in *St. Joseph Abbey v. Castille* considered a regulation of casket retailing substantially similar to that before the Sixth Circuit in *Craigmiles*.<sup>75</sup> The monks of St. Joseph Abbey sought to sell simple wooden caskets they had been making for their own use for generations. Under Louisiana law, however, “intrastate sales of caskets to the public may be made only by a state-licensed funeral director and only at a state-licensed funeral home.”<sup>76</sup> The law thus imposed insuperable barriers to the monks’ entry into the casket market. The Abbey would have needed to become a licensed funeral establishment by “building a layout parlor for thirty people, a display room for six caskets, an arrangement room, and embalming facilities.”<sup>77</sup> And it would have needed to employ a full-time funeral director who met the state’s training and licensing requirements.<sup>78</sup> As the Fifth Circuit explained, “[n]one of th[e] mandatory training relates to caskets or grief counseling” and the licensing exam “does not test Louisiana law or burial practices.”<sup>79</sup> Thus, the court explained, the “sole regulation of caskets presently is to restrict their intrastate sales to funeral homes. There are no other strictures over their quality or use.”<sup>80</sup>

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<sup>74</sup> *Id.* at 991 n.15.

<sup>75</sup> 712 F.3d 215 (5th Cir. 2013).

<sup>76</sup> *Id.* at 218.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (“A funeral director must have a high school diploma or GED, pass thirty credit hours at an accredited college, and complete a one-time apprenticeship. The apprenticeship must consist of full-time employment and be the apprentice’s ‘principal occupation.’ . . . A funeral director must also pass a test administered by the International Conference of Funeral Examining Boards.”).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

As a threshold matter, the Fifth Circuit agreed with the other circuits' holding that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."<sup>81</sup> Because, however, "economic protection, that is favoritism, may well be supported by a post hoc perceived rationale,"<sup>82</sup> the court proceeded to consider any possible rationale that could justify the licensing regime.

The state argued the law was "rationally related to consumer protection because it restricts predatory sales practices by third-party sellers and protects consumers from purchasing a casket that is not suitable for the given burial space," but the court said this argument "obscures the actual structure of the challenged law."<sup>83</sup> By requiring any would-be casket retailer to become a licensed funeral home, the law made applicable to casket retailers consumer protection requirements relevant to funeral homes.<sup>84</sup> This was a byproduct of the evident purpose of the law, to "create funeral industry control over intrastate casket sales."<sup>85</sup> The law could have provided consumer protection guidelines for casket sales, but it did not. "No rule addresses casket retailers or imposes requirements for the sale of caskets beyond confining intrastate sales to funeral homes."<sup>86</sup>

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<sup>81</sup> *Id.* at 222; *see also* Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston, 660 F.3d 235, 240 (5th Cir. 2011) ("[N]aked economic preferences are impermissible to the extent that they harm consumers.").

<sup>82</sup> *St. Joseph Abbey*, 712 F.3d at 222-23.

<sup>83</sup> *Id.* at 223.

<sup>84</sup> *Id.* at 224 ("[A] casket retailer must comply with all the statutory requirements for funeral directors and funeral establishments.").

<sup>85</sup> *Id.* at 223.

<sup>86</sup> *Id.* at 224.

The State argued that limiting casket sales to funeral homes would “assure purchasers of caskets informed counsel” from a qualified funeral director.<sup>87</sup> The court, however, reasoned:

Given that Louisiana does not require a person to be buried in a casket, restrict casket purchases in any way by Louisianans over the internet or from other sources out of state, nor impose[] requirements on any intrastate seller of caskets directly to consumers, including funeral directors, regarding casket size, design, material, or price, whatever special expertise a funeral director may have in casket selection is irrelevant to it being the sole seller of caskets.”<sup>88</sup>

Moreover, “customers pay funeral directors a non-declinable service fee, which contractually binds a funeral director to assist the customer with funeral and burial logistics, including, for example, casket selection, even if the customer does not purchase the casket from the funeral director,” so the customer would have the benefit of the funeral director’s counsel even absent the licensing scheme.<sup>89</sup>

The court also perceived “a disconnect between restricting casket sales to funeral homes and preventing consumer fraud and abuse.”<sup>90</sup> Not only had funeral homes, rather than independent sellers, “been the problem for consumers with their bundling of product and markups of caskets,” but the state “Unfair Trade Practices and Consumer Protection Law already polices inappropriate sales tactics by all sellers of caskets,” making the licensing scheme

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 225.

<sup>90</sup> *Id.*

unnecessary.<sup>91</sup> Finally, the court held there was no rational relationship between the law and the state interest in public health and safety because “Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets.”<sup>92</sup>

The Fifth Circuit explained its rigorous application of rational basis review on two grounds. First, “[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation.”<sup>93</sup> Second, against the deference due the state is balanced “an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as ‘economic’ protection of the rulemakers’ pockets.”<sup>94</sup>

The Tenth Circuit considered a similar licensing law applied to casket retailers in *Powers v. Harris*.<sup>95</sup> In that case the court took a position different from the position its sister circuits had or would soon take, squarely holding that, “absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.”<sup>96</sup>

The Oklahoma Funeral Services Licensing Act considered in *Powers* provided that only a licensed funeral director operating out of a funeral establishment could engage in the sale of funeral-

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<sup>91</sup> *Id.* at 226 (“That grant of an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices.”).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 226-27; see also Sunstein, *supra* note 45, at 1713 (“Although the rationality test is highly deferential, its function is to ensure that classifications rest on something other than a naked preference for one person or group over another.”).

<sup>95</sup> 379 F.3d 1208 (10th Cir. 2004).

<sup>96</sup> *Id.* at 1221.

service merchandise, including caskets.<sup>97</sup> The licensing requirement did not apply to sellers of other funeral-related merchandise, such as urns or grave-markers, and orders of the State Board of Embalmers and Funeral Directors limited the scope of the statute further.<sup>98</sup> The Board, for example, distinguished between time-of-need and pre-need sales by providing that, “although a person must be fully licensed to make time-of-need sales, a salesperson may lawfully sell caskets pre-paid without a license so long as that person is acting as an agent of a licensed funeral director.”<sup>99</sup> The Board also limited its enforcement to in-state casket sales, so “an unlicensed Oklahoman may sell a time-of-need casket to a customer outside of Oklahoma . . . and an unlicensed salesperson who is not located in Oklahoma may sell a time-of-need casket to a customer in Oklahoma.”<sup>100</sup> Given this patchwork of exceptions, “[t]he requirement that a salesperson possess both a funeral director’s license and operate out of a licensed funeral establishment applies . . . only to the intrastate sale of time-of-need caskets in Oklahoma.”<sup>101</sup>

As in the other states, the licensing requirement imposed substantial barriers to entry into the retail casket market. An applicant for a funeral director’s license “must complete both sixty credit hours of specified undergraduate training and a one-year apprenticeship during which the applicant must embalm twenty-five bodies” before passing “both a subject-matter and an Oklahoma law exam.”<sup>102</sup> Moreover, “to be licensed as a funeral establishment in Oklahoma, a business must have a fixed physical location, a preparation room that meets the requirements for embalming bodies, a

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<sup>97</sup> *Id.* at 1211.

<sup>98</sup> *Id.* at 1212.

<sup>99</sup> *Id.* (footnote omitted).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*



funeral-service merchandise-selection room with an inventory of not less than five caskets, and adequate areas for public viewing of human remains.”<sup>103</sup>

It is unsurprising, therefore, that the plaintiffs, who wanted simply to sell caskets over the Internet, argued the licensing requirement served only to prevent their entry into the casket market without furthering any legitimate government purpose.<sup>104</sup> In response, the state argued the licensing requirement served a governmental interest in consumer protection. The court, perhaps recognizing the awkward fit between that interest and the contours of the law, decided instead to “consider whether protecting the intrastate funeral home industry constitutes a legitimate state interest. If it does, there can be little doubt that the FSLA’s regulatory scheme is rationally related to that goal.”<sup>105</sup>

In the court’s view, “the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest.”<sup>106</sup> The Tenth Circuit relied primarily upon four cases. In *Fitzgerald v. Racing Ass’n of Cent. Iowa*, the Supreme Court held that an Iowa statute taxing slot-machine revenues on riverboats at 20 percent, while taxing slot-machine revenues at racetracks at 36

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<sup>103</sup> *Id.* at 1212-13.

<sup>104</sup> Though it ultimately upheld the licensing requirement, the district court explained:

As a result of the substantial mis-fit between the education and training required for licensure and the education and training required to sell caskets in Oklahoma, people who only wish to sell caskets, if they wish to make in-state sales, are required to spend years of their lives equipping themselves with knowledge and training which is not directly relevant to selling caskets. *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155, at \*5 (W.D. Okla. Dec. 12, 2002), *aff’d*, 379 F.3d 1208 (10th Cir. 2004).

<sup>105</sup> *Powers*, 379 F.3d at 1218; see also *Craigmiles*, 312 F.3d at 228 (noting this “more obvious illegitimate purpose to which licensure provision is very well tailored”).

<sup>106</sup> *Powers*, 379 F.3d at 1220.

percent, did not violate the Equal Protection Clause because the “difference, harmful to the racetracks, is helpful to the riverboats, which were also facing financial peril.”<sup>107</sup> The Court upheld the differential tax treatment based upon “an inference that the reason for the different tax rates was to help the riverboat industry or the river communities.”<sup>108</sup>

In *Nordlinger v. Hahn*, the Court upheld a state property tax scheme that favored long-time property holders over new purchasers.<sup>109</sup> The Court had “no difficulty in ascertaining at least two rational or reasonable considerations of difference or policy that justify denying [a new purchaser] the benefits of her neighbors’ lower assessments.”<sup>110</sup> The first was an “interest in local neighborhood preservation, continuity, and stability,” which allowed the state “legitimately [to] decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established, ‘mom-and-pop’ businesses by newer chain operations.”<sup>111</sup> In other words, under rational basis review, economic protectionism for mom-and-pop businesses could justify the law. The second rationale was “that a new owner at the

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<sup>107</sup> 539 U.S. 103, 109 (2003).

<sup>108</sup> *Id.* at 110. The Court elaborated:

[A]side from simply aiding the financial position of the riverboats, the legislators may have wanted to encourage the economic development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State, rather than relocate to other States. Alternatively, they may have wanted to protect the reliance interests of riverboat operators, whose adjusted slot machine revenue had previously been taxed at the 20 percent rate. All these objectives are rational ones, which lower riverboat tax rates could further and which suffice to uphold the different tax rates. *Id.* at 109 (internal citation omitted).

<sup>109</sup> 505 U.S. 1 (1992).

<sup>110</sup> *Id.* at 12.

<sup>111</sup> *Id.*

time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner.”<sup>112</sup>

In *City of New Orleans v. Dukes*, the Court upheld a city ordinance that prohibited selling foodstuffs from pushcarts in the French Quarter while exempting vendors who had continuously operated for eight or more years.<sup>113</sup> The effect of the exemption was to allow only two vendors to continue operating, and the court of appeals had invalidated the law because the “the creation of a protected monopoly for the favored class member” was not rationally related to “the legitimate governmental interest in conserving the traditional assets” of the French Quarter.<sup>114</sup> The Supreme Court, however, held that the city could make “the reasoned judgment that street peddlers and hawkers tend to interfere with the charm and beauty of a historic area and disturb tourists and disrupt their enjoyment of that charm and beauty, and that such vendors in the Vieux Carre, the heart of the city’s tourist industry, might thus have a deleterious effect on the economy of the city.”<sup>115</sup> And “rather than

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<sup>112</sup> *Id.* With respect to the reliance of the Tenth Circuit on *Fitzgerald* and *Nordlinger*, it is worth noting that state legislative distinctions in the realm of taxation have long received especially deferential review. See, e.g., *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983) (“Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.”); *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940) (“The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.”); *N.Y. Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938) (“The power to make distinctions exists with full vigor in the field of taxation, where no ‘iron rule’ of equality has ever been enforced upon the states.”). Accordingly, the significance of the Court’s holdings in *Fitzgerald* and *Nordlinger* are somewhat diminished as a counterweight to decisions striking down other in-state discrimination.

<sup>113</sup> 427 U.S. 297, 298 (1976).

<sup>114</sup> *Dukes v. City of New Orleans*, 501 F.2d 706, 712-13 (5th Cir. 1974), *rev’d*, 427 U.S. 297 (1976).

<sup>115</sup> 427 U.S. at 304-05.

proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage” and “could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors who qualified under the ‘grandfather clause’ ... had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre.”<sup>116</sup>

Finally, in the landmark case of *Williamson v. Lee Optical of Oklahoma Inc.*, the Court had upheld as a legitimate governmental purpose “free[ing a] profession, to as great an extent as possible, from all taints of commercialism.”<sup>117</sup> In that case, opticians challenged an Oklahoma statute that prohibited anyone other than a licensed optometrist or ophthalmologist “to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist.”<sup>118</sup> The Court, declaring that state economic regulations would receive deferential review, hypothesized various possible justifications for the law.<sup>119</sup> In upholding a separate

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<sup>116</sup> *Id.* at 305.

<sup>117</sup> 348 U.S. 483, 491 (1955).

<sup>118</sup> *Id.* at 485. The opticians complained that “[t]he direct effect of [the law] is to transfer from the optician to the optometrist a large and profitable portion of the former’s business and to such an extent that the optician will cease to exist.” Brief for Respondents-Appellants Lee Optical of Oklahoma, Inc., et al. at 24, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (Nos. 184 & 185).

<sup>119</sup> *Lee Optical*, 348 U.S. at 487-88; *see id.* at 488 (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in *Munn v. State of Illinois*, ‘For protection against abuses by legislatures the people must resort to the polls, not to the courts.’”) (internal citations omitted); *see also* Powell, *supra* note 8, at 247 (“[T]he Court, almost certainly knowing what it was doing, allowed one side in an economic competition for

provision of the law that prohibited retailers from allowing “any person purporting to do eye examination or visual care to occupy space in such retail store,” the Court speculated that, for the legislature, “it may be deemed important to effective regulation that the eye doctor be restricted to geographical locations that reduce the temptations of commercialism. Geographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level.”<sup>120</sup>

These precedents led the Tenth Circuit to conclude that in-state economic protectionism was a legitimate governmental purpose and therefore could justify a law under rational basis review. The court explained that “dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”<sup>121</sup> States, for example, continually “provide business-specific economic incentives,” so “adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner would have wide-ranging consequences.”<sup>122</sup> Indeed, the court said it “would paralyze state governments if we undertook a probing review of each of their actions, constantly asking them to ‘try again.’”<sup>123</sup> Even if the court were inclined to attempt such a review, it suggested it had no principled ground upon which to do so:

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profits to manipulate the competitive playing field through legislation, to the likely detriment of everyone in Oklahoma except the successful interest group.”).

<sup>120</sup> *Lee Optical*, 348 U.S. at 491.

<sup>121</sup> *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).

<sup>122</sup> *Id.* at 1222. “[B]esides the threat to all licensed professions . . . every piece of legislation in six states aiming to protect or favor one industry or business over another in the hopes of luring jobs to that state would be in danger.” *Id.*

<sup>123</sup> *Id.* at 1218.

[I]t would be nothing more than substituting our view of the public good or the general welfare for that chosen by the states. As a creature of politics, the definition of the public good changes with the political winds. There simply is no constitutional or Platonic form against which we can (or could) judge the wisdom of economic regulation.<sup>124</sup>

In a concurring opinion, Judge Tymkovich disagreed with the majority's "unconstrained view of economic protectionism as a 'legitimate state interest.'"<sup>125</sup> Although the Supreme Court had upheld regulatory schemes that favored certain economic interests over others, "all of the cases rest on a fundamental foundation: the discriminatory legislation arguably advances either the general welfare or a public interest."<sup>126</sup> The Court "has consistently grounded the 'legitimacy' of state interests in terms of a public interest."<sup>127</sup> Even in *Williamson*, the Court "invoked consumer safety and health interests over a claim of pure economic parochialism," *Fitzgerald* "invoked economic development and protecting the reliance interests of river-boat owners," *Nordlinger* "invoked neighborhood preservation, continuity, stability, and protecting the reliance interests of property owners," and *Dukes* "invoked historical preservation and economic prosperity."<sup>128</sup> In sum, "whenever courts have upheld legislation that might otherwise appear protectionist . . . courts have always found that they could also rationally advance a *non-protectionist* public good. . . . No case holds that the bare preference

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1225 (Tymkovich, J., concurring).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1225-26.

of one economic actor while furthering no greater public interest advances a 'legitimate state interest.'" <sup>129</sup>

The Fifth and Ninth Circuits disagreed with *Powers* on the same ground.<sup>130</sup> Unlike those courts, however, Judge Tymkovich concurring in *Powers* concluded that "the funeral licensing scheme here furthers, however imperfectly, an element of consumer protection" though he could "imagine a different set of facts where the legislative classification is so lopsided in favor of personal interests at the expense of the public good, or so far removed from plausibly advancing a public interest that a rationale of 'protectionism' would fail."<sup>131</sup>

### III

As Professor Andrew Koppelman has observed, rational basis review with "bite" provides "a window into the hidden cultural roots of law. It reveals the normative premises of rational basis analysis, at least whenever that analysis is used to invalidate a statute."<sup>132</sup> Reflecting upon *Romer*, he noted "the changing cultural context within which legal analysis takes place" — particularly for that case, an evolution in "[t]he country's attitude toward gay peo-

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<sup>129</sup> *Id.* at 1226.

<sup>130</sup> *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) ("[T]he cases indicate that protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of the industry can be linked to advancement of the public interest or general welfare."); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("We do not disagree that there might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review. However, economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.").

<sup>131</sup> *Powers*, 379 F.3d at 1226 (Tymkovich, J., concurring).

<sup>132</sup> Koppelman, *supra* note 9, at 924.

ple.”<sup>133</sup> The legal change, he suggested, “is really one of normative priorities. The invocation of ‘rationality’ masks the processes that are actually at work.”<sup>134</sup> As we suggested above, a similar normative shift seems to explain how the rationality review applied at the turn of the century lost its bite during the New Deal era.

With the appearance in the circuits of a new series of cases applying “rational basis with bite,” one might ask whether underlying them is another normative change, one of growing public disapproval of rent-seeking and special-interest legislation. There has been just such an evolution in antitrust law. Until the late 1970s, the Supreme Court applied the Sherman Act to promote an assortment of vague and frankly anti-competitive social and political goals, such as protecting “small dealers and worthy men” from their larger and more efficient rivals.<sup>135</sup> Under the influence of the “new learning” in antitrust economics, however, the Court gradually reshaped antitrust law to focus solely upon the promotion of economic efficiency and consumer welfare.<sup>136</sup>

Since the Court adopted its formal stance of extreme deference to economic regulation in *Lee Optical*, the country has been swept by

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<sup>133</sup> *Id.* at 924-25.

<sup>134</sup> *Id.* at 924.

<sup>135</sup> See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“[W]e cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897) (“Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings.”).

<sup>136</sup> See generally Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL’Y 217, 217-23 (2010).



a deregulation movement aimed at extirpating the costs associated with excessive economic regulation.<sup>137</sup> At the same time, the confidence the Court expressed in *Carolene Products* that democratic “political processes . . . can ordinarily be expected to bring about repeal of undesirable legislation”<sup>138</sup> has been undermined by public choice theory.<sup>139</sup> By now, “[a]ll reasonably sophisticated persons know that a well-knit special interest group is likely to prevail over an amorphous ‘public’ whose members are dispersed and, as individuals, are not in sharp conflict with the organized interest.”<sup>140</sup> The occupa-

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<sup>137</sup> “[T]he future could not be foreseen, and indeed was to take an unexpected turn with the triumph of the deregulation movement.” *R.S. & V. Co. v. Atlas Van Lines, Inc.*, 917 F.2d 348, 352 (7th Cir. 1990); see also Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1325 (1998); Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 FORDHAM INT’L L.J. 7, 8 (2000) (“It was the relative handful of comprehensively regulated industries that became and has remained the focus of the deregulation movement, which began in the late 1970s in the airline industry and has continued ever since.”) (internal footnote omitted).

<sup>138</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 553 (1985) (expressing confidence in “[t]he effectiveness of the federal political process in preserving the States’ interests”).

<sup>139</sup> “[G]enerations of American political scientists have filled in the picture of pluralist democracy presupposed by *Carolene’s* distinctive argument for minority rights.” Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 719 (1985). According to this research, “*Carolene* is utterly wrongheaded in its diagnosis. Other things being equal, ‘discreteness and insularity’ will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics.” *Id.* at 723-24; see also Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 700 (1991) (“Ackerman’s critique of *Carolene Products* is firmly supported by public choice theory, particularly by Mancur Olson’s theory of collective action.”). See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) (arguing that small, concentrated interest groups can dominate a diffuse majority because of free rider problems in the larger group and concentrated incentives for active participants in the smaller group).

<sup>140</sup> Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 16 (1976).

tional licensing laws recently invalidated under rational basis review are just this type of special-interest legislation:

[O]ccupational licensing has typically brought higher status for the producer of services at the price of higher costs to the consumer; it has reduced competition; it has narrowed opportunity for aspiring youth by increasing the costs of entry into a desired occupational career; it has artificially segmented skills so that needed services, like health care, are increasingly difficult to supply economically; it has fostered the cynical view that unethical practices will prevail unless those entrenched in a profession are assured of high incomes; and it has caused a proliferation of official administrative bodies, most of them staffed by persons drawn from and devoted to furthering the interests of the licensed occupations themselves.<sup>141</sup>

The insight of public choice theory that these harms are unlikely to be cured through electoral politics undermines the case for deference to the political branches when such laws are challenged. In

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<sup>141</sup> *Id.* at 16-18 (internal footnotes omitted); see also Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1103-04 (2014) (“[Licensing] boards often succumb to the temptation of self-dealing, creating regulations to insulate incumbents rather than to ensure public welfare.”). As James Buchanan pointed out, such rent-generating legislation imposes social costs in two ways:

First, there is the destruction of value when the initial decision is somehow made to create artificial scarcity and thereby to make possible rents over and above competitively determined rates of return to resource use. Second, there is the loss reflected in the competitive struggles for the capture of the net rents made possible by the artificial scarcity.

James M. Buchanan, *Reform in the Rent-Seeking Society*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 359, 359 (James M. Buchanan, Robert D. Tollison & Gordon Tullock eds., 1980).

fact, once it is acknowledged that special-interest legislation is unlikely to be cured through “the operation of those political processes ordinarily to be relied upon,” the logic of the *Carolene Products* footnote itself “may call for a correspondingly more searching judicial inquiry.”<sup>142</sup> As Professor Bruce Ackerman has written, “the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes—groups that are ‘anonymous and diffuse’ rather than ‘discrete and insular.’ It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.”<sup>143</sup> If the judicial role following *Carolene Products* is centrally concerned with “clearing the channels of political change,” in Professor John Hart Ely’s evocative phrase, by “policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent,”<sup>144</sup> then courts should not ignore the advantages incumbents enjoy over their would-be competitors and consumers in the legislative process.

Public choice theory confirms that while legislative reform is unlikely, “[c]onstitutional rather than legislative change may be possible.”<sup>145</sup> A constitutional intervention is necessary because “[w]hereas no single set of winners will acquiesce in relinquishing their own gains without full compensation, many groups may, simultaneously, agree to a generalized elimination of all rent-seeking opportunities, since, by so doing, each group gains more than it loses in net.”<sup>146</sup> Thus, individual legislative acts are unlikely to be repealed through the legislative process, but the proscription of rent-

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<sup>142</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>143</sup> Ackerman, *supra* note 139, at 724.

<sup>144</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 102, 105 (1980).

<sup>145</sup> Buchanan, *supra* note 141, at 366.

<sup>146</sup> *Id.*

seeking legislation—imposed from outside the legislative process—might well enjoy popular support.

The now prevalent awareness of rent seeking by organized interest groups has led at least one prominent jurist to question whether “[t]he practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process.”<sup>147</sup> Her concern resonates not only with contemporary understandings of interest-group politics, but also with the attempt to address the problem of faction that is central to the American constitutional design.<sup>148</sup>

As Professor Cass Sunstein has observed, the basic requirements of rational basis review, “the required showing of some degree of means-ends connection and the identification of a category of impermissible government ends,” is applied under the Due Process and Equal Protection Clauses “to filter out naked preferences” and is therefore “closely related to the central constitutional concern of ensuring against capture of government power by faction.”<sup>149</sup>

The framers’ hostility toward naked preferences was rooted in the fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another. The constitutional requirement that something other than a naked preference be shown to

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<sup>147</sup> *Hettinga v. United States*, 677 F.3d 471, 482 (D.C. Cir. 2012) (Brown, J., concurring).

<sup>148</sup> See THE FEDERALIST No. 10 (James Madison); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 246 (1986) (“[T]he mechanisms and institutions established in the United States Constitution indicate a purpose to minimize special interest bargains.”); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29 (1985) (“The problem of faction has been a central concern of constitutional law and theory since the time of the American Revolution.”).

<sup>149</sup> Sunstein, *supra* note 45, at 1690.

justify differential treatment provides a means, admittedly imperfect, of ensuring that government action results from a legitimate effort to promote the public good rather than from a factional takeover.<sup>150</sup>

Epstein connects these themes in *The Classical Liberal Constitution*. He notes that the concern of *Carolene Products* with prejudices that “curtail the operation of those political processes ordinarily to be relied upon to protect minorities” contains “strong echoes of the earlier concern with factions that animated James Madison in *The Federalist Papers*.”<sup>151</sup> Although “the protection of beleaguered minorities is a powerful instantiation of that theory,” there is no reason “to retreat from the basic insight everywhere else.”<sup>152</sup> Anticipating scenarios like those presented in the occupational licensing cases discussed above, he writes:

It was easy in the race cases to identify the fatal misalignment of power. And it is easy to show the loss of both property rights and economic liberties that followed from excluding particular groups from the political process or marginalizing their influence. But, in line with Madison, it hardly follows that property owners and employers cannot on occasion find themselves in the same vulnerable position. Is a landowner who wants to develop property a member of a discrete and insular minority if all his neigh-

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<sup>150</sup> *Id.* (internal footnote omitted).

<sup>151</sup> EPSTEIN, *supra* note 1, at 309; see also Richard A. Epstein, *Toward A Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 714 (1984) (“[T]he interest-group theory of legislation . . . is consistent with what the framers themselves believed to be the evils inherent in the legislative process. *The Federalist* No. 10 on the evils of faction offers as forcible a condemnation of interest-group legislation as one might hope to find.”).

<sup>152</sup> EPSTEIN, *supra* note 1, at 309-10.

bors don't want him to build? Is an out-of-town landlord a member of a discrete and insular minority when the resident tenants push hard for a rent control statute?<sup>153</sup>

As Epstein suggests, the progressive effort in *Carolene Products* to cabin judicial scrutiny to the "easy" cases involving racial discrimination and the like identified a powerful general principle that might justify more muscular review of economic legislation as well.<sup>154</sup> Though the *Carolene* footnote focused on an easy case, that case is revealing: Where the legislature has picked politically influential winners over politically vulnerable losers—solely for the purpose of helping the winners at the expense of the losers—a court can be confident that the state is not legislating in the public interest because the legislative process is skewed toward a particular private interest.<sup>155</sup> The courts in the occupational licensing cases ap-

<sup>153</sup> *Id.* at 310; see also *id.* at 44 ("The chief attack against the progressive movement is that its uncritical praise of popular democracy leads it to understate the pervasive risks of faction and to throw its lot into an administrative state that does far better in creating needless monopolies than in controlling them.").

<sup>154</sup> If, as Epstein suggests, the *Lochner* Court invalidated "anticompetitive legislation that often bore heaviest on persons with little political power," the result in that case might also be justified on the ground of representation reinforcement. EPSTEIN, *supra* note 1, at 338; *id.* at 339 (arguing that Justice Peckham anticipated the approach of the World Trade Organization "on the lookout for protectionist legislation or administrative actions that masquerade as health statutes"); cf. Mavrinak, *supra* note 54 (defending *Lochner* on different political-process grounds). In a similar vein, David Bernstein has argued that the liberty of contract doctrine protected African Americans from protectionist labor laws promoted by white interest groups. DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (2001). Under the *Mugler* formula, a court would need to distinguish between proper and pretended exercises of the police power—a complex undertaking that might involve judgments about the scope of that power. See generally Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004); EPSTEIN, *supra* note 1, at 303-07.

<sup>155</sup> Ackerman, *supra* note 139, at 740 ("*Carolene's* first insight is that some groups suffer from systematic disadvantages in pursuing their interests in the pluralist bargaining process normally central to American politics. On this view, the Court ap-

pear to have concluded that such a dynamic was at play, and Epstein's discussion suggests there may and should be economic contexts other than occupational licensing where "rational basis with bite" has a proper role to play.

It is worth noting, moreover, that even the deferential attitude exemplified by the Tenth Circuit in *Powers* demonstrates a heightened awareness of the realities of interest-group politics.<sup>156</sup> The *Powers* decision also represents an evolution from "traditional" rational basis review because the court was unwilling to indulge the fiction that transparently protectionist legislation might be conceived to bear some slight connection to a legitimate, even if judicially hypothesized, governmental purpose. Instead, the court squarely faced the reality of special-interest legislation. In this way, the Tenth Circuit sided with those scholars for whom "new realism about the political process" indicates that scrutinizing legislation for a "rational basis" is impossible.<sup>157</sup> As Richard Posner has written, "Many public policies are . . . explained as the outcome of a pure power struggle—clothed in a rhetoric of public interest that is a mere figleaf—among narrow interest or pressure groups," so to re-

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pears as a perfecter of pluralist democracy."); see also Barnett, *supra* note 154, at 487 ("One sign that a law is pretextual is when it benefits a particular group rather than the general public. This type of inquiry was emphasized and developed by the courts during the Reconstruction and Progressive Eras.").

<sup>156</sup> See *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.").

<sup>157</sup> Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 28 n.51; Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 201-35 (1976); see also DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 119 (1991) ("We agree with Hans Linde that courts seem more capable of constructing 'a blueprint for the due process of deliberative, democratically accountable government' than of assessing, in all but exceptional cases, whether legislation properly promotes public values.").

quire that such legislation serve a public purpose is “to condemn as unconstitutional the most characteristic product of a democratic (perhaps of any) political system.”<sup>158</sup>

The sight of a figleaf, however, signals that an important normative point is being obscured: “A figleaf is a sign of shame, and shame here is brought on by a sense that the proposal—because of its purpose—pushes beyond the limits of legitimate legislative action.”<sup>159</sup> There is a reason *Lee Optical* rational basis review still hypothesized a public-regarding purpose for the legislation it upheld. “Widely shared concepts of legitimacy in legislative activity will not tolerate legislation that does no more than favor one interest at the expense of another, whether the ‘interest’ is that of an individual or of a group.”<sup>160</sup> This popular attitude is justified because “[r]ent seeking involves social waste.”<sup>161</sup> When it serves no public purpose, special-interest legislation imposes a social cost “with no countervailing moral benefit.”<sup>162</sup> Even if special-interest legislation is a frequent subject of political bargaining, “the legislative context is one in which the public business is done, and this places severe re-

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<sup>158</sup> Posner, *supra* note 157, at 27-28.

<sup>159</sup> Bennett, *supra* note 8, at 1083; see also Macey, *supra* note 148, at 251 (“The reason special interest legislation is so often drafted with a public-regarding gloss is because this gloss raises the costs to the public and to rival groups of discovering the true effect of the legislation.”).

<sup>160</sup> Bennett, *supra* note 8, at 1083; Sunstein, *supra* note 45, at 1697 (noting the prohibition on naked preferences “reflects the notion that the role of government is not to implement or trade off preexisting private interests, but to select public values”); see also Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109 (2009) (noting widespread public opposition to the eminent domain ruling of *Kelo v. City of New London*).

<sup>161</sup> Buchanan, *supra* note 141, at 359.

<sup>162</sup> FARBER & FRICKEY, *supra* note 157, at 35. The social cost of “rent-seeking can be justified when it advances other social values” because people “are willing to sacrifice some of society’s wealth to attain these goals.” *Id.* But without a genuine public-regarding purpose, society is only “made poorer by such legislation with no countervailing moral benefit.” *Id.*



straints on the permissible currency for any political trading.”<sup>163</sup> As Ackerman notes, even the deferential approach of *Carolene Products* maintains that in exercising judicial review, “courts insist that there are certain substantive principles—*Carolene* calls them ‘prejudices’—that pluralist politicians are simply not allowed to bargain over in normal American politics.”<sup>164</sup> In fact, the much expanded scope of government activities makes recognizing such boundaries all the more important:

In the system of activist government inaugurated by the New Deal, the course of pluralist bargaining would have a profound and pervasive impact upon the shape of every American’s life. Within this setting, the existence of systematic bargaining disadvantage erodes the perceived legitimacy of our constitutional regime in the eyes of broad segments of the American population.<sup>165</sup>

If courts were to take account of the “new realism about the political process,” then instead of indulging the fictions of *Lee Optical* rational basis review, they would surely engage in more rather than less searching scrutiny. The prohibition of naked preferences is a longstanding part of our constitutional tradition, “reflected in many

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<sup>163</sup> Bennett, *supra* note 8, at 1085; *see also* Epstein, *supra* note 151, at 712 (“Legislators . . . cannot be given the power of absolute owners because they hold power as trustees for the benefit of the public.”).

<sup>164</sup> Ackerman, *supra* note 139, at 740.

<sup>165</sup> *Id.* at 741; *see also* FARBER & FRICKEY, *supra* note 157, at 37 (“In the long run, it is not clear that a democratic society can function effectively once this perspective [that politics is just a fight for spoils] becomes thoroughly established.”); Ackerman, *supra* note 139, at 742 (“At the same time that we enrich the capacity of constitutional law to perfect pluralist democracy, we must also reaffirm a second fundamental mission for judicial review: to expound the ultimate limits imposed on pluralist bargaining by the American constitutional system.”).

areas of constitutional law.”<sup>166</sup> That tradition has long tolerated courts looking the other way when legislatures act upon naked preferences, but a court cannot look such preferences in the face without balking.

#### IV

Whether “rational basis with bite” might be applied beyond occupational licensing laws to protect economic liberty will depend upon several factors. First is the role of empirical evidence in rational basis review, both to determine the actual purpose of a law and to test the legitimacy of the state’s asserted interest. Indeed, the unwillingness to consider evidence of purpose may be what makes *Lee Optical*-style rational basis review so deferential in practice. The formal reasoning of the *Lee Optical* decision was not novel. In 1929, the Supreme Court acting upon a similar rationale had unanimously upheld a New York statute prohibiting the sale of eyeglasses without a physician or optometrist on the premises.<sup>167</sup> Based upon

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<sup>166</sup> Sunstein, *supra* note 45, at 1693; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES \*126 (“[E]ven laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of more indifference, without any good end in view, are regulations destructive of liberty.”).

<sup>167</sup> *Compare Roschen v. Ward*, 279 U.S. 337, 339-40 (1929) (“[M]uch good would be accomplished if eyes were examined in a great many cases where hitherto they have not been, and the balancing of the considerations of advantage and disadvantage is for the Legislature, not for the courts.”), *with Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 487 (1955) (“[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”); *compare Roschen*, 279 U.S. at 339 (“[T]here can be no doubt that the presence and superintendence of the specialist tend to diminish an evil.”), *with Lee Optical*, 348 U.S. at 488 (“It 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.”); *compare Roschen*, 279 U.S. at 339 (“A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.”), *with Lee Optical*, 348 U.S. at 487-88 (“[T]he law need not be in every respect logically consistent with its aims to be constitutional.”).

that precedent, the district court that had invalidated the law in *Lee Optical* had no doubt “it was in the competence of the police power of a State to regulate the examination of the eyes”<sup>168</sup> and that “the legislature in the instant regulation was dealing with a matter of public interest.”<sup>169</sup> The district court, however, had concluded “the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved.”<sup>170</sup> That conclusion was based, in turn, upon evidence in the record.<sup>171</sup> Before the Supreme Court, the opticians sought to distinguish *Roschen v. Ward* because, among other factors,

the “constitutional facts” as established in this case by the uncontradictable testimony of some of the nation’s foremost ophthalmologists that the fitting, adjusting and adapting of eyeglasses and frames to the face, and the duplicating of lenses or complete eyeglasses by opticians is not harmful or detrimental to the public health and welfare were not present in *Roschen v. Ward*.<sup>172</sup>

Yet the Supreme Court did not consider these or any other facts in its opinion reversing the district court. “The discussion is, intellectually, entirely in the subjunctive, a matter of theoretical possibilities with no relationship to the opticians’ factual claim that the law was simply a means of transferring much of the opticians’ business

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<sup>168</sup> 348 U.S. at 486.

<sup>169</sup> *Lee Optical v. Williamson*, 120 F. Supp. 128, 137 (W.D. Okla. 1954).

<sup>170</sup> *Id.*

<sup>171</sup> *See, e.g., id.* at 136 (“The evidence establishes beyond controversy that a skilled artisan (such as an optician) can accurately ascertain the power of a lense, or fragment thereof, without the aid of a written prescription, and can thus duplicate or reproduce the original pair of spectacles without adversely affecting the visual ability of the eyeglass wearing public.”).

<sup>172</sup> Brief for Respondents-Appellants, *supra* note 118, at 24.

to their competitors.”<sup>173</sup> Courts still must apply rational basis scrutiny and have realized, despite the example of *Lee Optical*, that “[f]or rationality review to be real rather than sham, the court must be willing to make some independent assessment of legislative purpose.”<sup>174</sup>

In the recent occupational licensing cases, the courts inferred the actual protectionist purpose behind the legislative enactments by considering variously expert testimony,<sup>175</sup> the evolution of the legislation through a series of amendments,<sup>176</sup> and the structure of the resulting law.<sup>177</sup> None of the recent cases considered more traditional legislative history materials though, as we noted above, the Supreme Court has considered legislative history in the cases involving “rational basis with bite.”<sup>178</sup> At some point, clear evidence of the actual purpose behind a challenged law or regulation must

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<sup>173</sup> Powell, *supra* note 8, at 247.

<sup>174</sup> Fallon, *supra* note 11, at 373 n.38.

<sup>175</sup> Merrifield v. Lockyer, 547 F.3d 978, 989-90 (9th Cir. 2008).

<sup>176</sup> *Craigmiles v. Giles*, 312 F.3d 220, 227 (6th Cir. 2002) (“By specifically amending the Act in 1972 to cover the sale of funeral merchandise, the legislature specifically brought casket retailers under the coverage of the licensing scheme, and could have applied Section 317 directly to retailers. This specific action of requiring licensure, which had the byproduct of making Section 317 applicable, appears directed at protecting licensed funeral directors from retail price competition.”); *see also* *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013) (“The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption.”).

<sup>177</sup> *St. Joseph Abbey*, 712 F.3d at 223 (“[T]he State Board’s argument obscures the actual structure of the challenged law.”).

<sup>178</sup> *See, e.g.,* *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (citing conference report and congressional record for conclusion that the “amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program”).

make it impossible for an honest court to pretend some hypothesized alternative is a plausible explanation for the enactment.<sup>179</sup>

A similar issue has recently arisen among state and federal courts in the area of eminent domain. In *Kelo v. City of New London*, the Supreme Court maintained that a government will not “be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”<sup>180</sup> The opinion, however, provided little guidance as to how a court should determine the “actual purpose” of a taking.<sup>181</sup> In a concurring opinion, Justice Kennedy argued the analysis should parallel the “rational basis with bite” cases:

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.<sup>182</sup>

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<sup>179</sup> “[U]ncertainty about purpose justifies flexibility in its definition,” but “the flexibility should not be extended to allow use of a ‘purpose’ confidently determined to have played no operative role in the legislation.” Bennett, *supra* note 8, at 1073.

<sup>180</sup> *Kelo v. City of New London*, 545 U.S. 469, 478 (2005).

<sup>181</sup> See Goldstein v. Pataki, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007) (“Although *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term ‘mere pretext’ or cite any case in which a taking was found to be unconstitutional on the ground that its purposes were merely pretextual.”), *aff’d*, 516 F.3d 50 (2d Cir. 2008).

<sup>182</sup> *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47, 450 (1985); *U.S. Dep’t of Agric. v. Moreno*,

The “rational basis with bite” standard is also somewhat elusive,<sup>183</sup> and there has emerged “no consensus among either state or federal judges on the criteria for determining what counts as a pretextual takings claim after *Kelo*.”<sup>184</sup>

The application of “rational basis with bite” in takings cases parallels the developments in the occupational licensing cases to the extent that “most courts that have addressed the matter have at least attempted to enforce a pretext constraint on takings that is not completely deferential to the government.”<sup>185</sup> The limiting principle identified by the Court in *Kelo* is the prohibition on naked preferences, but whether that principle will amount to a genuine constitutional guarantee will depend upon courts’ willingness to consider evidence of the actual purpose behind a taking,<sup>186</sup> which some courts have done.<sup>187</sup> To be sure, some courts have been “reluctant to

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413 U.S. 528, 534-35 (1973)). On the “rational basis with bite” cases, *see supra* notes 48-53 and accompanying text.

<sup>183</sup> *See Powers v. Harris*, 379 F.3d 1208, 1223-24 (10th Cir. 2004) (“Despite the hue and cry from all sides, no majority of the Court has stated that the rational-basis review found in *Cleburne* . . . differs from the traditional variety.”) (footnote omitted); *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in the judgment in part and dissenting in part) (“[T]he Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question.”). Unsurprisingly, Justice Kennedy’s concurring opinion has been criticized for its lack of clarity “as to how to determine what counts as a taking ‘intended to favor a particular private party.’” Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV’T L. REV. 1, 24 (2011).

<sup>184</sup> Somin, *supra* note 183, at 35.

<sup>185</sup> *Id.* at 36.

<sup>186</sup> *See, e.g., Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007) (internal citation omitted) (“In considering whether a primary public purpose was properly invoked, this Court has looked for the ‘real or fundamental purpose’ behind a taking. Stated otherwise, the true purpose must primarily benefit the public.”).

<sup>187</sup> Some courts have investigated whether the taking was part of a comprehensive development plan, whether an extensive planning process led to the taking, and whether a private beneficiary was known in advance of the taking; other courts have

investigate the underlying motivations of state legislators.”<sup>188</sup> Inquiring into legislative purpose, however, is a common feature of judicial review,<sup>189</sup> so there is no reason to expect such an inquiry to prove unworkable only in this context.

The occupational licensing cases also indicate a willingness to consider evidence regarding the effectiveness of a challenged law. The Fifth Circuit, for example, considered the findings of the Federal Trade Commission that “there is insufficient evidence that . . . third-party sellers of funeral goods are engaged in widespread unfair or deceptive acts or practices”; that the “record [was] ‘bereft of evidence indicating significant consumer injury caused by third-party sellers’”; and that “third-party sellers do not have the same incentive as funeral home sellers to engage in deceptive sales tac-

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examined evidence of the actual motives of government decision-makers. *See generally* Somin, *supra* note 183, at 24-36; Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 184-99 (2009).

<sup>188</sup> *Id.* at 197.

<sup>189</sup> *See, e.g.*, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993) (“Here, as in equal protection cases, we may determine the city council’s object from both direct and circumstantial evidence.”); *id.* (“Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”); *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (concluding that judicial inquiries into the purpose of peremptory challenges would not “create serious administrative difficulties”). In reviewing agency action under the Administrative Procedure Act, courts seek to discern “when an improper motive has influenced the decisionmaking process.” Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 556 (1985). One commentator has suggested that “the Supreme Court’s precedents on APA arbitrary and capricious review fit quite well with the rational basis with bite doctrine.” Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 425 (2009).

tics.”<sup>190</sup> As noted above, the Supreme Court has considered similar empirical evidence in its “rational basis with bite” cases.<sup>191</sup> Another way to carry the rational basis burden, then, might be to demonstrate empirically that the asserted harm does not exist or, if it does, that the regulation provides no solution. A similar approach has been employed in “pretextual takings” cases where courts focus on “[t]he magnitude of the public benefit created by the condemnation.”<sup>192</sup> Courts consider whether the alleged public benefit from the taking is actual and substantial, just as courts in the occupational licensing cases considered whether the regulation addressed an actual public safety concern. In *Carolene Products* the Court maintained “the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”<sup>193</sup> Demonstrating that the alleged state interest lacks an empirical foundation would seem to meet that test.

Another way of identifying an impermissible purpose is to examine the fit between the law and its ostensible purpose. As the Sixth Circuit in *Craigsmiles* explained, “The Supreme Court, employing rational basis review, has been suspicious of a legislature’s cir-

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<sup>190</sup> *St. Joseph Abbey v. Castille*, 712 F.3d 215, 225 (5th Cir. 2013) (quoting 73 Fed. Reg. 13740, 13742, 13745 (Mar. 14, 2008)).

<sup>191</sup> *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 228 (1982) (“[T]he available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.”). *See supra* notes 48-53 and accompanying text.

<sup>192</sup> *Somin*, *supra* note 179, at 25 (“If the benefits are large, it seems less likely that they are merely pretextual.”); *see also Kelly*, *supra* note 187, at 185-86 (“[S]everal post-*Kelo* decisions have focused on the magnitude of public benefits as an important, and perhaps decisive, factor. . . . If the public benefits of a taking were relatively large, then a court might conclude that such benefits outweigh the risk of impermissible favoritism.”).

<sup>193</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).



cuitous path to legitimate ends when a direct path is available.”<sup>194</sup> In *Cleburne*, the Court noted “that if the city were really concerned about the ills that they claimed (overcrowded dwellings), they could have passed better-tailored regulations without the suspicious side-effect of keeping the mentally disabled out of neighborhoods.”<sup>195</sup> Similarly, in the casket cases, the Fifth and Sixth Circuits observed that if the state were really concerned about consumer protection, it could have regulated casket sales directly instead of subjecting all casket retailers to the licensing scheme for funeral directors. Everyone must acknowledge, as the Supreme Court has done, that at some point the overbreadth of a regulation renders it irrational.<sup>196</sup> The use of indirect means when direct means are available might similarly indicate an impermissible purpose is at play.

While these factors might lead courts to apply “rational basis with bite” to more economic regulation than occupational licensing, one possible constraint identified by Epstein is the “bad constitutional odor” associated with judicial protection of economic liberty and with “Lochnerism” in particular.<sup>197</sup> Perhaps for that reason each of the three circuits that invalidated an occupational licensing law expressly abjured *Lochner*-style fundamental-rights analysis<sup>198</sup> and spoke instead in terms of deferential rational basis review.<sup>199</sup> In

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<sup>194</sup> *Craigsmiles v. Giles*, 312 F.3d 220, 227 (6th Cir. 2002).

<sup>195</sup> *Id.*

<sup>196</sup> *Cf. Nordlinger v. Hahn*, 505 U.S. 1, 35 (1992) (“[I]n some cases the underinclusiveness or the overinclusiveness of a classification will be so severe that it cannot be said that the legislative distinction ‘rationally furthers’ the posited state interest.”).

<sup>197</sup> EPSTEIN, *supra* note 1, at 371.

<sup>198</sup> *See supra* notes 38-41 and accompanying text.

<sup>199</sup> As the Sixth Circuit put it:

Our decision today is not a return to *Lochner*, by which this court would elevate its economic theory over that of legislative bodies. No sophisticated economic analysis is required to see the pretextual nature of the state’s proffered explanations for the 1972 amendment. We are not imposing our view of a well-functioning market on the people of Tennessee. Instead, we

any event, the principle that states may not act upon naked preferences should not be thought to threaten any legislature's regulatory agenda. Rather, that principle reflects a view of legitimacy in the legislative process that has persisted, in one verbal formulation or another, from the founding era through *Carolene Products* and beyond,<sup>200</sup> and that has acquired renewed salience in contemporary debates about interest group politics.

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The variable rigor with which statutes are reviewed for a rational basis makes clear the role of changing norms underlying the courts' reasoning. The contemporary emergence in the circuits of meaningful rational basis review of statutes that restrict one group's economic liberty solely for the benefit of another group's economic gain invites a new debate over the scope of our constitutional rights. In that debate Richard Epstein, with *The Classical Liberal Constitution*, has made a powerful opening argument.

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invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.

*Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (internal citation omitted); *see also Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008) ("Although economic rights are at stake, we are not basing our decision today on our personal approach to economics, but on the Equal Protection Clause's requirement that similarly situated persons must be treated equally."); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) ("Nor is the ghost of *Lochner* lurking about. We deploy no economic theory of social statics or draw upon a judicial vision of free enterprise. Nor do we doom state regulation of casket sales.").

<sup>200</sup> *See supra* notes 148-53 and accompanying text.