CASKETS AND THE CONSTITUTION: HOW A SIMPLE BOX HAS ADVANCED ECONOMIC LIBERTY

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I. INTRODUCTION

This Article explains how caskets are at the center of a major circuit split on a fundamental question of constitutional law: may the government enact a law for the sole purpose of advancing private financial interests? The circuit split over the validity of private economic protectionism is part of a larger debate occurring within the federal courts over the proper scope of rational-basis review. Rational-basis review is the deferential standard that federal courts apply when examining restrictions on non-fundamental rights. Under rational-basis review, a challenged law is presumed constitutional, and the burden is on the citizen to establish that the statute is not rationally related to any legitimate government interest. The Supreme Court allows the government to invoke purely hypothetical facts to justify a law.

Rational-basis review applies to economic regulations because the liberty interest at stake—the right to earn an honest living—has been deemed non-fundamental. Thus, a constitutional challenge to an economic regulation will receive rational-basis review unless the regulation impinges on a fundamental right, such as free speech.

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4. See id. at 695.


The world around us is the world that the Supreme Court has created with the rational-basis test. Economic regulations—in contrast, for example, to religious regulations—are pervasive because there are only weak judicial constraints on the elected branches in the economic context.\textsuperscript{7} If a legislature enacts an economic statute or an administrative agency promulgates an economic rule, there is little chance that anyone will invest the resources necessary to mount a long-shot constitutional challenge.\textsuperscript{8}

A consequence of rational-basis review is that the elected branches understand that they are largely unaccountable to the judicial branch when it comes to economic regulations.\textsuperscript{9} The elected branches also understand that voters, for the most part, are unaware of what economic legislation (or administrative rulemaking) is pending.\textsuperscript{10} This means that people and entities with strong incentives to know about particular lawmaking activities—think the steel-manufacturing industry’s incentive to understand tariffs on the importation of foreign steel—are likely to dominate the lawmaking process.\textsuperscript{11} As the branch of economics known as public-choice theory has elucidated over recent decades, a great deal of economic regulation is the result of politicians behaving in their own self-interest, while interacting with professional lobbyists acting in the interest of their industry patrons.\textsuperscript{12}

This basic dynamic is prevalent in the funeral industry, which helps explain why casket cases have been at the forefront of a mini-revolution in rational-basis doctrine.\textsuperscript{13} In a typical state, the funeral industry is regulated by a state licensing board.\textsuperscript{14} The board issues licenses to practitioners, disciplines practitioners and

\begin{itemize}
  \item See Chemerinsky, supra note 5, at 641, 695.
  \item See Raynor, supra note 5, at 1071–72.
  \item Id. at 1089.
  \item Id.
\end{itemize}
investigates consumer complaints, helps draft amendments to funeral statutes, and promulgates administrative regulations. State licensing boards almost invariably consist of state-licensed funeral directors. Those state board members are, in turn, members of state and national funeral director associations, which lobby their own members on the state licensing boards for industry-favoring forms of regulation. Public-choice economists refer to this as “industry capture.”

The reality that much economic regulation is rigged in favor of industry groups and against the public has given rise to the debate, frequently occurring in funeral cases, that is the subject of this article. Is private economic protectionism a legitimate government interest? And just how much leeway should the rational-basis test give the government in a world dominated by industry interests and government officials beholden to them?

In Part II, this article examines the history of the rational-basis test and the breadth of its deference. In Part III, this article explains how a circuit split has emerged—a split driven by casket cases—over whether private economic protectionism is a legitimate government interest, and how this split relates to historical concerns about judicial activism.

II. THE SPECTER OF LOCHNER: A HISTORY OF RATIONAL-BASIS REVIEW

The modern rational-basis test emerged historically as a reaction to Lochner v. New York. Along with Dred Scott v. Sanford (holding that a slave is not a citizen and has no standing to sue for his freedom) and Plessy v. Ferguson (holding that segregation does not violate the equal-protection clause under a separate-but-

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15. Id. at 152.
16. Id. at 155.
equal theory),\textsuperscript{21} \textit{Lochner} is the third member of the triumvirate of the most reviled decisions in American constitutional law.\textsuperscript{22}

\textit{Lochner}’s status as a judicial pariah, equal in contemptibility to cases like \textit{Dred Scott}, might strike the uninitiated as an overreaction.\textsuperscript{23} In contrast to the evils of slavery and segregation—or the internment of American citizens of Japanese descent in \textit{Korematsu v. United States}\textsuperscript{24}—\textit{Lochner} was about something much less dramatic: the length of a baker’s work week.\textsuperscript{25} In 1895, the state of New York passed the Bakeshop Act, which, among other provisions, forbade a bakery from allowing a baker to work more than sixty hours per week and no more than ten hours per day.\textsuperscript{26} Joseph Lochner was convicted in 1897 for violating the Bakeshop Act and fined $25.\textsuperscript{27}

Not having learned his lesson, Lochner was convicted again in 1905 of violating the Bakeshop Act and was fined $50.\textsuperscript{28} This time, however, he fought the charge, asserting a defense that the statute violated his Fourteenth Amendment substantive due-process right to freedom of contract.\textsuperscript{29} New York’s intermediate appellate court upheld his conviction by a narrow three-to-two margin, and the Court of Appeals (New York’s highest court) affirmed by the equally narrow four-to-three.\textsuperscript{30} Undeterred, Lochner petitioned for review in the United States Supreme Court\textsuperscript{31} and made constitutional history.

By yet another razor-thin margin, the United States Supreme Court invalidated Lochner’s conviction on the ground that a maximum-workweek statute violated his right to contract with his bakers.\textsuperscript{32} The majority opinion by Justice Rufus Peckham

\textsuperscript{21} Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).
\textsuperscript{23} Id.
\textsuperscript{24} Korematsu v. United States, 323 U.S. 214, 215–16 (1944).
\textsuperscript{25} Lochner v. New York, 198 U.S. 45, 52 (1905).
\textsuperscript{26} Id.
\textsuperscript{28} Lochner, 198 U.S. at 47.
\textsuperscript{29} Id. at 48.
\textsuperscript{31} Lochner, 198 U.S. at 45.
\textsuperscript{32} Id. at 53.
emphasized what the high court perceived as the bargaining-power parity between bakery owners and their bakers:

There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action.\textsuperscript{35}

In addition to viewing bakery owners and bakers as equal adversaries in negotiations over the length of the workday and workweek, the opinion also advanced a narrow conception of the public interest. The Court concluded that protecting bakers was beyond the scope of the traditional police power because a maximum-workweek law was not aimed at the health, safety, welfare, or morals of the general public, only at the interests of bakers themselves: “[t]he statute does not affect any other portion of the public than those who are engaged in that occupation.”\textsuperscript{34}

Finally, along with these pronouncements, the court set forth what modern scholars would call the standard of review for analyzing substantive due-process challenges to economic regulation under a freedom-of-contract theory.\textsuperscript{35} Justice Peckham formulated the standard this way:

The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.\textsuperscript{36}

\textsuperscript{33} Id. at 57.
\textsuperscript{34} Id.
\textsuperscript{36} \textit{Lochner}, 198 U.S. at 57–58.
Next, the majority opinion expressed three principles that are, as we shall see, antithetical to modern rational-basis review and to the sentiments of most legal scholars and lawyers. First, the *Lochner* majority made its own factual determination about the relative bargaining power of bakery owners and bakers. Modern rational-basis doctrine would treat this as an exclusively legislative determination. Second, Justice Peckham’s opinion drew a distinction between the public as whole, which is the proper focus of government attention, and a specific subset of the public, such as bakers, at which point the Court concluded only private interests are at stake. No modern federal court would make this distinction. Finally, the Court required a “direct relation” to a legitimate government purpose, and established that this means-ends fit was a factual inquiry for the courts to make. Justice Peckham found, as a trial court might after weighing evidence, that bakeries were not unhealthful and that restrictions on the length of working hours would have no salutary benefits. Federal courts applying rational-basis review do not require a truly direct relationship.

*Lochner* is assailed alongside *Dred Scott* and *Plessy* because it is understood to represent a judicial preference for free-market capitalism and a willingness by the Supreme Court to treat the principles of free-market capitalism as constitutional rights. This preference threatened to thwart the political agenda of the Progressive Era, which sought to revolutionize labor laws in favor of workers. The central critique of *Lochner*, from Progressive Era figures through the present, was set forth in its basic outlines in

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37. *Id.* at 62-63.
40. *See*, e.g., Steel Inst. of N.Y. v. City of New York, 716 F.3d 31, 36 (2d Cir. 2013) (“‘Protection of the safety of persons is one of the traditional uses of the police power,’ which is ‘one of the least liminal of governmental powers.’” (quoting Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82–83 (1946))).
42. *Id.* at 59.
43. United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 (1937) (deciding whether the weight of the evidence supports a regulation of commerce is a task for Congress, not the courts).
44. *See* *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).
the dissent of Justice Oliver Wendell Holmes, who derided the majority opinion for enshrining a theory of capitalist economics, “which a large part of the country does not entertain.” In his most famous barb, Justice Holmes lambasted the majority for treating the Fourteenth Amendment as though it “enact[ed] Mr. Herbert Spencer’s Social Statics,” referring to a British Social Darwinist who believed in applying a “survival of the fittest” approach to society.

Although he did not use the term, Holmes was accusing the *Lochner* majority of judicial activism. In other words, Holmes believed that the Court was overriding the collective decision of a political majority, as expressed through a statute enacted by a democratically elected legislature, based on the personal preferences of the five justices. Justice Harlan, in his own dissent, picked up on Holmes’s objection, which was fundamentally about the separation of powers between the judicial and elected branches. In a formulation that is consistent with the modern rational-basis test, Justice Harlan believed that the burden should be on the citizen challenging the economic regulation and that if “the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere.”

*Lochner*, then, is hated because it symbolizes judicial activism. This fact transformed *Lochner* into an object of scorn for both the left and the right. Liberals view *Lochner* with contempt because, in their view, it represents the enforcement of the norms of robber-baron capitalism against progressive social and economic legislation. Conservatives view *Lochner* with equal contempt, ranking it as a usurpation of the elected branches’

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46. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).
47. Id.
49. Id.
51. Id.
54. Gillman, *supra* note 52, at 207 n.8 (listing several scholarly works which advocate this view).
authority along the same lines as later cases involving reproductive rights such as Griswold v. Connecticut and, of course, Roe v. Wade.\footnote{55}

In 1923, the Supreme Court reaffirmed Lochner in Adkins v. Children’s Hospital.\footnote{56} In that case, a hospital and one of its female elevator operators challenged a 1918 act of Congress that set minimum wages for women and children working in the District of Columbia.\footnote{57} The majority held that a minimum-wage law was analogous to the maximum-workday and workweek statute in Lochner.\footnote{58} Thus, according to the Court, fixing the minimum wage violates the substantive due-process freedom of contract.\footnote{59}

The seeds of the modern rational-basis test continued to be sowed in the Adkins dissents. Justice Taft rejected one of the cornerstones of the Lochner decision, which concluded that owners and workers had roughly equal bargaining power, and hence states should not interfere in their contractual negotiations over working conditions.\footnote{60} He wrote:

Legislatures in limiting freedom of contract between employee and employer by a minimum wage proceed on the assumption that employees, in the class receiving least pay, are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered.\footnote{61}

In contrast to Justice Peckham’s Lochner majority opinion, Justice Taft regarded bargaining-power determinations as solely a legislative function, not something for the courts.\footnote{62} This is consistent with the practice of modern courts employing rational-basis review.\footnote{63}


\footnote{56} Adkins v. Children’s Hosp., 261 U.S. 525, 562 (1923).

\footnote{57} Id. at 542–43.

\footnote{58} Id. at 554–55.

\footnote{59} Id. at 561–62.

\footnote{60} Id. at 562 (Taft, C.J., dissenting).

\footnote{61} Id.

\footnote{62} Id.

\footnote{63} See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (*Whether in fact the Act will promote more environmentally desirable milk packaging is
Justice Taft also rejected *Lochner*’s notion that economic regulation directed at a specific class of workers did not protect the whole public and, as such, was outside the scope of the police power. To the contrary, he wrote that society benefits when particular members of society are protected from the ills associated with poor working conditions: “[I]t is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound.”

The *Lochner* Era is understood to have ended in *West Coast Hotel Co. v. Parrish* in 1937. *West Coast Hotel* overruled *Adkins* and largely ended the use of substantive due process to challenge economic regulations. In *West Coast Hotel*, a chambermaid sued her employer for the difference between what she had been paid and the minimum wage established by Washington State.

The basic contours of the modern rational-basis test emerged a year later in *United States v. Carolene Products Co.*, in which Carolene Products asserted a constitutional defense to its prosecution for violating the Filled Milk Act of 1923. The Act restricted the use of vegetable oil as an additive to milk products. *Carolene Products* marks a turning point in constitutional law for two reasons. First, infamous footnote four introduced the concept of varying standards of review based on what the Supreme Court regarded as the status of the right at stake. For a tiny set of fundamental rights—those “within a specific prohibition of the Constitution, such as those of the first ten Amendments”—courts would apply real judicial scrutiny.

For non-fundamental rights, on the other hand, which the Court regarded as of only minor importance, judges were to apply rational review, formulating the test this way:

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64. *Adkins*, 261 U.S. at 563 (Taft, C.J., dissenting).
65. *Id.* at 562.
67. *Id.* at 391, 400.
68. *Id.* at 388.
70. *Id.* at 144.
71. *Id.* at 152 n.4.
72. *Id.*
The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.\footnote{Id. at 152.}

Translated into modern rational-basis parlance, this means that laws come with a presumption of constitutionality and that the facts necessary to support that presumption are to be assumed.

Using this post-	extit{Lochner} standard of review, the Supreme Court upheld the Filled Milk Act.\footnote{Id. at 154.} The Court stated that Congress was entitled to judicial deference on the question of whether filled milk was wholesome or otherwise.\footnote{Id.} Absent overwhelming reason to believe that a legislative decision was arbitrary or irrational, the presumption of constitutionality should translate into victory for the government in most challenges to ordinary social and economic regulations.\footnote{CHEMERINSKY, supra note 3, at 640–41.}

The modern rational-basis test was first clearly articulated in 	extit{Williamson v. Lee Optical Co.} in 1955.\footnote{Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955).} In that case, unlicensed opticians brought a Fourteenth Amendment challenge to a 1953 Oklahoma statute that permitted only state-licensed optometrists and ophthalmologists to fit (or duplicate) corrective lenses.\footnote{Id. at 484-85.} The plaintiffs argued that the law violated substantive due process because there was no evidence to suggest that opticians were less able to fit lenses, as was the norm across the country at the time.\footnote{Id. at 486.} They also argued that the statute violated equal protection because sellers of ready-to-wear corrective glasses were unregulated, and hence no different from opticians in terms of any danger posed to the ocular health of Oklahomans.\footnote{Id. at 488.}
The *Williamson* decision is notable for its dismissive attitude towards the Fourteenth Amendment rights of opticians to pursue an honest living, as well as its dismissive tone in rendering its judgment. The Court concluded that the substantive due-process claim failed because requiring citizens to visit optometrists and ophthalmologists “might” result in more eye examinations, which meant that there was a “rational” relationship between the government’s interest in eye health and the occupational-licensing statute at issue.81

Importantly, the Court did not know, or care, if the law achieved the presumed purpose of more eye examinations. All that mattered, from the Court’s perspective, was that one could imagine it to be the case that the statute would lead to more eye exams.82 Justice Douglas wrote that “[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”83 By making the standard of constitutional review whether something “might be thought” to correct a perceived problem, the Court in effect held that the only limits on government power in the rational-basis context are the limits of the human imagination.

Justice Douglas was similarly blasé about the opticians’ equal-protection claim. The majority opinion posited that perhaps the Oklahoma legislature was just fixing problems incrementally: optician regulation now, maybe ready-to-wear glasses sellers later.84 According to the Court, legislatures do not run afoul of the Equal Protection Clause by enacting laws “one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”85 This approach largely vitiated the equal-protection doctrine in the non-fundamental rights context. If the government draws a distinction between A and B, even if they are similarly situated, that unequal treatment could be excused offhand as a form of incremental regulation. Indeed, Justice Douglas was candid about the fact that the Court was all but foreclosing equal-protection challenges outside of the very small fundamental-rights arena in which a suspect class such as race was

81. *Id.* at 487–88.
82. *Id.*
83. *Id.* at 488.
84. *Id.* at 489.
85. *Id.*
at issue: “The prohibition of the Equal Protection Clause goes no further than invidious discrimination. We cannot say that this point has been reached here.”

Justice Douglas believed that his Williamson opinion put a final nail in the Lochner coffin in case there was any doubt: “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.” It is ironic, then, that Justice Douglas wrote an opinion just ten years later in Griswold v. Connecticut that not only seems to stand in stark contrast to the judicial deference embodied in Williamson, but that also set in motion what conservative jurists and commentators describe as a Lochner-like line of cases invoking substantive due process in order to advance the personal social preferences of the Supreme Court justices.

Griswold involved a challenge to Connecticut’s so-called “Comstock Act of 1879.” Comstock Acts were, by the 1960s, relics of the Reconstruction Era that banned the use of birth control. In 1961, when Estelle Griswold opened a Planned Parenthood clinic in New Haven, Connecticut and Massachusetts were the only states that appeared to enforce their Comstock Acts. A challenge to Comstock Acts seemed inevitable because the Supreme Court had rejected several on procedural grounds. In Poe v. Ulman, Justice Harlan dissented from the Supreme Court’s dismissal of a Comstock Case for lack of standing. This dissent, which provided the conceptual foundation for Griswold a few years later, treated substantive due process as an important source of personal autonomy: “[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms

86. Id.
87. Id. at 488.
89. Colby & Smith, supra note 53, at 528.
90. Griswold, 381 U.S. at 480.
94. Id. at 522 (Harlan, J., dissenting).
of the specific guarantees elsewhere provided in the Constitution."95 Justice Harlan went on to describe the liberty protected by substantive due process as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."96

Faced with the Comstock Act challenge in 1965 in *Griswold*, Justice Douglas had to square the bend-over-backwards judicial deference of *Williamson*—the case about the Oklahoma opticians97—with the Court’s desire to invalidate Connecticut’s criminal prohibition on birth control. How could the substantive due-process doctrine be elaborated in a way that is largely indifferent to laws that impinge on economic liberty, but extremely sensitive to laws that impinge on sexual autonomy? This was a particularly difficult challenge as the very words that Justice Harlan used in his famous *Poe* dissent sounded a lot like rational-basis review—speaking of "arbitrary impositions and purposeless restraints."98

Justice Douglas threaded this needle by announcing that the "penumbras" and "emanations" of various provisions of the Bill of Rights created a sheltering zone of privacy.99 In contrast to *Williamson*, and harkening back to *Carolene Products* distinction between fundamental and non-fundamental rights, Justice Douglas treated the substantive due-process right of privacy as a fundamental right subject to strict scrutiny.100

*Williamson* and *Griswold*, then, mark the divergence of two distinct lines of substantive due-process cases, one involving non-fundamental economic liberty (which receives rational-basis review)101 and one involving the fundamental right of privacy for sexual autonomy (which receives strict scrutiny).102 The Supreme Court has not recognized a fundamental right outside of the sexual and marital autonomy context since *Griswold*, and its 1997 decision in *Washington v. Glucksberg*, in which the high court rejected a proposed fundamental substantive due-process right to

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95. *Id.* at 543.
96. *Id.*
100. *See id.* at 503-04 (White, J., concurring).
assisted suicide, seems to have spelled the end of the Supreme Court’s interest in substantive due process.103

As the Griswold line of cases expanded in areas such as abortion and gay rights (to the dismay of conservatives decrying judicial activism), the Supreme Court repeatedly reaffirmed the judicial deference required in the area of non-fundamental substantive due process.104 The decisions of the Supreme Court through today read like a race to the bottom, with each major decision describing yet another way to characterize the deference that the courts owe the elected branches.105

FCC v. Beach Communications is the iconic modern case setting forth the true scope of judicial deference in the rational-basis context.106 In Beach Communications, a cable distributor challenged a federal statute regulating how companies could provide cable TV signals to various types of consumers.107 The D.C. Circuit Court of Appeals invalidated the FCC’s interpretation of the statute because it seemed to subject some signal providers to a franchise requirement while arbitrarily exempting others.108 In reversing, the Supreme Court, in a unanimous opinion, emphasized that rational-basis review is “a paradigm of judicial restraint.”109

The Court observed that it did not matter what Congress was actually trying to accomplish “because we 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.”110 In sum,

equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification

107. Id. at 311.
108. Id. at 311–12.
109. Id. at 314.
110. Id. at 315.
that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational-basis for the classification.\textsuperscript{111} As with its antecedents back to \textit{Williamson v. Lee Optical}, the rational-basis standard set forth in \textit{Beach Communications} was framed as a safeguard against separation-of-powers dangers: “Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.\textsuperscript{112}

\textit{Beach Communications} represents the complete evolution of the Supreme Court’s thinking on how to review substantive due-process claims that do not implicate a fundamental right and equal-protection claims that do not implicate a suspect class. The high court justifies its extreme deference in part on a faith stretching back to the New Deal rebellion against \textit{Lochner} that “absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”\textsuperscript{113} The legislature, in other words, can be trusted to get it right.

But is this faith in the legislature justified? And should there not be a constitutional remedy, even in the context of challenges to economic regulations, when the legislature is not only getting it wrong, but apparently acting primarily in the interests of industry special interests? These are the questions being debated in the federal courts in the context of economic-liberty challenges, and the driving force behind that debate is a series of decisions in funeral-industry cases.

\begin{itemize}
\item \textsuperscript{111} \textit{Id.} at 313.
\item \textsuperscript{112} \textit{Id.} at 315 (quoting Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 510 (1937)).
\item \textsuperscript{113} \textit{Id.} at 314 (quoting Vance v. Bradley, 440 U.S. 95, 97 (1979)).
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III. CHALLENGES TO FUNERAL LAWS | REDEFINE RATIONAL-BASIS REVIEW

Lochner is despised by generations of law school professors and their students because it is understood as a reactionary decision by aged, pro-capitalist Supreme Court Justices who were determined to thwart progressive legislation protecting workers toiling in deplorable conditions.\(^{114}\) The underlying premise of the Supreme Court’s rational-basis doctrine is that legislatures have broad discretion to regulate the economy, and, just as important, should be trusted to do so.\(^{115}\) In a sense, the Supreme Court subscribes to an optimistic account of the elected branches that one might find in a high-school civics class.

But the high-school-civics narrative is not the only one to describe economic legislation, and it is not even likely to be the right one in many cases. The alternative narrative is that a great deal of economic regulation is the result of industry lobbyists securing anti-competitive laws that restrict entry into a line of business and interfere with innovation.\(^ {116}\) Lochner itself has undergone a significant revision by scholars noting that New York’s Bakeshop Act was spearheaded by native-born Americans of German ancestry who did not want to compete with Jewish immigrants, who were prepared to work longer hours.\(^ {117}\) According to this version of events, the Bakeshop Act was not a noble effort to protect bakers from unhealthy conditions, but instead an effort by one ethnic group to maintain dominance over an upstart ethnic group.\(^ {118}\)

This is not to say that all economic legislation is protectionist, just that a significant fraction may be. This is hard to deny given the undeniable fact that the legislative or rulemaking processes for economic regulations invariably involve the special interests with the largest stake in the outcome. Public-choice economics has done a great deal to explain how lawmaking is dominated by those with the time, resources, expertise, and

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\(^{115}\) See United States v. Carolene Prods., 304 U.S. 144, 147 (1938).


\(^{117}\) See Bernstein, supra note 27, at 1476.

\(^{118}\) See id. at 1477.
incentives to influence the process. American steel manufacturers, for example, have enormous incentives to lobby for barriers against the importation of foreign steel, but consumers, who will pay fractionally more for a variety of products, do not have incentives to organize to oppose such tariffs. Indeed, the premise behind campaign-finance regulation is that legislators are hopelessly beholden to big-money donors and big business.

The Public-choice narrative is particularly compelling in the context of funeral-industry laws, which is why they have become the targets in a series of constitutional cases redefining how courts apply rational-basis review to economic regulations. To begin with a recent example, in 2015, the state of New Jersey amended its religious corporations law to forbid religious institutions from selling monuments such as headstones to their parishioners for use in their own cemeteries.

The impetus for the prohibition was the Inscription Rights Program of the Archdiocese of Newark. The Archdiocese of Newark is the largest Catholic jurisdiction in the United States, boasting 1,300,000 Catholics in and around the city of Newark. The Archdiocese has nearly one million parishioners interred or entombed in its cemeteries. As the cemeteries age and require more maintenance, the Archdiocese sought new ways to raise


120. John Craig & David Madland, How Campaign Contributions and Lobbying Can Lead to Inefficient Economic Policy, CTR. FOR AM. PROGRESS (May 2, 2014, 8:37 AM), https://www.americanprogress.org/issues/economy/reports/2014/05/02/88917/how-campaign-contributions-and-lobbying-can-lead-to-inefficient-economic-policy/ (“[S]udies find that businesses with the most to gain from favorable public policy engage in the most political activity.”).


124. Id. at 51.

125. Id. at 4.

126. Id. at 14.
revenue beyond the sale of burial plots. The Inscription Rights Program was an innovation that emerged from the brainstorming process. Under the program, parishioners would pay the Archdiocese for a memorial, but the Church would, technically, retain ownership of the monument. The Archdiocese would promise to maintain the monument in perpetuity, cleaning and eventually replacing it as necessary. By all accounts, the Inscription Rights Program was popular with parishioners and grew annually following its inception in 2013 and its shutdown in 2016 when the 2015 statutory prohibition went into effect.

There were two groups, however, that hated the Inscription Rights Program: the Monument Builders of New Jersey and the New Jersey State Funeral Directors Association. The Monument Builders, which is the industry lobbying group for businesses in New Jersey that sell cemetery monuments, did not want the Archdiocese entering the market. The New Jersey State Funeral Directors Association—the funeral-industry lobby—feared that the Archdiocese’s expansion into monuments (on top of burial plots) would eventually lead down a slippery slope to cemeteries operating funeral homes and performing other services that funeral laws authorized only funeral directors to do.

The Monument Builders filed suit against the Archdiocese in 2013 in New Jersey state court, arguing that the sale of monuments by religious institutions violated common law doctrines against unfair competition. After a full-blown trial, the trial court ruled that New Jersey’s common law had been superseded by the Cemetery Act of 1971 and its major revision in

127. Id.
128. Id. at 16.
129. Id. at 16–17.
131. See Brief for the Roman Catholic Archdiocese of Newark as Amici Curiae Supporting Petitioner at 1, Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281 (2015) (No. 15-607) (discussing the lobbying campaign by the Monument Builders against the Archdiocese); see also Barron, supra note 130 (discussing the funeral directors’ opposition to the Archdiocese’s Inscription Rights).
132. See Brief for the Roman Catholic Archdiocese of Newark as Amici Curiae Supporting Petitioner, supra note 131, at 1.
133. Barron, supra note 130.
2003. The statute did not prohibit religious cemeteries from selling monuments, and hence the Archdiocese’s Inscription Rights Program was not illegal. New Jersey’s intermediate court of appeals affirmed on the same grounds.

Upon discovering that the Archdiocese’s monument program was perfectly legal, the Monument Builders and Funeral Directors teamed up to lobby the General Assembly for the law that the Monument Builders lacked in their state-court suit: a statutory prohibition on the sale of monuments by religious cemeteries. The industry groups made a full-court press in the legislature claiming that allowing the Archdiocese and other religious cemeteries to sell monuments would harm monument builders economically and, consequently, the public. No parishioners of the Archdiocese nor any consumer group supported the bill. Indeed, as Public-choice economics predicts, consumers are not even aware of and do not participate in the legislative haggling over who gets regulated and how. Those battles are generally fought by industry lobbyists. The bill passed and Governor Chris Christie signed it into law.

The Archdiocese then sued in federal court in Trenton, New Jersey, arguing that the statute failed the rational-basis test because it advanced no legitimate government interest and that the only interest that the law advanced—protecting the wallets of monument sellers and funeral directors from competition—was illegitimate. In making these arguments, the Archdiocese plunged into the central debate among federal courts across the country about how rational-basis review should be applied. First,

135. See id. at 5-6.
136. See id. at 8-9.
137. See id.
138. Barron, supra note 130.
139. Id.
142. Id. at 337.
the Archdiocese asserted that private economic protectionism is not a legitimate government interest and could not be a basis for upholding the law.\textsuperscript{145} Second, the Archdiocese argued that, even if the government could invoke hypothetical facts to justify the statute, the Archdiocese could use evidence to negate those hypothetical justifications.\textsuperscript{146}

Both questions are significant, and the first—about private economic protectionism—involves a circuit split that can be traced back to another funeral case. In 2002, in \textit{Craigmiles v. Giles}, the Sixth Circuit invalidated a Tennessee statute that required a funeral-director license to sell funeral merchandise such as caskets.\textsuperscript{147} Nathaniel Craigmiles had opened casket stores in Chattanooga and Knoxville.\textsuperscript{148} He did not offer any funeral-director services such as embalming or arranging funerals.\textsuperscript{149} The state licensing board sent Craigmiles a cease-and-desist letter and he brought suit in federal court asserting his Fourteenth Amendment equal-protection and substantive due-process rights.\textsuperscript{150}

The Sixth Circuit applied the rational-basis test because, for the substantive due-process claim, the right to earn an honest living is non-fundamental.\textsuperscript{151} The panel also applied rational-basis review to his equal-protection claim because the case did not involve a suspect class such as race.\textsuperscript{152} The court examined whether the challenged statute was rationally related to legitimate government interests such as consumer protection or public health and safety, and found no such relationship.\textsuperscript{153}

This is where the Sixth Circuit raised private economic protectionism. “The weakness of Tennessee’s proffered explanations indicates that the 1972 amendment adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic

\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002).
\textsuperscript{148} Id. at 222-23.
\textsuperscript{149} Id. at 223.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 223-24.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 226-28.
competition.” The court found the protectionist nature of the statute so convincing, and the government’s asserted rationales so unconvincing, that it described the government’s case as “striking us with the force of a five-week-old, unrefrigerated dead fish.” The panel struck down the casket sales prohibition because it was “left with the more obvious illegitimate purpose to which licensure provision is very well tailored;” namely, the “licensure requirement imposes a significant barrier to competition in the casket market.” The Sixth Circuit held that purely private economic protectionism is not a legitimate government interest and hence cannot be the basis for upholding an economic regulation. The Sixth Circuit’s decision in Craigmiles was the first time in the post-Lochner Era that a federal court of appeals had struck down any part of an occupational licensing law. Aware that its decision could elicit cries of Lochnerism, the panel acknowledged that “[j]udicial invalidation of economic regulation under the Fourteenth Amendment has been rare in the modern era.” The court nevertheless made clear that restraining legislatures from using public power for purely private gain “is not a return to Lochner, by which this court would elevate its economic theory over that of legislative bodies.” Rather, a “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.”

The Craigmiles decision is significant not just for being the first one to strike down a licensing law since the so-called Lochner Era ended. It is significant because it expressed reasonable skepticism of the legislative process. In contrast to the premise underlying the post-Lochner New Deal jurisprudence—that legislatures can generally be trusted to act in good faith to get

154. Id. at 225.
155. Id. (quoting United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001)).
156. Id. at 228–29.
157. Id. at 229.
159. Craigmiles 312 F.3d at 229.
160. Id.
161. Id.
things right for the public—Craigmilestook a more realistic view of how a great deal of economic regulation is passed and for what unsavory purpose.

Craigmile's skepticism of the legislative process marked a turning point in economic-liberty doctrine and generated an almost immediate circuit split. In Powers v. Harris, the Tenth Circuit issued an opinion two years after Craigmiles that upheld an Oklahoma statute essentially identical to the Tennessee law struck down in Craigmiles.\(^\text{162}\) Kim Powers founded an Oklahoma business to sell funeral merchandise such as caskets online.\(^\text{163}\) Because Powers was not an Oklahoma-licensed funeral director, she was forbidden by law from operating her business.\(^\text{164}\) The Powers panel concluded that the Oklahoma statute was rationally related to legitimate government interests such as consumer protection.\(^\text{165}\)

But the court went one step further. It held that the law would still survive even if it were not related to a traditional government interest such as consumer protection, and even if the statute really was just a form of private economic protectionism for Oklahoma funeral directors.\(^\text{166}\) Like Craigmiles, and in contrast to the idealism of much post-New Deal rational-basis jurisprudence, the panel acknowledged that legislatures behave in protectionist ways: “while 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.”\(^\text{167}\)

The court concluded that adopting a rule against private economic protectionism would threaten to undo occupational licensing, and stated that while “the creation of such a libertarian paradise may be a worthy goal, Plaintiffs must turn to the Oklahoma electorate for its institution, not us.”\(^\text{168}\) Thus, in the Tenth Circuit, the government can win any challenge to an economic regulation simply by asserting that the state legislature may have wanted to make the protected class of businesses richer at the expense of competitors and the general public. This, of

\(^\text{162}\) Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004).
\(^\text{163}\) Id. at 1213.
\(^\text{164}\) Id. at 1211–12.
\(^\text{165}\) Id. at 1215.
\(^\text{166}\) Id. at 1221.
\(^\text{167}\) Id.
\(^\text{168}\) Id. at 1222.
course, is tantamount to a doctrine of “the government always wins.”

Because the Tenth Circuit’s approval of private economic protectionism for its own sake amounts to a rule that the government always wins, the next two cases to consider the question rejected it. First, in a case involving a challenge to California’s pest-control statutes, the Ninth Circuit held in *Merrifield v. Lockyear* that the rational-basis analysis could not be short-circuited simply by declaring that the California government had a naked bias for the success of one group over another.169 Then, in another casket case, the Fifth Circuit not only rejected the economic-protectionism doctrine of the Tenth Circuit, but it also fleshed out how the rational-basis test works in the economic-liberty context.170

Decided in 2013, the Fifth Circuit case is *St. Joseph Abbey v. Castille*, in which a monastery of casket-making monks challenged a Louisiana funeral statute that—as in Tennessee and Oklahoma—forbade anyone but a state-licensed funeral director from selling a casket.171 As with the Ninth Circuit panel in *Merrifield*, the Fifth Circuit rejected private economic protectionism as a legitimate government interest, depriving Louisiana of the ability to win the case simply by asserting that the legislature likes funeral directors more than monks or the general public.172 This conclusion isolated the Tenth Circuit even more, making the split three (Sixth, Ninth, and Fifth) to one.173

The Fifth Circuit also made clear that rational-basis review was not a charade in which the government’s victory was predetermined. This recognition consisted of two points. First, “although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of

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171. *Id.* at 217; *see Merrifield*, 547 F.3d at 992 (“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.”).
irrationality.”\textsuperscript{174} In other words, the government does not need to submit evidence and can assert plausible justifications for a law, but plaintiffs can negate those rationales through their own evidence and argument. Second, any “hypothetical rationale . . . cannot be fantasy.”\textsuperscript{175} Instead, the “analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts.”\textsuperscript{176} To the contrary, courts are to undertake their analysis “informed by the setting and history of the challenged rule.”\textsuperscript{177} As in Craigmiles, the monks prevailed.

The three-to-one circuit split over private economic protectionism deepened in 2015, right about the time that New Jersey enacted its restriction on the sale of headstones by religious cemeteries, when the Second Circuit handed down its decision in Sensational Smiles L.L.C. v. Mullen.\textsuperscript{178} In that case, Lisa Martinez, who was not a state-licensed dentist, opened a teeth-whitening business in Connecticut in which she provided her customers with over-the-counter whitening products and a space to use them.\textsuperscript{179} She was quickly served with a cease-and-desist letter from the state dental board, which told her that she was illegally providing oral care to the public without being a state-licensed dentist.\textsuperscript{180} After proceedings in the trial court, the only question on appeal was whether Martinez could shine a low-powered, over-the-counter blue light at a customer’s teeth to enhance the whitening process.\textsuperscript{181}

The Second Circuit ruled that the dentist-licensing statute was rational as applied to Martinez for consumer-protection reasons.\textsuperscript{182} But beyond that, the panel also held that even if the statute lacked a traditional rational basis in health and safety or consumer protection, the law would still be permissible even if it amounted only to economic protectionism for dentists.\textsuperscript{183} The

\textsuperscript{174} St. Joseph Abbey, 712 F.3d at 223.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281, 291, cert. denied 136 S. Ct. 1160 (2016) (“In short, no matter how broadly we are to define the class of legitimate state interests, I cannot conclude that protectionism for its own sake is among them.”).
\textsuperscript{179} Id. at 283.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 288.
\textsuperscript{183} Id. at 286.
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court said that the purpose of the legislation did not matter
because legislatures are never required to give their reasons for a
law.184 In any case, favoring one group over another for economic
advantages has a name, according to the Second Circuit: “We call
this politics.”185

Echoing the separation-of-powers concerns at the heart of
Carolene Products’ infamous footnote four, the Second Circuit
concluded that “[w]hether the results [of the legislative process]
are wise or terrible is not for us to say, as favoritism of this sort is
certainly rational in the constitutional sense.”186 According to the
court, to “hold otherwise would be to interpret the Fourteenth
Amendment in a way that is destructive to federalism and to the
power of the sovereign states to regulate their internal economic
affairs.”187 This would be a return to Lochner. “As Justice Holmes
wrote over a century ago, “[t]he Fourteenth Amendment does not
enact Mr. Herbert Spencer’s Social Statics.”188

All of this circles back to the New Jersey case discussed at
the start of this section. No reasonable person can look at the
process in the New Jersey General Assembly and conclude that the
prohibition on the sale of monuments by religious cemeteries is
anything but private economic protectionism. The Third Circuit
has yet to weigh in, thus ensuring that the split will deepen one
way or the other because an appeal seems inevitable regardless of
which party prevails in the trial court. On April 29, 2016, a federal
judge denied the state of New Jersey’s motion for summary
judgment and ruled that the Archdiocese’s case deserves a full
hearing.189 Perhaps this will be the case that goes to the Supreme
Court to test just how deferential rational-basis basis ought to be.

IV. Conclusion

The modern rational-basis test emerged out of a reaction
to what was perceived as the judicial activism of the Lochner Era.
This reaction swung the pendulum so far that by the Supreme

184. Id.
185. Id. at 287.
186. Id.
187. Id.
188. Id.
189. Roman Catholic Archdiocese of Newark v. Christie, No. CV155647MASLHG,
Court’s 1993 decision in *Beach Communications* it was hard to discern how plaintiffs could ever win a rational-basis case. But a series of cases involving the funeral industry has called in question the consensus about how much courts should defer.

The federal courts of appeals have split over whether private economic protectionism is a legitimate government interest, and they have acknowledged that plaintiffs may use evidence to negate the government’s hypothesized justifications for a challenged law. Although still deferential, these decisions have carved out a space for courts to reject what we might call *legislative activism*—laws that are irrational either because they have no plausible connection to a legitimate government interest or because they pursue an illegitimate one.

With this debate percolating in the lower courts, the Supreme Court will one day have to hear an economic-liberty case. Whether it is the challenge now before the federal district court in New Jersey over the sale of monuments by religious cemeteries or some other cases, it is high time for the Supreme Court to make clear that the rational-basis test is a real standard of constitutional review, that plaintiffs can and do win these cases, and that they do so by using evidence that a challenged law has gone too far.