

# ECONOMIC LIBERTY AND THE ARIZONA CONSTITUTION: A Survey of Forgotten History

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## ABSTRACT

*Justice Brennan’s exhortation—now forty years old—for lawyers and judges to rediscover protections for individual rights in state constitutions was a timely reminder of the importance of state constitutions in our system of federalism. Justice Brennan issued this call at a time when he believed the U.S. Supreme Court was retreating from the protection of individual rights under the U.S. Constitution. It is doubtful that Justice Brennan meant to include economic liberty—the right to earn a living free from oppressive government regulation—in his “new federalism.” But economic liberty is a nearly textbook example of an individual right that the U.S. Supreme Court had once vigorously protected but had retreated from by the late 1970s.*

*The pattern of meaningful protection for economic liberty fading into non-protection was repeated at the Arizona Supreme Court. The change in Arizona jurisprudence, however, happened at a different time than in the federal courts and has never been adequately explored or explained—either by the courts or commenters. Neither have the “early” Arizona economic liberty cases—which actually span the decades between the 1920s and 1970s—been given credit for their consistency and sophisticated understanding of the police power, individual rights, and the threat of government-created monopoly. A comprehensive survey of these early cases demonstrates a tradition under the Arizona Constitution of providing more meaningful judicial protection for economic liberty than under the U.S. Constitution. This tradition was seemingly abandoned as the Arizona Supreme Court embraced—without explanation—a “lockstep” approach to economic liberty by adopting federal jurisprudence to interpret the relevant*

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*provisions of the Arizona Constitution. But this lockstep approach cannot be squared with the original cases, ignores unique aspects of the Arizona Constitution, and leads to incorrect results. As other states have begun to explore the greater protections for economic liberty in their constitutions, Arizona courts need to rediscover the same in our Constitution.*

#### INTRODUCTION

Forty years ago, under the banner of “new federalism,” U.S. Supreme Court Justice William Brennan issued his now famous exhortation for lawyers and judges to rediscover protections for individual rights in state constitutions.<sup>1</sup> Coming in the wake of the Warren Court’s federalization of so many questions of individual rights, Justice Brennan’s exhortation was a much-needed recognition of the importance of state constitutions in our system of federalism and a timely reminder to the legal community not to forget our dual system of constitutionalism.

Justice Brennan’s new federalism correctly recognized that a state constitution may be interpreted differently than the U.S. Constitution; and interpreted differently not only when the state’s constitutional provisions are unique or different than the U.S. Constitution, but also when the provisions in question are worded identically.<sup>2</sup> Certainly there are those who have criticized Justice Brennan as being concerned only about his favored outcomes, rather than a principled proponent of federalism or state constitutions.<sup>3</sup> But these critics have also agreed that Justice Brennan was right: State constitutions can and often do protect rights more fully than does the U.S. Constitution, both because these constitutions contain unique provisions and because state courts have flat disagreed with Supreme Court precedent.<sup>4</sup>

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1. William J. Brennan, Jr., *State Constitutions & the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

2. *Id.* at 495, 500.

3. *E.g.*, CLINT BOLICK, GRASSROOTS TYRANNY 30 (1993) (“The individual liberties protected by Brennan’s concept of federalism are . . . highly selective.”); *see also* Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New “Rights” in State Constitutions*, 21 ARIZ. ST. L.J. 1005, 1010 (1989) (criticizing a later Justice Brennan exhortation about state constitutions as “not the exhortations of a judge seeking to apply ‘neutral principles’”).

4. Clint Bolick, *Vindicating the Arizona Constitution’s Promise of Freedom*, 44 ARIZ. ST. L.J. 505, 509 (2012) (“Freedom advocates on both the left and right should heed Brennan’s call to recourse to state constitutions. Many state constitutions contain protections of individual rights and restraints on government power that are unknown to the U.S. Constitution.”); Twist & Munsil, *supra* note 3, at 1006 (“State courts are free to interpret state constitutional provisions according

Justice Brennan did not mean to include economic liberty—the right to earn a living free from oppressive government regulation—in his new federalism. Economic liberty has long been recognized by the U.S. Supreme Court as a right protected by the constitution—indeed, even a fundamental right.<sup>5</sup> But it is the textbook example of an individual right that the U.S. Supreme Court had once protected but then retreated from by the late 1970s. Justice Brennan had done nothing to halt that retreat and failed to discuss economic liberty as part of his new federalism.<sup>6</sup> Even so, state supreme courts generally had not similarly retreated, even at that relatively late date.<sup>7</sup> And a close inspection of Arizona’s history, constitutional text, and jurisprudence, demonstrates the need for a different approach to economic liberty than that currently taken by the federal courts.

Economic liberty under the Arizona Constitution has not been the subject of much study. One of the few commenters has noted that the earliest economic liberty cases from the Arizona Supreme Court—decided during the “*Lochner* era”—did not follow the U.S. Supreme Court’s lead and instead “rebuffed challenges . . . to various forms of governmental regulation,” but that the court later did use substantive due process under the Arizona Constitution to strike down economic regulations.<sup>8</sup> Observers have also deemed the early body of economic liberty case law in Arizona to be “inconsistent,”<sup>9</sup> while concluding that the court has more recently “given the legislature increased deference in regulation of economic rights.”<sup>10</sup>

But these observations about the earliest economic liberty case law in Arizona are of limited value because they are incomplete, look only at case

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to their own text and history, unless the citizens adopt a specific constitutional provision to the contrary.”).

5. See Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 897, 902–03 nn.31–35 (2005) (collecting cases).

6. Anthony B. Sanders, *The “New Judicial Federalism” Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457, 459–60 (2005) (“[F]or some inexplicable reason Justice Brennan completely omitted a field of state constitutional law in which states had been actively pursuing this ‘New Judicial Federalism’ for years. The omission is truly staggering. The field he neglected to include among the three mentioned above is the protection of economic liberties.”).

7. *Id.* at 461 (“[F]rom 1937 through the present day, almost every state court of highest review has interpreted its own constitution’s Due Process Clause and similar provisions, to strike down economic regulations. These state courts have done so even when explicitly acknowledging that the U.S. Supreme Court has interpreted the equivalent language in the U.S. Constitution to not extend such protection of economic liberties.”).

8. JOHN D. LESHY, *THE ARIZONA STATE CONSTITUTION* 59 (2d ed. 2011).

9. *Id.* (discussing David Smith, *Economic Substantive Due Process in Arizona: A Survey*, 20 ARIZ. ST. L.J. 327 (1988)).

10. *Id.*

outcomes rather than the judicial processes or rationales employed, and fail to examine the unique history of and provisions in the Arizona Constitution that may account for differences in outcome compared to similar federal cases. It is true that the pattern of economic liberty decisions in Arizona—meaningful protection for economic liberty fading into non-protection—looks very much like what happened in the federal courts. But Arizona’s “fade”—which happened decades after the federal courts’ jurisprudential shift—has never been adequately explored or explained by the courts or commenters.

Neither have the “early” Arizona economic liberty cases—which actually run at least from the 1920s through the 1970s—been given credit for their general consistency or sophisticated understanding of the police power, individual rights, and the threat of government-created monopoly. These early cases demonstrate a decades-long tradition of judicial protection for economic liberty and from the use of government power for private gain that is more meaningful than under the federal jurisprudence. Indeed, Arizona’s early jurisprudence is quite understandable given the particular historical concerns of the framers of Arizona’s Constitution—concerns that manifested themselves in several unique provisions in the Arizona Constitution.

In short, when it comes to protecting economic liberty, Arizona has several markers of a “unique” tradition to differentiate it from federal jurisprudence. This uniqueness was seemingly abandoned as the Arizona Supreme Court adopted—without explanation—a “lockstep” approach to economic liberty by adopting federal jurisprudence to interpret the relevant provisions of the Arizona Constitution. But this lockstep approach cannot be squared with the original cases, ignores the unique history and provisions of the Arizona Constitution, and leads to incorrect results. As other states have begun to explore the greater protections for economic liberty in their constitutions, the Arizona courts need to do the same. This Article seeks to reinvigorate the original—more protective—understanding of economic liberty under the Arizona Constitution.

Part I of this Article discusses the proper methodologies for interpreting, understanding, and applying the Arizona Constitution. To set up the discussion of Arizona’s unique history, Part II sketches the history of the U.S. Supreme Court’s treatment of economic liberty while noting criticisms of the Court’s current approach—both by legal observers and under the insights of “public choice economics.” In Part III.A, we set out the particular history of Arizona’s constitutional framers and the unique provisions in the Constitution, showing how its text, understood in light of the context of the day, provides for greater judicial checks against regulatory capture and the use of government power for private economic interests than currently

employed under federal law. Part III.B then discusses the “early” Arizona cases to demonstrate their remarkable consistency of approach and sophistication in applying this greater protection for economic liberty. Part IV compares the early cases to the later, more permissive, cases and shows that the approach of the later cases diverged from the earlier precedents without explanation or comment. Finally, Part V argues that Arizona courts should reclaim the sophisticated and meaningful protections for economic liberty contained in the Arizona Constitution.

#### I. THE NEW FEDERALISM AND INTERPRETATIVE METHODOLOGIES OF THE ARIZONA CONSTITUTION

Debate over how to interpret a constitution is by now familiar to judges, lawyers, and legal academics. The various schools of textualism, originalism (of both “original intent” and “original meaning” varieties<sup>11</sup>), and other approaches<sup>12</sup> should be familiar to the reader and need not be rehashed here. But the overwhelming majority of this debate has focused on the U.S. Constitution; very little have state constitutions been discussed.<sup>13</sup> Instead, discussion about state constitutional interpretation has tended to the relationship—a compare and contrast—between the state constitution and the U.S. Constitution. This compare and contrast approach has led to other interpretative approaches less familiar to most observers: “lockstep,” “interstitial,” and “primacy.” This Part argues that originalism is the proper approach to interpreting the Arizona Constitution, that originalism demands a “primacy” approach to interpreting the Arizona Constitution, and sets forth the reasons why the primacy approach was forgotten.

The Arizona Supreme Court has long held that some form of originalism is the proper method to employ when interpreting the Arizona Constitution. Less than five months after statehood, the court noted the “salutary rule of

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11. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–29 (1999) (discussing the difference); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) (originalists now seek “the original meaning of the text, not what the original draftsmen intended”); see also Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011) (discussing evolution of originalism from a critical perspective).

12. E.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

13. See generally Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, GEO. J.L. & PUB. POL’Y (forthcoming), <http://ssrn.com/abstract=2827872>.

construction” is to give “each and every clause in a written constitution” meaning “so that intent of the framers may be ascertained and carried out.”<sup>14</sup> In the years since, the court has continued to voice originalist approaches to the Arizona Constitution by searching for the intent and purpose of those who framed, adopted, and amended its text.<sup>15</sup> Although there is some inconsistency in whether courts should look to the intent of the drafters or to the public meaning of the text, that inconsistency mirrors the evolution of originalism in the federal courts.<sup>16</sup> Regardless, it is clear that some form of “originalism” is the proper analytic approach to take.

Beyond “originalism,” the Arizona Supreme Court has added to the interpretative lexicon. As summarized by then-Justice Ruth McGregor, there are generally three “interpretive methodologies” used when courts construe a state constitutional provision with a federal analogue, and the Arizona Supreme Court has applied all three of these approaches:

In the “lockstep” approach, the state court follows the U.S. Supreme Court’s interpretation of the analogous federal text. Using the “primacy” approach, the state court looks first to the state constitution and uses federal law only for guidance. The “interstitial” or “criteria” approach calls for state courts to follow federal law unless one or more factors unique to the state constitution justify diverging from the Supreme Court’s interpretation of the analogous clause.<sup>17</sup>

Unfortunately, as Justice McGregor also noted, when the Arizona Supreme Court chooses to apply one of these approaches, it often fails to

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14. *State ex rel. Davis v. Osborne*, 125 P. 884, 892 (Ariz. 1912).

15. *Rumery v. Baier*, 294 P.3d 113, 116 (Ariz. 2013) (“The [Arizona] Constitution should be construed so as to ascertain and give effect to the intent and purpose of the framers and the people who adopted it.”) (internal quotation marks omitted); *Brewer v. Burns*, 213 P.3d 671, 676 (Ariz. 2009) (same); *Cain v. Horne*, 202 P.3d 1178, 1181 (Ariz. 2009) (“In interpreting a[n Arizona] constitutional provision, our primary purpose is to effectuate the intent of those who framed the provision.”) (internal quotation marks omitted); *Jett v. City of Tucson*, 882 P.2d 426, 430 (Ariz. 1994) (“When interpreting the scope and meaning of a constitutional provision, we are guided by fundamental principles of constitutional construction. Our primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it.”); *McElhanev Cattle Co. v. Smith*, 645 P.2d 801, 804 (Ariz. 1982) (“The governing principle of constitutional construction is to ascertain and give effect to the intent and purpose of the framers of the constitutional provision and of the people who adopted it.”); *Morrison v. Nabours*, 286 P.2d 752, 755 (Ariz. 1955) (“It is generally conceded that a Constitution should be construed so as to ascertain and give effect to the intent and purpose of the framers and the people who adopted it.”).

16. Colby, *supra* note 11, at 721–23.

17. Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 ARIZ. ST. L.J. 265, 267 (2003).

explain why it has chosen that one and not one of the other approaches.<sup>18</sup> Neither has the court spent any time discussing the relationship between these approaches and the originalist approach the court is supposed to take when interpreting the Arizona Constitution.

Originally, of course, the Arizona Constitution would have been viewed as the primary protection of individual rights against the state. At the time the Arizona Constitution was drafted and ratified in 1910 and approved in 1912, there were few federal constitutional rights that were applied against the states.<sup>19</sup> Only a handful of provisions of the original Constitution applied against states, the U.S. Bill of Rights did not apply to the states, the U.S. Supreme Court had all but neutered provisions that expressly protected rights against infringement by the states,<sup>20</sup> and the Court had not begun in earnest to “incorporate” certain rights against states.<sup>21</sup>

While this history is, of necessity, a little too cursory,<sup>22</sup> it seems to have been the understanding of the men who wrote the Arizona Constitution. During the debate about adopting the Declaration of Rights (“Substitute Proposition 94”), some delegates were apparently of the understanding that no such enactment was necessary and sought to indefinitely postpone further consideration of the proposition.<sup>23</sup> But Delegate Frederick Ingraham, a lawyer, informed them otherwise:

Gentlemen may say these principles are all in the Constitution of the United States, and therefore are absolutely unnecessary here now. That is a mistake; that is not the law, and I want to state it is so mainly that the mistake will not occur again, that the first ten amendments to the United States Constitution, which is the Bill of Rights, have no application to the state law; they are restrictions

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18. *Id.* at 270–71.

19. LESHY, *supra* note 8, at 53.

20. *See* discussion *infra* Part II.

21. *See* *Gitlow v. New York*, 268 U.S. 652 (1925) (applying the First Amendment against a state for the first time).

22. For example, in “diversity cases” under the doctrine of *Swift v. Tyson*, 41 U.S. 1 (1842), which was not abandoned until *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court had for many years been applying restrictions to state power without necessarily citing the Constitution. *See* discussion *infra* Part II and notes 38, 45. Moreover, in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 234–35, 241 (1897), the U.S. Supreme Court had already applied the Fifth Amendment’s “just compensation” requirement to a state’s exercise of its eminent domain power through the Fourteenth Amendment. And, yes, *Lochner v. New York*, 198 U.S. 45 (1905), was the law of the land. *See* discussion *infra* Part II.

23. THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 759 (John S. Goff ed., 1991) [hereinafter RECORDS].

upon the power of the United States; they are not restrictions upon the states, and they are not aimed to affect state affairs.<sup>24</sup>

The proposition was not postponed<sup>25</sup> and was, eventually, adopted.

Given this history and understanding of the framers of the Arizona Constitution, some observers—including a current Arizona Supreme Court justice—have criticized taking anything but a “primacy” approach:

A lockstep approach hitches state constitutional rights to federal judicial proclivities, draining them of the independent vitality they clearly were intended to have by the framers. Far better is the “primacy” approach—that is, interpreting state constitutional provisions separately from their federal constitutional counterparts, focusing on their language, intent, and history. Such an approach contributes to consistency in the law, it honors the intent of the framers to provide an independent and primary organic law, and it ensures that the rights of Arizonans will not erode even when federal constitutional rights do.<sup>26</sup>

Essentially then, “primacy” and “originalism” go together. If the goal is to “ascertain and give effect to the intent and purpose of the framers and the people who adopted it,”<sup>27</sup>—originalism—primacy is the only approach that does that. After all, as Oregon Supreme Court Justice Hans Linde put it:

The right question is not whether a state’s guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state’s guarantee means and how it applies to the case at hand.<sup>28</sup>

Under originalism and primacy it may still be the case that a state constitutional provision is interpreted to mean the same thing as its federal counterpart. But that is only because, as Justice Linde argued, that was the original intention or understanding.

For many years, however, the intuitive appeal of the primacy approach waned. First, the Warren Court era “accustomed lawyers and judges to believe that state law was unlikely to provide greater individual-rights protection than was available in federal courts and through federal

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24. *Id.*

25. *Id.* at 760.

26. Bolick, *supra* note 4, at 509.

27. Rumery v. Baier, 294 P.3d 113, 116 (Ariz. 2013) (internal quotation marks omitted).

28. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

constitutional law.”<sup>29</sup> Second, law schools then spent decades teaching individual rights as “primarily a federal subject” and generally paid no attention to state constitutions.<sup>30</sup> Third, judges and lawyers coming out of this education system “bec[a]me comfortable with an approach with which they [were] familiar,” and stopped trying to develop “a body of independent state constitutional law.”<sup>31</sup> Fourth, there has been—at least in Arizona—a paucity of accessible sources to use to study the constitution,<sup>32</sup> which, when combined with the lack of judicial, practitioner, and academic interest in state constitutions, exacerbated a lack of research about the original meaning of the Arizona Constitution.

As shown below, the period when the Warren Court cast a shadow over state constitutions is the same period in which older Arizona case law taking a “primacy” approach began to be “lost” and a “lockstep” approach began to be adopted by lawyers and judges. The older primacy cases are still there, of course, but they were ignored by the subsequent lockstep judicial decisions—likely because they were ignored by practitioners. This means that there exists today in Arizona a body of constitutional law that was handed much down closer in time to the adoption of our Constitution and that has never been explicitly overruled but that is contrary to later legal decisions. This body of case law demands a reexamination to ensure that we are properly interpreting the Arizona Constitution.

## II. FEDERAL COURTS’ ABANDONMENT OF ECONOMIC LIBERTY FOLLOWING THE NEW DEAL HAS PAVED THE WAY FOR WIDESPREAD ABUSE OF THE POLICE POWER

To properly consider the Arizona Constitution’s protections for economic liberty it is useful to consider the (admittedly oversimplified) arc of the U.S. Constitution’s protections of the same. As critics of that jurisprudence have observed, and as public choice economics further explains, the federal

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29. Paul Bender, *The Arizona Supreme Court and the Arizona Constitution: The First Hundred Years*, 44 ARIZ. ST. L.J. 439, 458 (2012).

30. *Id.*

31. McGregor, *supra* note 17, at 279.

32. With regard to the Arizona Constitution, “[a]lmost nothing is available about the deliberations of the committees, where much of the actual drafting was done.” LESHY, *supra* note 8, at 15–16. There is no official complete record of the constitutional convention. *Id.* at 15. There is a compilation of the available materials, but it was published some eighty-one years after the convention itself. RECORDS, *supra* note 23. Neither is there any Arizona equivalent of *The Federalist*, much less anti-Federalist essays for scholars and practitioners to refer to.

jurisprudence has led to the widespread use of government power for private benefit.

### A. Jurisprudential History

Initially, of course, few rights guaranteed by the U.S. Constitution applied against the states—the only governments of general jurisdiction, vested with the police power, and therefore far more likely to engage in “economic” regulations. The Bill of Rights applied not at all.<sup>33</sup> There were, however, a handful of restrictions on state power in the original Constitution (including some that affected state economic regulations): the Privileges and Immunities Clause of Article IV, Section 2; the Supremacy Clause of Article VI, Section 2; and the Bills of Attainder, Ex Post Facto, and Impairment of Contracts Clauses in Article 1, Section 10. But there are few pre-Civil War cases that addressed economic liberty as a matter of federal constitutional law and far fewer still are relevant to the topic of discussion here.<sup>34</sup>

The most noted pre-civil war case today is *Corfield v. Coryell*.<sup>35</sup> In *Corfield*, Justice Bushrod Washington, riding circuit, famously recognized that the Privileges and Immunities Clause ensured that states had to afford out-of-state residents equal civil rights as in-state residents.<sup>36</sup> Among these equal civil rights were:

[T]he enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; [and] to take, hold and dispose of property, either real or personal . . . .<sup>37</sup>

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33. *Barron v. Baltimore*, 32 U.S. 243 (1833).

34. For example, *Gibbons v. Ogden*, 2 U.S. 1 (1824), held that New York courts could not enjoin the operation of a ferry between New York and New Jersey, notwithstanding the fact that New York had granted a monopoly on ferry services in New York to someone else, because the New York-New Jersey ferry operator was operating pursuant to a license granted by the federal government pursuant to the federal Coasting Act of 1793. The Coasting Act was a legitimate exercise of the Commerce Clause, and therefore the federal license was supreme over conflicting state law.

35. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

36. *Id.* at 551.

37. *Id.* at 551–52.

Unfortunately for Corfield, these equal civil rights did not include equal rights to property owned by the state. Corfield, a citizen of Delaware, had been farming oysters in New Jersey waters.<sup>38</sup> Because oysters in New Jersey were deemed property of the State of New Jersey, Justice Washington ruled that Corfield had no right to farm them.<sup>39</sup> This makes the passage about equal civil rights and the pursuit of trade, agriculture, or professions in *Corfield* to be, strictly speaking, dicta. But it was and remains very influential dicta.

The adoption of the Fourteenth Amendment following the Civil War, and specifically its Privileges or Immunities,<sup>40</sup> Due Process,<sup>41</sup> and Equal Protection Clauses,<sup>42</sup> greatly expanded the opportunity for courts to protect economic liberty as a federal right because of the direct constitutional restraints on state governments. Almost immediately, however, the Supreme Court gutted the protections of the Fourteenth Amendment's Privileges or Immunities Clause when it handed down *The Slaughter-House Cases* and *Bradwell v. State of Illinois*<sup>43</sup> on back-to-back days in April 1873. Both cases threatened to read economic rights out of the Fourteenth Amendment.<sup>44</sup> Though these protections applied to economic liberty would see a brief revival near the turn of the Twentieth Century, the Supreme Court would again ultimately suppress them. Mostly.

*Slaughter-House* arose from Louisiana's creation of a monopoly. The legislature adopted several provisions that prohibited the landing or slaughtering of animals for food in and around New Orleans except within

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38. *Id.* at 546.

39. *Id.* at 551.

40. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

41. *Id.* (forbidding a State from depriving “any person of life, liberty, or property, without due process of law”).

42. *Id.* (prohibiting a State from “deny[ing] to any person within its jurisdiction the equal protection of the laws”).

43. *Bradwell v. Illinois*, 83 U.S. 130 (1873); *The Slaughter-House Cases*, 83 U.S. 36 (1873).

44. Notably, however, the Court used “general-law principles” that they did not expressly ground in constitutional text to strike down state action even after *Slaughter-House* and *Bradwell*. See DAVID BERNSTEIN, REHABILITATING *LOCHNER* 12 (2011) (“Soon after the Civil War, the Supreme Court began invalidating state legislation that went beyond what the justices saw as the states’ legitimate powers. The Court did this in ‘diversity’ cases, in which the plaintiff and the defendant were citizens of different states.”); Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1291 (2000) (“Federal diversity courts also invoked general-law principles when they construed the ‘reasonableness’ of governmental activity. The reasonableness inquiry served in part as a way to test whether a state’s action was a bona fide exercise of its ‘police power’ and directed to public purposes or whether its action was for some impermissible nonpublic purpose, masquerading as an exercise of lawful state power.”).

certain areas.<sup>45</sup> Within the areas where landing or slaughtering was not prohibited, the legislature forbade anyone other than a single corporation—the Crescent City Live-Stock Landing and Slaughter-House Company, which the legislature then created—from landing or slaughtering animals.<sup>46</sup> Every other stock-landing and slaughter-house in the affected area was ordered closed.<sup>47</sup> Thereafter, anyone who wanted to be a butcher was only allowed to practice their occupation at the single “grand slaughterhouse” owned and operated by the company—paying a fee to the company for each animal butchered.<sup>48</sup> Thus, as the Supreme Court recognized, Louisiana had, through legislation, gave the company “the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within” New Orleans and surrounding areas.<sup>49</sup>

A group of local butchers sued Louisiana in state court, arguing the law violated the Privileges or Immunities Clause of the newly enacted Fourteenth Amendment.<sup>50</sup> The butchers’ argument was ultimately rejected by the U.S. Supreme Court in a 5–4 decision.<sup>51</sup> The majority held that the Privileges or Immunities Clause only forbids the states from withholding rights belonging to American citizenship, not state citizenship, and that the “privileges or immunities” of American citizens were limited to rights such as the right to travel to the nation’s seat of government and the right to use navigable waters.<sup>52</sup> Thus, according to the majority, there are not many rights that states are bound to recognize as belonging to their own citizens under the Privileges or Immunities Clause of the Fourteenth Amendment; the only restriction is that the Privileges and Immunities Clause of Article IV requires out-of-state visitors to share in whatever equal rights in-state residents had.<sup>53</sup> This meant that the rights regarding pursuit of trade, agriculture, or professions identified by Justice Washington in *Corfield* were not protected by the Privileges or

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45. *Slaughter-House*, 83 U.S. at 59.

46. *Id.*

47. *Id.* at 59–60.

48. *Id.*

49. *Id.* at 59.

50. *Id.* at 66.

51. *Id.* at 78–79.

52. *Id.* at 79–80.

53. Further discussion about *Slaughter-House* is not necessary here, but suffice it to say that this decision remains controversial. *E.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 851 (2010) (Thomas, J., concurring) (rejecting *Slaughter-House*’s “understanding” of the Privileges or Immunities Clause); Steven G. Calabresi, Sarah E. Agudo & Katherine L. Dore, *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J.L. & LIBERTY 685, 695 (2015) (stating that the key point of *Slaughter-House* “is recognized as having been erroneous by every liberal, conservative, and libertarian constitutional scholar who has researched the matter”).

Immunities Clause of the Fourteenth Amendment against a citizen's own state.<sup>54</sup>

The very next day, the Supreme Court reinforced *Slaughter-House* in *Bradwell*. Mrs. Myra Bradwell had applied for a license to practice law. Her application was in complete order—she was of appropriate age and possessed the requisite character and learning—but the Illinois Supreme Court twice denied her application on the ground that she was a woman.<sup>55</sup> Bradwell argued that the Privileges or Immunities Clause protected her right to work as a lawyer; that “admission to the bar of a State of a person who possesses the requisite learning and character is one of those [privileges or immunities] which a State may not deny.”<sup>56</sup>

The majority summarily rejected this argument by reference to *Slaughter-House*:

The opinion just delivered in the *Slaughter-House Cases* renders elaborate argument in the present case unnecessary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of

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54. *Slaughter-House*, 83 U.S. at 75–77. Interestingly, Justice Miller, the author of the *Slaughter-House* majority, was elsewhere willing to find limits on state power, though without invoking the Constitution. Thus, in *Citizens' Sav. & Loan Ass'n v. Topeka*, 87 U.S. 655 (1874), another “diversity” case, see *supra* note 44 and accompanying text, decided less than a year after *Slaughter-House*, Justice Miller struck down a municipal tax—authorized by state law—that was used to pay bonds that financed a private company's construction of an iron-bridge manufacturing plant. Miller recognized that “there are limitations on [governmental] power which grow out of the essential nature of all free governments,” including “[i]mplied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.” *Loan Ass'n*, 87 U.S. at 663. Included within these limitations on governmental power were state laws interfering with the sanctity of marriage, effecting property redistribution, or assessing taxes for other than public purposes. *Id.* at 663–64. In *Loan Association*, Miller recognized that using money wrung from the public to “aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.” *Id.* at 664.

55. *Bradwell v. Illinois*, 83 U.S. 130, 130–31 (1873).

56. *Id.* at 138. The syllabus to *Bradwell* more fully sets out her lawyer's *cri de cœur* for economic liberty:

I maintain that the fourteenth amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employments of life; and that no citizen can be excluded from any one of them. Intelligence, integrity, and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation, and all the privileges and immunities which I vindicate to a colored citizen, I vindicate to our mothers, our sisters, and our daughters.

*Id.* at 137 (syllabus).

license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.<sup>57</sup>

In 1889, the Court considered a Fourteenth Amendment challenge to a state medical licensing law.<sup>58</sup> Although the Court upheld the law—in a decision by Justice Field, one of the dissenters in *Slaughter-House*—it did so under a different rationale. First, the Court recognized it was “undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose,”<sup>59</sup> a marked departure from *Slaughter-House*. This right was, however, subject to a state’s power to “provide for the general welfare” by regulating to protect against “the consequences of ignorance and incapacity as well as of deception and fraud.”<sup>60</sup> Thus, people are “subject only to such restrictions as are imposed upon all persons of like age, sex and condition” and that are “appropriate to the calling or profession, and attainable by reasonable study or application.”<sup>61</sup> This standard was necessary to protect against arbitrary and capricious acts by the government that restricted rights, including the right to pursue an honest living.<sup>62</sup>

By 1897 the Supreme Court was clearly protecting economic liberty through the Fourteenth Amendment’s Due Process Clause. In *Allgeyer v. Louisiana*,<sup>63</sup> the Court confronted a Louisiana law that prohibited Louisianans (both individuals and companies) from contracting with marine insurance companies that were not in compliance with Louisiana law. Louisiana prosecuted E. Allgeyer & Co. for violation of this law after Allgeyer contracted with the Atlantic Mutual Insurance Company of New York for marine insurance for the shipment of 100 bales of cotton to foreign ports.<sup>64</sup> Allgeyer argued in defense that the Louisiana law was

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57. *Id.* at 139.

58. *Dent v. West Virginia*, 129 U.S. 114 (1889). An 1887 case had signaled this development. In *Mugler v. Kansas*, 123 U.S. 623, 661–62 (1887), the Court had upheld the constitutionality of a Kansas liquor regulation. But in lengthy dictum the Court noted that courts had to independently determine whether economic legislation is a proper exercise of a state’s police power. *Id.* at 668–75.

59. *Dent*, 129 U.S. at 121.

60. *Id.* at 122.

61. *Id.* at 121.

62. *Id.* at 123–24.

63. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

64. *Id.* at 579.

unconstitutional because it deprived them of their property without due process of law and denied them the equal protection of the laws in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>65</sup>

The *Allgeyer* Court held that the Louisiana law was “a violation of the [F]ourteenth [A]mendment of the [F]ederal [C]onstitution, in that it deprives the defendants of their liberty without due process of law.”<sup>66</sup> The Court read the Due Process Clause—which forbids the states from depriving “any person of life, liberty, or property, without due process of law”<sup>67</sup>—broadly:

The “liberty” mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>68</sup>

Indeed, *Allgeyer* further signaled the Court’s break from the view of economic liberty in *Slaughter-House* and *Bradwell*. *Allgeyer* cited to Justice Bradley’s concurrence (which had been joined by Justice Field) in *Butchers’ Union Company v. Crescent City Company*.<sup>69</sup> *Butchers’ Union*, as one might ascertain from the names of the parties, had also arisen from the monopoly grant to the Crescent City Company at issue in *Slaughter-House*. Bradley and Field had pointedly dissented in *Slaughter-House* because they believed the Privileges or Immunities Clause did protect economic liberty from state-created monopoly.<sup>70</sup> *Butchers’ Union* allowed them to continue their objection to *Slaughter-House*, where, as the unanimous *Allgeyer* Court quoted at length, they again recognized that:

“[T]he right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase

65. *Id.*

66. *Id.* at 589.

67. U.S. CONST. amend. XIV, § 1.

68. *Allgeyer*, 165 U.S. at 589; see also Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 919–20 (1999) (discussing the Court’s use of economic substantive due process from the 1890s through the 1930s).

69. *Allgeyer*, 165 U.S. at 589 (citing *Butchers’ Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring)).

70. *The Slaughter-House Cases*, 83 U.S. 38, 101 (1873) (Field, J., dissenting); *id.* at 118 (Bradley, J., dissenting).

‘pursuit of happiness’ in the Declaration of Independence, which commenced with the fundamental proposition that ‘all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.’ This right is a large ingredient in the civil liberty of the citizen.” . . . “I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.” . . . “But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.”<sup>71</sup>

Ultimately, *Allgeyer* found that Louisiana’s statute was “not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform,” to wit, to contract outside of the state with a company outside of the state for insurance on his property that was also outside the state.<sup>72</sup> *Allgeyer* was the beginning of the “*Lochner* era”—named for the most well-known (to modern lawyers) case to protect economic liberty during that era—a nearly forty-year period of regularly protecting economic liberties through a substantive reading of the due process clause.

*Lochner v. New York*<sup>73</sup> dealt with a challenge to the New York Bakeshop Act. The Act was modeled on an earlier English enactment and, like its English forebear, the New York Act banned employees from sleeping in bakeries, specified drainage and plumbing requirements, required inspections, and required various other sanitary measures.<sup>74</sup> But the New York Act had added a maximum hours provision that limited bakers to ten hours of work per day and sixty hours per week.<sup>75</sup> This provision was added at the urging of the baker’s union—German-dominated—and supported by corporate bakeries—at which the unions had contracts.<sup>76</sup> The targets of the maximum hours provision were small ethnic bakeries owned by and employing ethnic Italian, French, and Jewish immigrants that were largely

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71. *Allgeyer*, 165 U.S. at 589–90 (quoting *Butchers’ Union*, 111 U.S. at 762, 764, 765 (Bradley, J., concurring)).

72. *Id.* at 590–91.

73. *Lochner v. New York*, 198 U.S. 45 (1905).

74. BERNSTEIN, *supra* note 44, at 26; *see also Lochner*, 198 U.S. at 46, n.1 (syllabus) (setting forth the various provisions of the Bakeshop Act).

75. *Lochner*, 198 U.S. at 68–69; BERNSTEIN, *supra* note 44, at 26.

76. BERNSTEIN, *supra* note 44, at 26–28.

not unionized.<sup>77</sup> And the unions supported the selective enforcement of the maximum hours law against the small non-union shops.<sup>78</sup>

Eventually, the Act was challenged in court by a coalition of the small bakeries that were the targets of the Act.<sup>79</sup> These small bakeries did not challenge the whole of the Act, only the maximum hours provision; the various sanitary measures were never challenged.<sup>80</sup> As the *Lochner* Court explained, the State “could properly” regulate “the conduct of bakeries” through these several sections of the Act because they went to “the cleanliness and the healthiness” of bakeries.<sup>81</sup> This was a valid use of the state’s police power.<sup>82</sup> The maximum hours law, however, was a different matter.

The Court split as to the constitutionality of the maximum hours provision. Both the majority and main dissent—authored by Justice Harlan—agreed that (1) there was a “right to contract” protected by the Constitution and (2) that this right could be overcome by a valid enactment of the police power.<sup>83</sup> But while the main dissent would have upheld the maximum hours law, the majority held that it was a violation of the individual economic and contractual liberty interests within the Due Process Clause.<sup>84</sup> More specifically, the majority held that “although passed in the assumed exercise

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77. *Id.* at 23–24.

78. *Id.* at 28; Rebecca L. Brown, *Constitutional Tragedies: The Dark Side of Judgment*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 139, 142 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (noting that the maximum hours law “was probably a rent seeking, competition-reducing measure supported by labor unions and large bakeries for the purpose of driving small bakers and their large immigrant workforce out of business”).

79. BERNSTEIN, *supra* note 44, at 28–29.

80. *Id.* at 34.

81. *Lochner v. New York*, 198 U.S. 45, 61–62 (1905).

82. *Id.* at 61.

83. *Id.* at 53; *id.* at 68 (Harlan, J., dissenting). Justice Holmes’s “pithy lone dissent, one of the most celebrated and influential opinions in American history,” denied the entire concept of individual economic rights against state action. BERNSTEIN, *supra* note 44, at 35–36; *see also Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting). Holmes’s opinion was outside of mainstream constitutional understanding of that time or any other. BERNSTEIN, *supra* note 44, at 37. Nevertheless, Holmes’s *Lochner* dissent fits his general jurisprudence, which denied recognition of individual rights against the state through famous (or infamous) pithiness. *See, e.g.,* *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding compulsory sterilization because those sterilized “sap the strength” of the state and proclaiming that “three generations of imbeciles are enough”); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (affirming conviction of an anti-war pamphleteer over a free speech objection because “falsely shouting fire in a theater” is not protected speech). In his denigration of individual rights, Holmes was little different than many (but not all) of his elite progressive brethren. *See* THOMAS C. LEONARD, *ILLIBERAL REFORMERS, RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* 24–25 (2016) (collecting examples).

84. *Lochner*, 198 U.S. at 57–58.

of the police power, and as relating to the public health, or the health of the employees named, [the maximum hours law] is not within that power, and is invalid.”<sup>85</sup> The Court thus recognized two claims about the purported purpose of the maximum hours law: one about the public health and one about the baker’s health.

As to the public health, the Court’s majority and main dissent had relatively little to say. The main dissent never addressed any potential benefit to the public health.<sup>86</sup> The majority, as noted, recognized the other provisions of the Act did go directly to public health and contrasted them with the maximum hours provision which, in comparison, was “wholly beside the matter.”<sup>87</sup> Moreover, the majority rejected the argument that a reduction in hours encouraged sanitary practices by bakers, because there was, as a factual matter, no “connection” between the two claims.<sup>88</sup> Indeed, the majority found this claimed benefit of the maximum hours provision so implausible that it undermined their confidence in the Act because “it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.”<sup>89</sup>

Really, the majority and main dissent split on whether there was a benefit to the bakers themselves. The majority did not hold that that maximum hours laws—when applied to “grown and intelligent men”<sup>90</sup>—were beyond the police power. Rather, the majority held such laws were not saved “unless there be some fair ground, reasonable in and of itself, to say that there is material danger . . . to the health of the employees, if the hours of labor are not curtailed.”<sup>91</sup> The majority found no such ground, inasmuch as “the common understanding the trade of a baker has never been regarded as an unhealthy one,” that “statistics regarding all trades and occupations” showed that bakers were not particularly unhealthy compared to other occupations,

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85. *Id.* at 61.

86. *Id.* at 65–74 (Harlan, J., dissenting).

87. *Id.* at 61.

88. *Id.* at 62; *see also id.* at 61 (requiring “some fair ground, reasonable in and of itself, to say that there is material danger to the public health . . . if the hours of labor are not curtailed.”).

89. *Id.* at 62–63; *see also id.* at 64 (“It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law.”).

90. *Id.* at 61. This proviso served to distinguish prior cases that had approved maximum hours laws for women, children, and certain classes of male workers who needed “special aid from the state in negotiating their contracts.” BERNSTEIN, *supra* note 44, at 34.

91. *Lochner*, 198 U.S. at 61.

and that “[t]here must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty,” lest the government have authority to regulate everything.<sup>92</sup> The main dissent, on the other hand, pointed to other statistics that seemed to support particularly restricting the hours of bakers<sup>93</sup> and held that should have been sufficient to defeat *Lochner*’s claim even in the face of the recognized liberty of contract.<sup>94</sup>

Thus, there was relatively little that separated eight of the nine justices (all but Justice Holmes)<sup>95</sup> in *Lochner*. Really, *Lochner* came down to a question of fact: Was there enough evidence that the maximum hours law was “a legitimate health law” as opposed to “a law that singled out bakers for no constitutionally legitimate reason.”<sup>96</sup>

The *Lochner* era came to an end at least by the time of the Court’s 1934 decision in *Nebbia v. New York*.<sup>97</sup> *Nebbia* came about because New York passed the “Milk Control Law,” which established the “Milk Control Board” and gave the Board the power to fix minimum and maximum retail prices charged by stores to consumers for milk.<sup>98</sup> *Nebbia* was a storekeeper who had the audacity to sell milk to a customer for less than the price fixed by the Board and had been charged with and found guilty of the crime of inexpensive milk.<sup>99</sup> *Nebbia* challenged his conviction on the grounds that the Fourteenth Amendment prohibited the state from prescribing the prices at which he might sell milk.<sup>100</sup>

The Court upheld *Nebbia*’s conviction. The Court determined that the state was “free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”<sup>101</sup> So long as laws had “a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the

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92. *Id.* at 59. Although it is not clear from the decision, *Lochner* had provided with his brief an appendix “which provided statistics about the health of bakers” and showed that bakers were not particularly unhealthy. BERNSTEIN, *supra* note 44, at 34. It is the appendix material that the majority relied on with regard to this conclusion.

93. *Lochner*, 198 U.S. at 70–71 (Harlan, J., dissenting). It is unclear where Harlan found these statistics; New York had certainly not provided any such justification in its own briefing. BERNSTEIN, *supra* note 44, at 32–33, 35.

94. *Id.* at 68 (Harlan, J., dissenting).

95. *See supra* note 83.

96. BERNSTEIN, *supra* note 44, at 35.

97. *Nebbia v. New York*, 291 U.S. 502 (1934).

98. *Id.* at 515.

99. *See id.*

100. *Id.*

101. *Id.* at 537.

requirements of due process are satisfied.”<sup>102</sup> Although the term was not used, this was the beginning of the so-called “rational-basis test” for regulation of economic liberty. Thereafter, the denigration of economic liberty under the U.S. Constitution came fast and furious.

In 1938, the Court formalized the “rational basis” test in *United States v. Carolene Products Co.*<sup>103</sup> *Carolene Products* arose from a 1923 federal prohibition on “filled milk” in interstate commerce. Filled milk was a variety of evaporated milk made by compounding skimmed milk with any fat or oil other than milk fat.<sup>104</sup> Filled milk, as well as other kinds of evaporated milk (milk preserved through heat sterilization) and condensed milk (milk preserved with sugar) were critically important at the time because food refrigeration and transportation systems had not penetrated the whole of the country yet—particularly poorer areas—and filled, condensed, and evaporated milk all resisted spoilage.<sup>105</sup> Filled milk was a substitute for ordinary evaporated whole milk but cost markedly less.<sup>106</sup> This price advantage prompted the ban on filled milk based on lobbying by the then-powerful dairy industry.<sup>107</sup>

The Carolene Products Company produced a filled milk product called “Milnut” and was indicted for shipping Milnut in interstate commerce.<sup>108</sup> Applying the rational-basis test, the Court determined that the prohibition on filled milk was constitutional on its face.<sup>109</sup> The Court did so based largely on the procedural posture of the case. The Court determined that “the existence of facts supporting the legislative judgment is to be presumed.”<sup>110</sup> And Carolene Products had only filed a demurrer; a pleading that, like the modern motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), presumes the facts alleged in a complaint or indictment are true and cannot argue contrary facts.<sup>111</sup>

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102. *Id.*

103. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

104. *Id.* at 146.

105. ROBERT A. LEVY & WILLIAM H. MELLOR, *THE DIRTY DOZEN 189–90* (2008). See generally Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 S. CT. REV. 397.

106. LEVY & MELLOR, *supra* note 105, at 190.

107. *Id.*

108. *Carolene Prods. Co.*, 304 U.S. at 146. Charles Hauser, the President of the Company at the time, apparently tried to launch this as a test case by personally driving a truck of the product across state lines. Josh Blackman, *Constitutional Faces: Charles Hauser, President of Milnot, Defendant in United States v. Carolene Products*, JOSH BLACKMAN’S BLOG (Aug. 23, 2012), <http://joshblackman.com/blog/2012/08/23/constitutional-faces-charles-hauser-president-of-milnot-defendant-in-united-states-v-carolene-products/>.

109. *Carolene Prods. Co.*, 304 U.S. at 154.

110. *Id.* at 152.

111. *Id.* at 154; see *Demurrer*, BLACK’S LAW DICTIONARY (10th ed. 2011).

After *Carolene Products*, there was still reason to believe that, even under “rational basis” deference, the U.S. Constitution would continue to protect economic liberty. After all, the Court had expressly, repeatedly, insisted in *Carolene Products* itself that the constitutionality of an economic regulation could be attacked with facts:

[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.

....

. . . [R]egulatory 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.

....

Where 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, and 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. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of *facts* tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class. But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of *facts* either known or which could reasonably be assumed affords support for it.<sup>112</sup>

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112. *Carolene Prods. Co.*, 304 U.S. at 152–54 (internal citations omitted) (emphases added); see also *Polk Co. v. Glover*, 305 U.S. 5, 9–10 (1938) (holding that state court erred in dismissing challenge to law governing labelling of citrus fruit on 12(b)(6) motion because allegations “were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues . . . in advance of that

But further Supreme Court decisions soon made it apparent that there was no practical opportunity to strike down economic regulations under the Fourteenth Amendment.

A 1941 decision upholding a Nebraska regulation limiting the price employment agencies could charge their customers undermined *Carolene Products*' determination that facts matter. Justice Douglas, writing for the Court, noted the "increasingly wider scope [the Court had given] to the price-fixing powers of the states and of Congress."<sup>113</sup> The "constitutional validity of price-fixing legislation" had previously depended on some showing, such as a state of emergency, the need for special protection from exploitation, or "whether or not the business in question was 'affected with a public interest.'"<sup>114</sup> But henceforth, facts would not matter. Although employment agencies had argued that "no circumstances are shown which curb competition between the private agencies and the other types of agencies, there are no conditions which the legislature might reasonably believe would redound to the public injury unless corrected by such legislation," the government still won because there was "no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field."<sup>115</sup> That is, even in the face of an argument that no facts supported the validity of the legislation, the government could be presumed to have facts on its side.

This dismissive attitude toward facts found its fullest voice—again through Justice Douglas—in *Williamson v. Lee Optical*.<sup>116</sup> *Lee Optical* arose from an Oklahoma law prohibiting opticians "from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist."<sup>117</sup> In practice, this prohibited, among other things, opticians from taking old lenses and placing them in new frames.<sup>118</sup> Today, it is widely recognized that this law was enacted to protect ophthalmologists and optometrists—who tended

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opportunity"); *Nashville, C. & St. Louis Ry. v. Walters*, 294 U.S. 405, 414–16 (1935) (stating that state court was wrong to "decline[] to consider the [s]pecial facts" under rational-basis review and noting that a statute that was "valid when enacted may become invalid by change in the conditions to which it is applied"); *Borden's Farm Prods. v. Baldwin*, 293 U.S. 194, 209–11 (1934) (explaining that presumption of constitutionality "is a rebuttable presumption . . . of fact," and "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault"; it is "imperative" for courts in rational basis cases to engage in fact-finding and "not proceed upon false assumptions").

113. *Olsen v. Nebraska*, 313 U.S. 236, 244 (1941).

114. *See id.* at 245–46.

115. *Id.* at 246.

116. *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483 (1955).

117. *Id.* at 486.

118. *Id.*

to be locals—from competition by the corporate business model of Lee Optical and other out-of-state businesses that offered lower prices.<sup>119</sup> A three judge panel of the district court had concluded, after presuming the law’s constitutionality but then considering the facts of the case, that the restriction was unconstitutional.<sup>120</sup> But the Supreme Court reversed.

In contravention of the factual analysis done by the district court, the Supreme Court offered only speculation. The Court never analyzed the actual purpose for the law, the motivation of the legislature in enacting it, whether there was a true problem to be addressed, or if the law addressed that problem, nor does it appear Oklahoma ever argued those actualities. Rather, the Supreme Court itself speculated as to the legislative purpose,<sup>121</sup> and pointedly refused to analyze any of those potential purposes, pithily opining that “[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.”<sup>122</sup>

*Lee Optical* thus established the farce that is the modern federal rational basis standard for economic liberty. The *Lee Optical* Court postulated its own reasons to uphold the challenged law and refused to subject those assumptions to any scrutiny. Today, plaintiffs must “negative every conceivable basis” that might support a challenged law; the courts deem it “entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature;” and reasons never claimed by the government itself and only conceived of by judges after the fact are sufficient to sustain regulations.<sup>123</sup>

Granted, federal courts do occasionally strike down economic regulations even under the current rational-basis test;<sup>124</sup> rational-basis review is thus not

119. See, e.g., WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 300 (1995) (“There is no credible reason for this law other than that optometrists had a more effective lobby than the opticians in the Oklahoma legislature at the time.”); Randy E. Barnett, *Judicial Engagement Through the Lens of Lee Optical*, 19 *GEO. MASON L. REV.* 845, 851–52 (2012) (recounting history of the Lee Optical company and recognizing that “local ophthalmologists and optometrists were none too keen on out-of-state chain competitors advertising lower prices on glasses”).

120. *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128 (W.D. Okla. 1954), *aff’d in part, rev’d in part*, 348 U.S. 483 (1955); see also Barnett, *supra* note 119, at 852–55 (discussing the district court holding).

121. *Lee Optical*, 348 U.S. at 487–89 (noting several things that the legislature “may” or “might” have believed).

122. *Id.* at 488 (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

123. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (affirming on a basis first suggested by an appellate court judge in a concurrence).

124. See, e.g., *Williams v. Vermont*, 472 U.S. 14, 17, 20–21 (1985) (holding a tax on non-residents who purchased motor vehicles out-of-state and then registered them in-state unconstitutional because benefiting in-state automobile dealers at the expense of out-of-state

completely “toothless.”<sup>125</sup> “But with a few notable exceptions . . . rational-basis review under the Fourteenth Amendment is largely a judicial shrug.”<sup>126</sup>

### B. Criticisms of the Current Jurisprudence

Criticism of the current federal jurisprudence can be summarized into five primary and interrelated points, none of which will be much belabored here. First, as a matter of original meaning, the U.S. Constitution protects economic liberty and the current federal jurisprudence utterly fails to do that. Second, there is no constitutional basis for the concept of tiered scrutiny where some cases get “real judging” and others “no judging.” Third, the fact-free “inquiry” of the rational-basis test is an abdication of the judicial duty to be a truth-finder. Fourth, the post-*Lee Optical* rational-basis test requires judges to be biased; to become advocates for the government when the government fails to make its own case. Fifth, by removing themselves as a check on the use and abuse of government power, courts have allowed government power to be used for private, not public, gains.

First, to the extent that the U.S. Constitution—either originally or through the Fourteenth Amendment—was meant to protect economic liberty, current federal jurisprudence clearly fails to protect it. The original Constitution meant to protect economic rights from state power through the Impairment

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dealers not a legitimate interest); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878, 882–83 (1985) (holding a domestic preference tax statute to be unconstitutional because the promotion of domestic businesses by discriminating against nonresidents is not a legitimate state purpose and is “the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent”) (internal citation omitted); *Schware v. Bd. of Bar Exam’rs*, 353 U.S. 232, 247 (1957) (holding a state violated the Fourteenth Amendment when it denied a law license to an applicant based on a factually unreasonable good moral character determination just two years after *Lee Optical*); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013) (holding that restricting sale of caskets to only licensed funeral directors was unconstitutional); *Merrifield v. Lockyer*, 547 F.3d 978, 991–92 (9th Cir. 2008) (holding that a licensing scheme that required non-chemical using pest controllers to have training in use of chemicals, but only when controlling certain pests, was irrational); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (holding that restricting sale of caskets to only licensed funeral directors was unconstitutional); *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 892 (W.D. Tex. 2015) (determining that it was irrational to require schools that teach only hair braiding to have facilities to teach barbering); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1216 (D. Utah 2012) (finding that it was irrational to require natural hair braider to first obtain cosmetology license); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118 (S.D. Cal. 1999) (same).

125. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

126. *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 111–112 (Tex. 2015) (Willett, J., concurring).

of Contracts Clause,<sup>127</sup> Commerce Clause, Interstate and Alien and Diversity Clauses, and in the Bill of Rights' Takings Clause.<sup>128</sup> And the framers of the Fourteenth Amendment designed that provision to protect individual economic rights from state overreach.<sup>129</sup> Indeed, given the large number of cases—including post-*Carolene Products* and *Lee Optical* cases—that expressly recognize a right to earn a living in the occupation of one's choice, it is impossible to square the rhetoric recognizing the right with the non-protection the Court affords the right.<sup>130</sup>

Second, critics have noted that there is no constitutional basis for the concept of tiered scrutiny where some cases get “real judging” and others “no judging.” At least Justices Stevens,<sup>131</sup> Scalia,<sup>132</sup> and Thomas<sup>133</sup> have questioned the legitimacy of the two- or three- (or more-) tiered approach to enforcing rights in the first place. The Court has previously admitted that “[a]nnounced degrees of ‘deference’ to legislative judgments, just as levels of ‘scrutiny’ which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile

127. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 537 (1989) (“[T]he Federalists valued market ‘freedom’ so highly that they forbade the states from ‘impairing the obligation of Contract’ in the original 1787 Constitution, at a time when they believed an elaborate Bill of Rights unnecessary.”).

128. Renée Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 HARV. J.L. & PUB. POL’Y 37, 40–41 (2012); see also James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL’Y 27, 33 (2012) (“Clearly, the Founders intended the Constitution to secure property and contractual rights, and to that extent embodied an economic policy that government was not free to abridge.”).

129. See BERNSTEIN, *supra* note 44, at 8–22 (describing historic views of substantive due process, including the belief it protected individual economic liberties); Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5, 10–11 (2012); Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453, 454–55, 492–97 (1985). See generally TIMOTHY SANDEFEUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* 88–89 (2010); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 689 (1980).

130. Neily, *supra* note 5, at 902–04, 903 & n.31 (collecting cases).

131. *Craig v. Boren*, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) (“There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”).

132. *United States v. Virginia*, 518 U.S. 515, 570 (1996) (Scalia, J., dissenting) (“[T]he Court’s made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means.”); see also *id.* at 569 (“[C]urrent equal protection jurisprudence . . . regards this Court as free to evaluate everything under the sun by applying one of three tests: ‘rational basis’ scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.”).

133. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (“The Constitution does not prescribe tiers of scrutiny.”).

abstractions used to justify a result.”<sup>134</sup> Thus, if it is the case that “our Constitution renounces the notion that some constitutional rights are more equal than others” and that “a law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment,”<sup>135</sup> then the tiers of scrutiny do not make any sense.<sup>136</sup>

Third, and very much related to the first two criticisms, the fact-free “inquiry” of the rational-basis test is an abdication of the judicial duty to be a truth-finder. In ordinary litigation, facts matter: Whether a person is guilty of a crime or liable for a tort are almost entirely questions of fact. Indeed, in constitutional litigation, the Court professes a preference for fact-bound cases; for “as-applied” challenges—“the basic building blocks of constitutional adjudication”<sup>137</sup>—rather than “facial” challenges<sup>138</sup> because the Court does not want to invalidate statutes when they may be constitutionally applied to other facts.<sup>139</sup> Under the rational-basis test, however, this same preference for facts is thrown out. A legislative choice—a choice that the legislature may not have ever actually made<sup>140</sup>—is not subject to courtroom fact-finding and may be based on “speculation unsupported by evidence or

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134. *Rostker v. Goldberg*, 453 U.S. 57, 69–70 (1981).

135. *Whole Woman’s Health*, 136 S. Ct. at 2329–30 (Thomas, J., dissenting).

136. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 779 (2d ed. 1988) (“[T]he attempt to distinguish [economic] rights . . . from the preferred rights . . . in terms of a supposed dichotomy between economic and personal rights must fail.”); Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1472 (2015) (reviewing RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014)) (finding that scholars have advanced “no successful sustained defense of the bifurcated standard of review [distinguishing between ‘economic’ and ‘personal’ liberty] that has served as the framework for our constitutional jurisprudence for the past seventy-five years”).

137. *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1328 (2000)).

138. *Cf. Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (“[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.” Rather, the distinction “goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.”).

139. *E.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge . . . must establish that no set of circumstances exists under which the Act would be valid. The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . .”).

140. *E.g.*, *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214 (D. Utah 2012) (recognizing, in a constitutional challenge to the requirement of a cosmetology license to those who just braid hair, the undisputed fact “that the legislature never considered African hair braiding when creating its licensing scheme and that the State has never investigated whether African hair braiding is a threat to public health or safety”).

empirical data.”<sup>141</sup> But courts emphatically reject speculation unsupported by evidence or empirical data as a basis for judgment in other circumstances.<sup>142</sup>

Fourth, the *Lee Optical* version of the rational-basis test requires judges to be biased, but judicial bias violates due process guarantees. The threat of a judge with actual bias—such as mixing the advocate and judicial functions—is such a grave risk to both the affected litigants and the “reputation and integrity” of the entire judicial system that bias is grounds for immediate reversal, even in the absence of evidence the bias made a difference to the outcome of the proceeding.<sup>143</sup> But *Lee Optical* is clear that, in the absence of a sufficient argument from the government, the judge is to become the government’s lawyer and to try to justify the challenged regulation.<sup>144</sup> The *Lee Optical* standard thus stands in great tension with traditional notions of due process,<sup>145</sup> that apply in other cases.<sup>146</sup>

141. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

142. *E.g.*, *Galloway v. United States*, 319 U.S. 372, 395 (1943) (“Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.”); *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011) (“To survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations.”); *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) (holding “non-moving party may not rely on conclusory allegations or unsubstantiated speculation” to oppose summary judgment); *Moody v. Saint Charles Cty.*, 23 F.3d 1410, 1412 (8th Cir. 1994) (noting that “mere speculation, conjecture, or fantasy” insufficient to meet burden under FED. R. CIV. P. 56) (quoting *Gregory v. Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992)); *Orme Sch. v. Reeves*, 802 P.2d 1000, 1010 (Ariz. 1990) (“[W]hen discovery has been completed and the proponent of a claim or defense is unable to produce evidence sufficient to send the claim or defense to the jury, it would effectively abrogate the summary judgment rule to hold that the motion should be denied simply on the *speculation* that some slight doubt (and few cases have complete certainty), some scintilla of evidence, or some dispute over irrelevant or immaterial facts might blossom into a real controversy in the midst of trial.”) (emphasis added); *see also* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993) (indicating that federal courts must serve gate-keeper function with regard to purported expert evidence to prevent “subjective belief or unsupported speculation” because that is unreliable).

143. *See* *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909–10 (2016).

144. *E.g.*, *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001) (“Even if Soto’s stated justification for enforcing Market Regulation No. 13 is insufficient to uphold the rationality of the legislation, this Court is obligated to seek out other conceivable reasons for validating Regulation No. 13.”).

145. *See* Andrew Ward, Note, *The Rational-Basis Test Violates Due Process*, 8 N.Y.U. J.L. & LIBERTY 714, 715 (2014).

146. *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 116 (Tex. 2015) (Willett, J., concurring) (“As in other constitutional settings, we should be neutral arbiters, not bend-over-backwards advocates for the government.”).

The recent Eleventh Circuit decision in *Dana's Railroad Supply v. Attorney General*<sup>147</sup> nicely illustrates the ridiculousness of current federal jurisprudence with regard to the above four criticisms. As most consumers are aware, retailers sometimes charge consumers differential prices: more for those using a credit card, less for those paying with cash. Florida made it a crime to “impose a surcharge on the buyer or lessee for electing to use a credit card,” while expressly allowing “the offering of a discount for the purpose of inducing payment by cash.”<sup>148</sup> Thus, it was legal in Florida to have a price differential for cash versus card users, but it was illegal to call that price differential the wrong thing. A number of retailers then challenged this law.<sup>149</sup>

The case turned entirely on the kind of scrutiny the law received. The district court conceived of the law as an economic regulation—a “[r]estriction[] on pricing’ that fell within ‘the Florida Legislature’s broad discretion in regulating economic affairs’”—and subject only to rational-basis review.<sup>150</sup> The State “advanced only a generalized and cursory interest in ‘protecting consumers’” that was insufficient to support the law, and so the district court “hypothesized” its own three possible justifications for the law.<sup>151</sup> The district court admitted that none of these justifications “[were] ‘compelling’ and ‘might not even be persuasive,’” but nevertheless upheld the law under rational-basis review.<sup>152</sup>

The Eleventh Circuit recognized that the fate of the law “hinge[d] on a single determination: whether the law regulates *speech*—triggering First Amendment scrutiny—or whether it regulates *conduct*—subject only to rational-basis review as a mine-run economic regulation.”<sup>153</sup> Applying the heightened scrutiny required in free speech cases,<sup>154</sup> the court looked for actual reasons supporting the law, rejected abstract concerns, and required some level of tailoring between the regulation and the actual concerns.<sup>155</sup> Ultimately, the Eleventh Circuit agreed with the district court that none of the reasons for the law were compelling or even persuasive, and therefore struck the law down.

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147. *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1239 (11th Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3686 (U.S. June 6, 2016) (No. 15-1482).

148. *Id.* at 1239 (citations omitted).

149. *Dana's R.R. Supply*, 807 F.3d at 1239.

150. *Id.* at 1240.

151. *Id.* at 1240 & n.2.

152. *Id.* at 1240.

153. *Id.* at 1241; *see also id.* at 1242 (calling the speech/conduct determination “dispositive”).

154. *Id.* at 1246.

155. *Id.* at 1249–51.

As *Dana's Railroad Supply* demonstrates, constitutional adjudication has largely turned into a labeling exercise.<sup>156</sup> Moreover, the widely different ways the district court and the Eleventh Circuit approached the act of judging—due solely to the tiered scrutiny and the rational-basis test—brings to mind an observation made by Hadley Arkes:

[H]ow would it make sense to mark off a category of laws that require a “compelling” justification, as opposed to a laws [sic] that can be floated with a justification not exactly compelling, but good enough, say, to get through the day? Can we have, in contrast to a “compelling justification,” a “lame justification” that still satisfies the properties of a real “justification”? For the man who sees his freedom to make a living blocked, say, by price controls, a weak justification is no justification at all.<sup>157</sup>

Fifth, by removing themselves as a check on the use and abuse of government power, courts have allowed government power to be used for private, not public, gains. There is general agreement that the U.S. Constitution prohibits “naked preferences,” “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”<sup>158</sup> The Supreme Court has long recognized the legislative temptation to exercise raw political power “under the guise of protecting the public interest” to enact naked preferences and restrict, inter alia, “the right of the individual to contract [or] engage in any of the common occupations of life.”<sup>159</sup> And the Court has recently reaffirmed the threat of naked preferences from occupational licensing,<sup>160</sup> with some justices even admitting it is a frequent

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156. Shortly before this Article went to press, the Supreme Court issued its decision in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). *Expressions Hair Design* dealt with a New York regulation almost identical to the Florida regulation at issue in *Dana's R.R. Supply*. *Id.* at 1149–1150. The Second Circuit had deemed the law a regulation of conduct, not speech, and upheld it. *Id.* at 1150. The Supreme Court, however, determined the law was not a regulation of conduct, i.e., pricing, but rather was the regulation of speech about prices and remanded for further proceedings to determine if the regulation survived First Amendment scrutiny. *Id.* at 1149–1152.

157. Hadley Arkes, *The Shell Game of “Tiers of Scrutiny”—Exposed, Once and for All*, LIBRARY OF LAW & LIBERTY (July 13, 2016), <http://www.libertylawsite.org/2016/07/13/the-shell-game-of-tiers-of-scrutiny-exposed-once-and-for-all-2/>.

158. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

159. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

160. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1108, 1117 (2015) (noting that regulatory board consisting of dentists had used government power to protect dentists from competition in the absence of any evidence of consumer harm and affirming antitrust liability against the board).

abuse.<sup>161</sup> Nevertheless, the Court continues in its “unerring acceptance of creative defenses to special interest legislation masqueraded as furthering the public interest.”<sup>162</sup> Even those observers who insist on judicial minimalism—for “a strong presumption of deference” by judges to the political branches—concede that the *Lee Optical* approach of “fabricat[ing] justifications” to approve “naked rent seeking, clear giveaways from one group of economic competitors to another” is a bridge too far.<sup>163</sup>

This fifth criticism has been bolstered by the growing recognition and influence of public choice theory.

### C. Public Choice Economics and Economic Regulation

Another development that has led to increased criticism of the current federal economic liberty jurisprudence has been the development of Public Choice Economics. Public Choice is “the economic study of nonmarket decision making, or simply the application of economics to political science.”<sup>164</sup> Since the 1980s, Public Choice has been “almost universally accepted” as a basis for explaining much economic regulation.<sup>165</sup>

Public Choice rests on the insight that politicians and constituents are rational economic actors; that is, constituents compete with one another to demand political favors from the government, and politicians frequently use the coercive powers of the state to provide wealth transfers in return for political support. This has confirmed that “[t]he interest group most able to translate its demand for a policy preference into political pressure is the one most likely to achieve its desired outcome.”<sup>166</sup> Therefore, governmental policies—particularly economic policies—often reflect the goals of the interests who are able to organize and exert great political influence relative

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161. *Id.* at 1117 (Alito, J., dissenting) (“Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.”).

162. Maxwell L. Stearns, Obergefell, Fisher, and the *Inversion of Tiers*, U. PA. J. CONST. L. (forthcoming 2017) (manuscript at 7–8) (<http://ssrn.com/abstract=2745369>).

163. Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 HARV. J.L. & PUB. POL’Y 13, 21 (2012).

164. DENNIS C. MUELLER, PUBLIC CHOICE III 1 (2003).

165. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 n.6 (1986) (citing Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984)).

166. James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1100 (2005).

to the public, rather than the public itself.<sup>167</sup> In short—and as seen in cases like *Lochner*, *Lee Optical*, and *Dental Examiners*—Public Choice predicts that concentrated interest groups have both the incentive and the ability to enact laws to benefit themselves rather than the public.

Two important concepts elucidated by Public Choice are “rent-seeking” and “regulatory capture.” Rent-seeking is the term used to describe the expected phenomenon of an economic interest group seeking advantage through government regulation.<sup>168</sup> Classic examples of rent-seeking include tariffs, subsidies, discriminatory taxes, and regulations that prevent competition with the interest group, such as occupational licensing. Regulatory capture is a term used both broadly and narrowly. The broad meaning includes the general phenomenon of an economic interest group affecting state intervention generally (as at the legislature). The narrow meaning is used to describe the common scenario in which an economic interest group controls a regulatory agency, such that the regulatory agency itself advances the commercial or special concerns of interest groups that dominate the industry or sector it is charged with regulating, rather than the public interest.

When it comes to rent seeking behavior, smaller, homogenous interest groups—such as members of a specialized trade—frequently have a comparative advantage in the political process relative to larger, more heterogeneous and diffuse groups such as consumers and the public at large.<sup>169</sup> Because members of a concentrated interest group stand to make a substantial economic gain from securing favorable legislation, they have an incentive to inform themselves about laws and regulations that affect their industry and to organize to secure favorable legislation or block adverse legislation.<sup>170</sup> But consumers and the general public, by contrast, are hard pressed to oppose such anticompetitive regulations because the costs are spread thinly across consumers, principally in the form of marginally higher

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167. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 534–36 (6th ed. 2003).

168. Nobel laureate James Buchanan defined “rent” as “that part of the payment to an owner of resources over and above that which those resources could command in any alternative use,” or “receipt in excess of opportunity cost.” James M. Buchanan, *Rent Seeking and Profit Seeking*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 1, 1 (James M. Buchanan, Robert D. Tollison & Gordon Tullock eds., 1980).

169. See generally MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1–3 (1965).

170. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *TEX. L. REV.* 703, 735 & n.137 (2002) (observing that the “intense common concerns” of special interest groups “help them overcome organizational difficulties and give them more influence than their numbers warrant”).

prices, giving each individual consumer little incentive to learn about and organize to oppose every anticompetitive or protectionist regulation. Thus, because of insiders' "superior efficiency in political organization relative to consumers, consumer interests often are subservient to industry interests in the regulatory process."<sup>171</sup> The result is that consumers and excluded workers—the general public—often have little hope of stopping the enactment of anticompetitive regulations.

The insights of Public Choice explain the explosion in occupational licensing across the country. In the early 1950s—roughly the time of *Lee Optical*—less than five percent of the U.S. workforce required an occupational license. Today, however, about twenty-five percent of the workforce requires an occupational license; a five-fold increase.<sup>172</sup> Moreover, most of this growth in licensing—two-thirds of the growth since the 1960s—came from an increase in the number of licensed professions.<sup>173</sup> That is, the growth in licensing is not happening primarily because of growth in traditionally-licensed occupations; it is happening because more states are licensing more occupations than ever before. Why? Because industry insiders are demanding licensing. It should therefore not be surprising that "[e]mpirical work suggests that licensed professions' degree of political influence is one of the most important factors in determining whether States regulate an occupation."<sup>174</sup>

Public Choice thus demonstrates an unfortunate irony of the *Lee Optical* rational-basis test. When the Supreme Court adopted rational-basis review for economic regulations in *Carolene Products* (and, as shown, a stronger version of rational basis than is applied today), it went out of its way, in famous footnote 4, to say "more searching judicial inquiry" was necessary in cases where the outcome of the political process should not be trusted to "bring about repeal of undesirable legislation."<sup>175</sup> But today we know that economic regulations are precisely an example of when the political process

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171. Cooper et al., *supra* note 166, at 1099–1100; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212 (1976) ("A common, though not universal, conclusion has become that, as between the two main contending interests in regulatory processes, the producer interest tends to prevail over the consumer interest.").

172. DEP'T OF THE TREASURY OFF. OF ECON. POL'Y, COUNCIL OF ECON. ADVISERS & DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 6 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf) (citing Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S173–S202 (2013)).

173. *Id.* at 20.

174. *Id.* at 22 (citations omitted).

175. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

cannot be trusted. Thus, the modern federal rational-basis test—by effectively taking courts out of the checks-and-balances system—actually encourages and entrenches the very threat that courts cite as reason to not apply the rational-basis test.<sup>176</sup>

### III. THE ORIGINAL MEANING AND INTERPRETATION OF ARIZONA’S CONSTITUTION DEMONSTRATE A SOPHISTICATED AND MEANINGFUL COMMITMENT TO PROTECTING ECONOMIC LIBERTY FROM SPECIAL INTEREST REGULATION

There are several reasons for state courts to reject the federal jurisprudence set forth above<sup>177</sup> when interpreting their own constitutions. Not the least of these reasons is that the U.S. Supreme Court is wrong and that the U.S. Constitution *is* more protective of economic liberty than the Court’s current jurisprudence holds.<sup>178</sup> But this point applies generally and we are here to discuss Arizona in particular.

There are additional reasons—particular to Arizona—to reject the current federal jurisprudence when applying the Arizona Constitution. First, any originalist interpretation of the Arizona Constitution must be driven by the unique provisions and history of the Arizona Constitution.<sup>179</sup> Those provisions and that history demonstrate the Constitution is designed to guard against the kind of rent-seeking and regulatory capture now permitted—indeed encouraged—by existing federal jurisprudence. Second, the Arizona Supreme Court’s jurisprudence from statehood through at least the 1970s confirms this intention. By pointing to Arizona’s history and some unique provisions in its Constitution, and by flatly disagreeing with federal precedents, the Arizona Supreme Court did originally differentiate state from federal jurisprudence on economic liberties.

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176. *E.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. PUB. POL’Y 209, 325 (2016) (“A refusal to scrutinize occupational licensing regimes with some degree of vigor, keeping in mind the practical operation of the political process as revealed by Public Choice Theory, leads to the unfortunate result that the Constitution affords the least protection for those individuals who are least able to protect themselves against, and are most harmed by, the very political process that charter created.”).

177. *See* discussion *supra* Part II.A.

178. *See* discussion *supra* Part II.B–C.

179. *See* discussion *supra* Part I; *see also* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 519 (2013) (“The basic idea of contextual enrichment is that given the publicly available context of constitutional communication, the text conveys communicative content that is unstated, because, for example, the meaningfulness or sensibility of the text assumes the additional content.”).

A. *The Unique History and Provisions of the Arizona Constitution Demonstrate a Particular Concern About the Threat of Special Interest Regulation*

Conventional wisdom holds that the Arizona Constitution reflects the turn-of-the-century progressive ideals of its framers, and it does. These ideals, perhaps surprisingly, included a sincere commitment to the protection of free enterprise. While progressives are often (accurately) stereotyped as rejecting the doctrine of *laissez-faire*, this stereotype cuts too broadly. Arizona's unique historical experience, and in particular its experience as a western territory, motivated the framers of Arizona's Constitution to reject the idea that courts should leave the political branches of government alone when private interests capture their power in order to deprive ordinary people of the right to earn an honest living.

As has been noted by John Leshy, the "single dominant idea" at Arizona's constitutional convention was "a thorough[] skeptic[ism] of concentrating power in the hands of any institutions, governmental or not."<sup>180</sup> The notion that the framers of the Arizona Constitution were skeptical about government power may initially strike observers as discordant, given the overwhelmingly progressive politics of Arizona's founders<sup>181</sup> and the general faith that progressives had in the expansive and salutatory uses of governmental power.<sup>182</sup> As it relates to judicial review of regulations of economic activities, it may strike observers as particularly discordant, given progressive hostility to "Lochnerism."<sup>183</sup> After all, as Leshy also notes, "[n]ationally, progressives distrusted judges, for this was the heyday of 'substantive due process' and other judicial doctrines that allowed courts dominated by conservatives to declare various regulatory measures unconstitutional."<sup>184</sup> But western

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180. John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 58 (1988); see also LESHY, *supra* note 8, at 18 ("[T]he Arizona framers manifested . . . more distrust than confidence in the uses of authority. Their skepticism of concentrating power in the hands of the few extended beyond government to embrace the private sector as well.") (internal quotation marks and citations omitted).

181. LESHY, *supra* note 8, at 13.

182. See, e.g., BERNSTEIN, *supra* note 44, at 4 ("Leading Progressive lawyers believed in strong interventionist government run by experts and responsive to developing social trends, and were hostile to countervailing claims of rights-based limits on government power."); LEONARD, *supra* note 83, at 21–22 (2016) ("Industrial capitalism, the progressives argued, required continuous supervision, investigation, and regulation. The new guarantor of American economic progress was to be the visible hand of an administrative state, and the duties of administration would regularly require overriding individuals' rights in the name of the economic common good.").

183. See generally BERNSTEIN, *supra* note 44, at 4.

184. LESHY, *supra* note 8, at 19.

progressives were different than their eastern counterparts; they had a different history, a different experience, and a specific set of concerns about and hostility to what we today recognize as regulatory capture of government power for private gain.

The history books today tell us that progressives were known for their embrace of the administrative state and regulation by “expert managers applying scientific methods.”<sup>185</sup> An ironic corollary to this view—ironic given expressed progressive hostility to monopoly and “trusts”—was the embrace of big business.<sup>186</sup> But this was primarily an eastern progressive view. “[E]astern progressives [such as Teddy Roosevelt] on the whole regarded industrial concentration as inevitable and looked to strict government regulation of big business as the only feasible way to destroy private economic power.”<sup>187</sup>

But befitting their different experience as westerners, western progressives took a very different view of things. Western progressives were much influenced by the populist movement of the 1890s against abuses by eastern “interests,” especially the railroads, but also banking and mining companies.<sup>188</sup> The western territorial years had been “years of unblushing government manipulation,” in which “economic interests,” especially railroads, “unabashedly manhandled the political process.”<sup>189</sup> Accordingly, western progressives tended to view both big business and the big government that accompanied it as “eastern” and dangerous; they had “a suspicion of corporate and governmental bigness.”<sup>190</sup> Indeed, “western progressives on the whole regarded big business as an artificial menace to self-government, not merely aided but *made possible by* a whole system of special privilege” granted by the government.<sup>191</sup>

Further feeding western progressive concern about government power was their experience as federal territories and with corrupt local government run

185. LEONARD, *supra* note 83, at 55–63; e.g., Michael P. Malone & F. Ross Peterson, *Politics and Protests*, in THE OXFORD HISTORY OF THE AMERICAN WEST 501, 506 (Clyde A. Milner II et al. eds., 1994).

186. LEONARD, *supra* note 83, at 56–57.

187. WALTER KARP, *THE POLITICS OF WAR* 138 (1979).

188. Malone & Peterson, *supra* note 185, at 504–06. The populist influence on Arizona progressives can be seen by comparing the progressive 1910 Constitution to the proposed 1891 populist one. Leshy has noted a number of similarities between the two, even though “there is no direct evidence” the 1891 constitution “had any influence on the deliberations of the 1910 Constitutional Convention.” LESHY, *supra* note 8, at 9.

189. Malone & Peterson, *supra* note 185, at 502.

190. MICHAEL P. MALONE & RICHARD W. ETULAIN, *THE AMERICAN WEST: A TWENTIETH-CENTURY HISTORY* 64 (1989).

191. KARP, *supra* note 187, at 138 (emphasis added).

by powerful political machines.<sup>192</sup> Struggles between “local economic interests” and the eastern interests—again, railroads and mining in particular—had manifested as “clashes between [locally] elected legislatures and appointed federal officials.”<sup>193</sup> These appointees were “appointed by the president in far-off Washington,” and often “had been political hacks with neither prior experience nor much interest in local affairs.”<sup>194</sup> Moreover, outright bribery was frequent, if not rampant. For example, the Southern Pacific Railroad—itsself an effort by the owners of the Union Pacific Railroad to monopolize rail transport into California<sup>195</sup>—bribed territorial Governor A.K. Safford \$25,000 to fix the legislature into granting the railroad a tax-exempt corporate charter.<sup>196</sup> “[Y]ears of such abuses finally resulted in thoroughgoing corporate domination.”<sup>197</sup> Similarly, but on a smaller scale, western progressivism often surfaced “as a reform reaction to the corrupt alliances that had developed between ‘machine’ politicians and business with contracts for city services” that “resulted in graft and gross inefficiencies.”<sup>198</sup>

Arizona had spent more time as a territory than most states and so the framers of Arizona’s Constitution were very aware of the phenomenon of power concentrated in private entities—such as the railroad companies and mining conglomerates—because they had co-opted government power to make life difficult for their competitors. As the debate over Arizona statehood progressed in Washington, D.C., the railroad and mining interests “hope[d] for domination of state government” as they had dominated the territory.<sup>199</sup> The Arizona Constitution was meant to put a stop to this phenomenon.

Western progressives generally—and Arizona’s framers in particular—were thus well aware of the phenomenon of regulatory capture. Louis Brandeis, though not a westerner, had “warned that the Rooseveltian approach”—the paring of big business with the administrative state—“might lead to corporate capture of government regulators, enabling rather than preventing corruption”; a concern that put him at odds with most of his

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192. Malone & Peterson, *supra* note 185, at 502.

193. *Id.*

194. LESHY, *supra* note 8, at 19.

195. The Southern Pacific Railroad was in a race with the Texas and Pacific Railroad, which had enlisted the federal military to block the Southern Pacific from bridging the Colorado River into Yuma. To escape detection, the Southern Pacific laid its tracks into Yuma under cover of night. See THOMAS E. SHERIDAN, *ARIZONA: A HISTORY* 123 (Univ. of Ariz. Press rev. ed. 2012).

196. *Id.*

197. Malone & Peterson, *supra* note 185, at 503.

198. MALONE & ETULAIN, *supra* note 190, at 57.

199. LESHY, *supra* note 8, at 9. This dominance also explains a unique aspect of Arizona progressivism—its alignment with labor unions, especially in the copper and railroad industries. *Id.* at 12, 16, 23–24.

eastern progressive brethren.<sup>200</sup> For example, historian Gabriel Kolko has shown that railroads—the classic example of big business sought to be curtailed by progressive government—actually welcomed government regulation as a means of controlling competition in the marketplace,<sup>201</sup> and that this same pattern of “political capitalism” marked the entirety of the “Progressive Era.”<sup>202</sup> Similarly, socialist journalist William J. Ghent observed as early as 1902 that the centerpiece of the regulatory state—regulatory boards, which were “charged with administrative, executive, semi-judicial, and even police powers”—was a system that gives great power without proper responsibility, and tends to remove the people’s government from the people’s control.<sup>203</sup> “Irresponsible to both the people and the people’s officials as they are, these boards are yet not wholly unsusceptible to outside pressure; they are, as is well known, peculiarly liable to the influence of the Big Men.”<sup>204</sup>

Thus, befitting their uniquely western experience, western progressives were well aware of, and hostile to, the threat presented by the use of government power for private ends. Arizona’s original Constitution therefore contains some particular provisions that look to limit the ability to concentrate government power and to use government power for private benefit.<sup>205</sup> Unlike the federal and many state constitutions, it contains an

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200. LEONARD, *supra* note 83, at 59–60. Brandeis was not, however, always so suspicious of regulatory capture. For example, in *New State Ice Co. v. Liebmann*, Brandeis would have upheld Oklahoma’s enforcement of a monopoly for manufacturing, selling, and distributing ice, in part because “the ice industry as a whole in Oklahoma has acquiesced in and accepted the act and the status which it creates.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 294 (1932) (Brandeis, J., dissenting).

201. *See generally* GABRIEL KOLKO, *RAILROADS AND REGULATION: 1877–1916*, at 102–26 (1965).

202. “Progressivism was initially a movement for the political rationalization of business and industrial conditions, a movement that operated on the assumption that the general welfare of the community could be best served by satisfying the concrete needs of business. But the regulation itself was invariably controlled by leaders of the regulated industry, and directed toward ends they deemed acceptable or desirable.” GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916*, at 2–3 (1963).

203. W. J. GHENT, *OUR BENEVOLENT FEUDALISM* 84–85 (3d ed. 1903).

204. *Id.* at 85.

205. In addition, though not a part of the original Arizona Constitution, Article XXVI also reflects the goal of restricting the use of government power for private benefit. Article XXVI was added in 1962 expressly to protect the right of real estate brokers and salesmen to practice their occupation free from regulation by the Arizona State Bar, which had tried to prohibit them from doing so for the financial benefit of lawyers. ARIZ. CONST. art. XXVI; *see* *State Bar of Ariz. v. Ariz. Land Title & Trust Co.*, 366 P.2d 1, 3–4 (Ariz. 1961); LESHY, *supra* note 8, at 405–06 (“Although neither attorneys nor real estate brokers seem to be held in particularly high public esteem, the latter clearly won this test in the court of public opinion because the vote on the

express separation of powers,<sup>206</sup> because the framers “were not satisfied” with only an implied separation of powers.<sup>207</sup> It contains a “Gift Clause,”<sup>208</sup> which prohibits giveaways to the private sector.<sup>209</sup> Its Takings Clause, again unlike the federal and many state constitutions, expressly prohibits (most) takings for private uses and requires adjudication of takings without deference to the government’s assertions of public use.<sup>210</sup> It has an anti-monopoly clause<sup>211</sup> and prohibits granting irrevocable franchises.<sup>212</sup> Finally, its Equal Protection Clauses prohibit *granting* special privileges and immunities,<sup>213</sup> rather than *denying* equal protection as under the Fourteenth Amendment; an arrangement rooted in pre-Civil War state constitutions and that reflects “opposition to corrupt state legislative acts of favoritism and special treatment on behalf of powerful economic interests.”<sup>214</sup>

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amendment was better than three to one in favor.”); Merton E. Marks, *The Lawyers and the Realtors: Arizona’s Experience*, 49 A.B.A. J. 139, 139 (1963) (stating that the State Bar had brought a lawsuit to prevent real estate agents from preparing documents the agents had long prepared because the Bar was concerned with “increasing lawyers’ incomes”); Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem that Won’t Go Away*, 34 ARIZ. ST. L.J. 585, 588 (2002) (“Although the Court in *Arizona Title* noted the puritan hostility to lawyers, perhaps they did not anticipate that Arizona’s populist tradition persisted and that anti-lawyer sentiments were also strong in Arizona. Despite, or perhaps because of, the strong opposition of the Arizona Bar, the Arizona voters approved the proposition by an overwhelming four to one margin.”).

206. ARIZ. CONST. art. III.

207. *Udall v. Severn*, 79 P.2d 347, 348 (Ariz. 1938).

208. ARIZ. CONST. art. IX, § 7.

209. *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 357 (Ariz. 1984) (noting that the Gift Clause “was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises”) (internal citation omitted).

210. ARIZ. CONST. art. II, § 17; *see also* *Bailey v. Myers*, 76 P.3d 898, 901–02 (Ariz. Ct. App. 2003) (explaining the limits on takings and the “constitutional right to a judicial determination whether the proposed use is ‘really public’”).

211. ARIZ. CONST. art. XIV, § 15. So serious were the framers about fighting monopolies and related abuses that they created something of an exemption to the right against self-incrimination with regard to “bribery or illegal rebating.” ARIZ. CONST. art. II, § 19; *see also* LESHY, *supra* note 8, at 84–85.

212. ARIZ. CONST. art. II, § 9. Skeptical readers are invited to compare the Progressives’ wording of these clauses with that of Adam Smith: “The exclusive privileges of corporations, statutes of apprenticeship, and all those laws which restrain in particular employments, the competition to a smaller number than might otherwise go into them . . . are a sort of enlarged monopolies.” ADAM SMITH, *THE WEALTH OF NATIONS* 42 (Simon & Brown 2012) (1776).

213. ARIZ. CONST. art. II, § 13; *id.* art. IV, pt. 2 § 19(13).

214. *Twist & Munsil*, *supra* note 3, at 1053. To be sure, *Twist and Munsil* argued that these provisions did not call for heightened scrutiny for *any* claim and instead claimed that rational-basis review—as demonstrated by *Lee Optical*—is all the Arizona Constitution anticipates. *Id.* at 1053 & n.308. But, as discussed in Part III, more than the rubber-stamp review set forth in *Lee*

Further illustrating the framers' concerns about the use of government power for private benefit is a debate on the floor of the constitutional convention about the regulation of the practice of medicine. This debate has largely been ignored. Indeed, the one commenter who has noted it has claimed the issue "received more attention than would probably be expected."<sup>215</sup> But a familiarity with the framers' concerns about regulatory capture by economic interests explains why the debate occurred.

At the time of the convention, the Arizona territory had established a board of medical examiners to license the practice of medicine based on having a medical college diploma and passing an examination.<sup>216</sup> By law, the board consisted of "three physicians of the so-called regular school of medicine and one of the so-called homeopathic school of medicine and one of the so-called eclectic school of medicine."<sup>217</sup> Candidates were allowed to demand an examination not from the entire board, but rather "from the member or members of the board belonging to the separate school or system of medicine" in which the candidate had his diploma.<sup>218</sup>

At the constitutional convention, Delegate Webb was troubled by this arrangement. As he explained on the floor of the convention, "we have a medical board in this territory on which some schools are represented, and others not" and he believed this was leading to discrimination against some people who were qualified to practice medicine.<sup>219</sup> Looking to the way the State Board of Medical Examiners acted, Webb was greatly concerned about regulatory capture of the board. He "believe[d] that in Arizona there is a doctor's trust"<sup>220</sup> or "if they have not a trust they certainly do discriminate" against qualified applicants.<sup>221</sup>

Webb therefore proposed Proposition 60 at the convention to prohibit the legislature from passing any law regulating the practice of medicine that "in any manner discriminate[s] against the Allopathic, Homeopathic, Eclectic,

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*Optical* must be employed in economic liberty cases precisely because the Arizona Equal Protection Clauses (and other provisions) recognize the threat of, and are distinctly hostile to, government power used for private ends.

215. RECORDS, *supra* note 23, at iv.

216. ARIZ. TERRITORY CIV. CODE tit. 53, ch. 1, §§ 1–3 (1901).

217. *Id.* § 3; *see also* Ram. R. Krishna, *Arizona Medical Board*, FED'N ST. MED. BOARDS, <http://centennial.fsmb.org/pdf/mh-az.pdf> (last visited Mar. 12, 2017) (explaining the differences between these schools and giving general background on the Board of Medical Examiners).

218. ARIZ. TERRITORY CIV. CODE tit. 53, ch. 1, § 4 (1901).

219. RECORDS, *supra* note 23, at 636.

220. *Id.* at 753. Webb insisted that "There are gentlemen on the medical examining board who frankly confessed to me they cannot give a fair and impartial examination to any but brothers in the same school of medicine." *Id.* at 636.

221. *Id.* at 755.

Osteopathic schools of medicine, or any other recognized school of medicine.”<sup>222</sup> Webb was adamant that he meant only to prohibit “discriminating against any school of medicine”—and osteopaths in particular—“not prevent the legislature from placing all proper restrictions on the practice of medicine.”<sup>223</sup> After all, he explained, “[t]he action of the gentlemen of this convention has been that there should be no special privileges or special opportunities,” and he wanted to ensure the same with regard to the practice of medicine.<sup>224</sup>

No one took issue with Webb’s central concern about regulatory capture. Other delegates shared in the concern that the government not give out “special favors.”<sup>225</sup> Generally, opposition focused on the concern that Proposition 60 could “be interpreted as forbidding the legislature to pass any law forbidding any method of healing”<sup>226</sup>—an outcome Webb disclaimed—and similarly was “too broad,”<sup>227</sup> rather than the non-discrimination principle. Although Delegate Tuthill, a licensed physician, spoke in defense of the territorial medical law (even though he “did not intend to take part in this discussion, because it might be thought [he] had some personal motive”<sup>228</sup>) he denied that there was a doctor’s trust and insisted there was not discrimination; that the examination was “open to all.”<sup>229</sup> Similarly, Delegate Moeur, also a licensed physician, insisted that “we” do not discriminate and “[o]ur interests are those of humanity.”<sup>230</sup> Finally, Delegate Short believed the proposition contributed to filling the constitution with “useless provisions.”<sup>231</sup> He asked, facetiously, whether they should “declar[e] that dry goods merchants shall not be discriminated against, or the grocery man, or like propositions,”<sup>232</sup> to which Webb responded that “Arizona does not discriminate as to dry goods merchants” but that the medical board did discriminate.<sup>233</sup>

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222. *Id.* at 1165.

223. *Id.* at 635; *see id.* at 637.

224. *Id.* at 635. As Webb told his fellow delegates, “if you vote against the adoption of this measure you will vote for that trust but if you vote for it you will be granting a right, a liberty and a privilege to all learned and professionals which should not be abridged.” *Id.* at 753.

225. *Id.* at 640–41.

226. *Id.* at 635.

227. *Id.* at 754.

228. *Id.* at 637.

229. *Id.* at 753.

230. *Id.* at 754.

231. *Id.* at 636.

232. *Id.*

233. *Id.* at 636.

Although Proposition 60 was not adopted,<sup>234</sup> the debate about it does show that Arizona's constitutional delegates were aware of the threat of regulatory capture. And, in a way, Webb ultimately got his way. By 1913, the Arizona Civil Code had diversified the membership of the medical examiners board,<sup>235</sup> was more specific as to the content of the exam,<sup>236</sup> and required anonymity for examinees such that the board members could not discriminate.<sup>237</sup>

This unique Arizona history and these particular provisions illustrate the heightened concern about concentrated power and regulatory capture the framers of Arizona's constitution shared. These influences are evident in the first several decades of Arizona Supreme Court decisions reviewing economic regulations where—contrary to what conventional wisdom suggests—the court struck down numerous enactments as beyond the power of the state. Rather than embrace the deferential judicial review set forth in federal jurisprudence, these Arizona decisions demonstrate a sophisticated and nuanced understanding of the limits of the police power which prevented regulatory capture and various forms of monopoly. Accordingly, under Arizona's Equal Protection<sup>238</sup> and Due Process<sup>239</sup> Clauses, the court struck down regulations that, despite the government's arguments, had no reasonable relationship to the public health, safety, or welfare.

*B. The First Several Decades of Arizona Supreme Court Jurisprudence  
Demonstrate a Level of Protection of Economic Liberty More  
Meaningful than the Federal Standard*

This Part reviews the Arizona Supreme Court's economic-liberty jurisprudence through 1981. Only one other article found has reviewed this subject before.<sup>240</sup> But that article's conclusion—that pre-1981 Arizona jurisprudence was “haphazard”<sup>241</sup>—is driven by a hostile attitude toward judicial protection for economic liberty, and merits reconsideration. In fact,

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234. The floor vote to adopt it resulted in a tie. *Id.* at 642. Thereafter it was indefinitely postponed twice and not raised again. *Id.* at 642, 758.

235. ARIZ. CIV. CODE tit. 48, § 4733 (1913) (“[M]embers from the allopathic school of medicine of the State of Arizona, one member from the homeopathic school of medicine of the State of Arizona, one member from the eclectic school of medicine of the State of Arizona, and one member from the osteopathic school of medicine of the State of Arizona.”).

236. *Id.* § 4739.

237. *Id.*

238. ARIZ. CONST. art. II, § 13; *id.* art. IV, pt. 2, § 19(13).

239. *Id.* art. II, § 4.

240. Smith, *supra* note 9, at 327–28.

241. *Id.* at 343.

the Arizona Supreme Court was remarkably consistent throughout most of the twentieth century, more so than the federal courts, in asking whether challenged regulations were actually designed to serve public-oriented ends. The court did this by asking whether challenged regulations were supported by actual reasons rather than hypothetical or dishonest ones. As will be shown, this hardly amounts to “judicial activism”; by and large, the court found most legislative enactments to be rational and therefore constitutional. Striking down irrational regulations does not threaten every regulation.

For ease of reference, this Part is divided into three sections. Section 1 reviews cases from Arizona statehood through 1938, when the U.S. Supreme Court announced in *Carolene Products* that economic regulations were subject to rational-basis scrutiny. Section 2 surveys Arizona cases from *Carolene Products* through 1955, when *Lee Optical* made clear that rational-basis scrutiny required federal courts to disregard evidence and invent hypothetical justifications for economic legislation.<sup>242</sup> And Section 3 shows that the Arizona Supreme Court continued to apply meaningful judicial scrutiny after *Lee Optical* until 1981, when it adopted, without explanation, a lockstep approach in *Arizona Downs*.<sup>243</sup>

### 1. 1912–1938

The Arizona Supreme Court was hardly “activist” during the height of the *Lochner* era. In the first decade of Arizona’s statehood, the court considered only two economic liberty challenges, and held for the government in both. The court would not invalidate an economic regulation on due process grounds until 1926, after which it showed a willingness, but by no means a zeal, to interfere with legislative judgments on economic matters.

The first instance of an economic-liberty challenge under the Arizona constitution was *Mosher v. City of Phoenix*, in which the owner of a property in central Phoenix challenged the city’s revocation of building permits that she had been using to construct rental properties in violation of the city’s fire code.<sup>244</sup> In addition to alleging that her buildings complied with the fire code, she challenged the validity of the code itself under the Arizona due process clause.<sup>245</sup> Far from issuing an expansive ruling in favor of property rights, the court deferred to the legislature’s ability to empower cities to enact fire codes, and noted that the property owner’s buildings did not comply with the fire

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242. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

243. See *Ariz. Downs v. Ariz. Horsemen’s Found.*, 637 P.2d 1053, 1059–60 (Ariz. 1981).

244. *Mosher v. City of Phoenix*, 181 P. 170, 170–71 (Ariz. 1919).

245. *Id.* at 170.

code's requirement that buildings be set back twenty feet from other structures.<sup>246</sup> The court declined to question the government's power to "provide[] for the height, size, and material to be used in structures" and upheld the fire code against the interests of the property owner.<sup>247</sup>

Four years later, the court in *State v. Hazas* declined yet another opportunity to strike down a law that curtailed the exercise of property rights.<sup>248</sup> In *State v. Hazas*, Gregario Hazas appealed his conviction for herding sheep on a cattle range.<sup>249</sup> Unlike *Mosher*, sheep herding is intuitively less of a threat to public safety than building in an urban area, and a conviction is a more severe penalty than the revocation of a building permit. Furthermore, a modern reader might perceive the law as a special favor to the historically powerful (and sometimes abusive)<sup>250</sup> cattle industry, leading Hazas to challenge the law not only under the due process clause but also under the special privileges clause.<sup>251</sup> Yet the *Hazas* court also found in favor of the state, inquiring into the facts and finding that the herder had been operating on a range customarily used for cattle.<sup>252</sup> In addition to relying on federal precedent upholding a similar law in Idaho,<sup>253</sup> the court noted (with considerable justification in light of Arizona's history)<sup>254</sup> that the law would "prevent[], or tend[] to prevent, quarrels, disputes, and conflicts between [sheep and cattle herders] over the use of the ranges of the state" and was reasonably calculated to "add to the general welfare of all."<sup>255</sup>

The Arizona Supreme Court's stance in *Mosher* and *Hazas*, much like contemporary (and often-ignored<sup>256</sup>) federal decisions upholding economic regulations, undermine the narrative that early twentieth-century economic liberty jurisprudence was motivated by "judicial activism." Rather, decisions from that era are more fairly understood as displaying "judicial engagement": meaningful inquiry into whether the government's ostensible protection of

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246. *Id.* at 171.

247. *Id.* at 170–71.

248. *State v. Hazas*, 219 P. 229, 232 (Ariz. 1923).

249. *Id.* at 229.

250. SHERIDAN, *supra* note 195, at 140–42 (describing the Aztec Land and Cattle Company's Hashknife outfit, which developed a reputation for driving cattle outside the company's land grant and over lands already settled by Mormons and other small ranchers).

251. *Hazas*, 219 P. at 230.

252. *Id.* at 231–32.

253. *See Omaechevarria v. Idaho*, 246 U.S. 343, 352–53 (1918).

254. *See SHERIDAN*, *supra* note 195, at 144–45 (recounting the "Pleasant Valley War" between sheep and cattle herders that resulted in thirty to fifty homicides between 1887 and 1892).

255. *Hazas*, 219 P. at 231.

256. *See BERNSTEIN*, *supra* note 44, at 49.

the public health, safety, or welfare is supported by credible evidence and legitimate reasons.<sup>257</sup>

*Elliott v. State*, decided in 1926, also displayed judicial engagement. In *Elliott*, a grocer challenged the constitutionality of a town ordinance under which he had been convicted for the crime of selling goods on a Sunday.<sup>258</sup> Although the court hinted that it would have upheld a generally applicable Sunday-closing ordinance,<sup>259</sup> the town ordinance was not generally applicable: it applied to grocers, butchers, dry goods stores, shoe stores, haberdashers, milliners, lumberyards, and hardware stores, but *not* to drug stores, tobacconists, confectioners, ice cream parlors, soda fountains, service stations, or ice vendors.<sup>260</sup> Such uneven application, the court said, could only be constitutional if it exempted only “certain works declared to be of necessity or charity.”<sup>261</sup> The opinion does not reflect that the state believed tobacconists or confectioners to be inherently necessary or charitable—how could a confectionery be necessary if a grocery store isn’t?—and so the court struck the ordinance down as “a special inhibition . . . upon certain otherwise praiseworthy and legitimate businesses.”<sup>262</sup> The court chose to support this sensible ruling not with *Lochner*-era federal jurisprudence—not a single federal case was cited—but rather with a string of economic-liberty cases from other Western states<sup>263</sup> where progressivism had long since taken hold.<sup>264</sup>

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257. See generally CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 2 (2013).

258. *Elliott v. State*, 242 P. 340, 340 (Ariz. 1926).

259. *Id.* at 340–42 (quoting *Ex parte Newman*, 9 Cal. 502, 519–20 (1858)).

260. *Id.* at 340.

261. *Id.* at 341.

262. *Id.* at 342.

263. See *id.* at 341 (citing *Ex parte Jentsch*, 44 P. 803 (Cal. 1896) (invalidating a Sunday-closing ordinance that applied only to barbers); *City of Denver v. Bach*, 58 P. 1089 (Colo. 1899) (invalidating a Sunday-closing ordinance that applied only to clothing retailers); *Eden v. People*, 43 N.E. 1108 (Ill. 1896) (invalidating a Sunday-closing ordinance that applied only to barbers); *Chan Sing v. City of Astoria*, 155 P. 378 (Or. 1916) (invalidating a Sunday-closing ordinance that applied only to certain stores but not to others that sold the same goods).

264. *Jentsch*, using progressive language, embraces the right of the people to “protect[] labor from the unjust exactions of capital.” 44 P. at 804. Noting that the barber had been *imprisoned* for keeping his shop open, the opinion then champions the right to earn a living in labor-friendly language:

A man’s constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet that is precisely what this law does. The laboring barber, engaged in a most respectable, useful, and cleanly pursuit, is singled out

The next year, the court struck down another arbitrary law in *State v. Childs*, in which a general store owner faced criminal charges for selling patent medicines without a pharmacy license.<sup>265</sup> Patent medicines, the early-twentieth-century equivalent of over-the-counter medications, are simply drugs that are sold in their original packaging, require no compounding by the pharmacist, and are deemed safe for sale without a prescription.<sup>266</sup> In *Childs*, the right to sell patent medicines was restricted to licensed pharmacists—but not really, since the Board of Pharmacy was empowered by statute to permit the sale of patent medicines by one (and only one) non-pharmacist in any community that lacked one.<sup>267</sup> Moreover, licensed pharmacists had a statutory exemption from “any responsibility as to the[] character and quality” of a patent medicine.<sup>268</sup>

The court again looked exclusively to state, not federal, case law to resolve the issue. The *Childs* court reconciled a split among the states by emphasizing the common ground on which all high courts agreed—that the police power encompasses the regulation of medicines that, if “carelessly or ignorantly compounded so as to contain deleterious ingredients or deceptively, so as to be something different from what they purported to be,” might harm the public health.<sup>269</sup> That, the court noted, was not the purpose of the Arizona statute, which did not make pharmacists “responsible for the quality” of patent medicines and reflected the legislature’s judgment that such medicines were inherently safe.<sup>270</sup> Rather, the legislation “on its face apparently ha[d] no effect except to grant a monopoly of the sale of certain articles to a special class under conditions which can in no manner benefit the public,” and therefore violated the prohibition on special or exclusive privileges in article IV, part 2, section 19(13).<sup>271</sup>

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from the thousands of his fellows in other employments, and told that, willy nilly, he shall not work upon holidays and Sundays after 12 o’clock noon. His wishes, tastes, or necessities are not consulted. If he labors, he is a criminal. Such protection to labor, carried a little further, would send him from the jail to the poorhouse . . . . The prisoner is discharged.

*Id.* at 804–05.

265. *State v. Childs*, 257 P. 366, 370 (Ariz. 1927).

266. *Id.* at 369; see also Comment, *State Regulation of Drugs: Who May Sell “Patent and Proprietary” Medicines*, 63 YALE L.J. 550, 550–53 (1954).

267. *Childs*, 257 P. at 368.

268. *Id.*

269. *Id.* at 368–69 (quoting *State Bd. of Pharmacy v. Matthews*, 90 N.E. 966, 968 (N.Y. 1910)).

270. *Id.* at 368.

271. *Id.* at 369–70; see also *id.* at 369 (“[W]hen so many selfish and private schemes in the way of securing monopolies and excluding competition in trade are attempted under the mask of

The court struck down another protectionist law in *Atchison, Topeka & Santa Fe Railway Co. v. State*.<sup>272</sup> In that case, the conductor of a freight train running from Gallup, New Mexico to Winslow, Arizona made a required stop at the railway's Cheto station, in Apache County near modern-day Sanders.<sup>273</sup> No telegraph operator was on duty at the station, so after waiting an hour, the conductor—who had twenty years' experience and had been using telephones since before the railway installed them—took matters into his own hands and used the station's telephone booth to contact the train dispatcher in Winslow to make sure the next train down the line would wait for him.<sup>274</sup> Operationally, this was a success, but there was one hitch: under then-existing Arizona law, it was a crime to use a *telephone* to take or send a train order without at least one year's experience as a *telegraph* operator.<sup>275</sup>

The *Atchison* court—"boldly," according to the modern academic viewpoint on substantive due process<sup>276</sup>—declared that that law made no sense. The court accepted that ensuring "the safety of train crews and passengers" was a legitimate state interest, but also noted that any law promoting that purpose could not be "unreasonable or arbitrary" or have "no real connection" to that purpose.<sup>277</sup> This was, and remains today, a conventional formulation of the rational-basis test. The *Atchison* court inquired into whether the telegraph-experience law was rational, and found that it was not, making the commonsense observation that "the ability to hear or talk over the phone can in no way be enhanced by one's experience in sending or receiving messages by telegraph."<sup>278</sup> Because the requirement was unreasonable, it was struck down.<sup>279</sup>

Contrast *Atchison* with *City of Tucson v. Arizona Mortuary*,<sup>280</sup> in which the court upheld a zoning ordinance of the type the U.S. Supreme Court had sanctioned two years before in *Village of Euclid v. Ambler Realty Co.*<sup>281</sup> On first glance, the facts of *Arizona Mortuary* seem suspicious from an economic-liberty perspective: the challenged zoning ordinance had been

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sanitary legislation, it may be an important question whether the judiciary are concluded by the mask, or whether they may tear it aside in order to ascertain who is in it." (quoting *State v. Donaldson*, 42 N.W. 781, 783 (Minn. 1889)).

272. *Atchison, Topeka & Santa Fe Ry. Co. v. State*, 265 P. 602, 605–06 (Ariz. 1928).

273. *See id.* at 603.

274. *Id.*

275. *Id.*

276. *See Smith, supra* note 9, at 332 n.50.

277. *Atchison*, 265 P. at 603–04.

278. *Id.* at 604.

279. *Id.* at 605.

280. *City of Tucson v. Ariz. Mortuary*, 272 P. 923, 931 (Ariz. 1928).

281. *See id.* at 925–28 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–97 (1926)).

hastily passed in reaction to the plaintiff's plan to construct a mortuary on property that had previously been unrestricted.<sup>282</sup> In other words, the ordinance—which the court upheld—was directly targeted at the plaintiff. But even in upholding the ordinance, the Arizona Supreme Court was careful to note that zoning ordinances, although generally valid, must maintain a “real or substantial relation to the general welfare” and would be vulnerable to challenges if it were pleaded that the ordinance were in fact passed for the improper purpose of “favor[ing] a special competitor,” which would be “unjust discrimination.”<sup>283</sup> That was not the case here, the court said: Arizona Mortuary had tried to set up shop outside Tucson's customary business district, in a neighborhood where ninety-eight percent of the existing buildings were being used for residential purposes and no ordinance had been thought necessary.<sup>284</sup> The facts showed that the mortuary had not been the victim of the sort of anticompetitive conduct that Arizona's framers sought to stamp out; it was a simple example of the residential district organizing itself politically to preserve its character.<sup>285</sup> The court's decision curtailed common-law property rights, true, but it did so with a respect for the facts that was common in *Euclid*-era zoning decisions<sup>286</sup> and has since gone by the wayside—at least in federal courts.<sup>287</sup>

The *Arizona Mortuary* court's emphasis on seeking out favoritism is crucial to understanding early Arizona decisions on economic liberty. The last survey on this subject highlighted the differing outcomes in *Childs* and

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282. *Ariz. Mortuary*, 272 P. at 924.

283. *Id.* at 927–28.

284. *Id.* at 927.

285. *See id.* at 927–28.

286. *Euclid*, in legalizing the practice of exclusionary zoning generally, was quite serious in inviting as-applied challenges to zoning ordinances. 272 U.S. at 387 (“A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.”). Contemporary zoning decisions would rely on *Euclid* to strike down pernicious zoning ordinances. *See, e.g.*, *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 120–21 (1928) (striking down a zoning ordinance targeted at a charity home for elderly indigents); *Nectow v. City of Cambridge*, 277 U.S. 183, 188–89 (1928) (invalidating a residential zoning boundary based on factual finding that the boundary did not promote the public health, safety, or welfare).

287. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (expanding the zoning power beyond “elimination of filth, stench, and unhealthy places”—the issue in *Euclid* and *Arizona Mortuary*—to extend to infinitely elastic concepts such as “family values, youth values, and the blessings of quiet seclusion” so that the village government could prohibit unrelated graduate students from renting a six-bedroom house from a willing landlord), *rev'g* 476 F.2d 806, 809 (2d Cir. 1973) (engaging the facts, stressing that the village government “conceded that all of the occupants have behaved in a responsible manner, and no immoral conduct on their part is suggested,” and affirming district court's invalidation of ordinance).

*Arizona Mortuary* as proof of the court's inconsistency during this period: *Childs* "reasoned that the judiciary is obligated to check legislative attempts to invade the economic liberties of individuals" (true), while *Arizona Mortuary* "read the due process clause much more narrowly and showed much more deference to legislative decisions."<sup>288</sup> But that assumes, incorrectly, that a decision to uphold a regulation must have exhibited "more deference" to the legislature than one that does not. The *Arizona Mortuary* court's engagement of the facts, and explicit willingness to invalidate a zoning ordinance found to be based on special favoritism, is not a departure from the reasoning of *Childs*.

Two decisions from 1929 flesh out the court's concern for favoritism. In *Prescott Courier v. Moore*, Yavapai County solicited a comprehensive contract for all its printing needs, including publishing its minutes, printing certain government materials, and supplying paper stock. The aggregation of all those services, along with the county's requirement that any company bidding on the contract had to be a newspaper with at least a year's history in the county, effectively limited the pool of eligible applicants to a single publisher.<sup>289</sup> And in *Gila Meat Co. v. State*, a statewide licensure scheme for slaughterhouses tied its licensing fees to the population of the town nearest a given slaughterhouse.<sup>290</sup> The court ruled against the government in both cases, citing favoritism concerns. In *Prescott Courier*, the controlling government-procurement statute was construed (so as to avoid violating the special-privileges clauses<sup>291</sup>) to require the government to allow non-newspapers to bid for the printing and supply jobs, the publishing job being the only one that inherently had to be performed by a newspaper.<sup>292</sup> And in *Gila Meat*, the court rejected the differentiated fees because they had nothing to do with the actual volume of business performed; it was important for fees to be tied to actual business volume to signal "that no favoritism can be shown or discrimination be practiced" in favor of urban slaughterhouses or against rural ones.<sup>293</sup>

The Arizona Supreme Court invalidated a law on economic substantive due process grounds only once during the 1930s. *City of Tucson v. Stewart* involved a challenge to Tucson's new electrical code, which required

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288. Smith, *supra* note 9, at 332.

289. *Prescott Courier v. Moore*, 274 P. 163, 164 (Ariz. 1929).

290. *Gila Meat Co. v. State*, 276 P. 1, 1-2 (Ariz. 1929).

291. *Prescott Courier*, 274 P. at 165-66; *see also* ARIZ. CONST. art. II, § 13; art. IV, pt. 2, § 19(13).

292. *Prescott Courier*, 274 P. at 166 (worrying that an alternate construction of the statute might unconstitutionally "stifle competition").

293. *Gila Meat*, 276 P. at 3-4 (quoting *Hager v. Walker*, 107 S.W. 254, 256 (Ky. 1908)).

contractors to pay a \$30 to \$60 annual registration fee, post a \$1,000 bond, and employ a licensed “supervising electrician” on each job.<sup>294</sup> Supervising electricians were limited to those who had passed a \$5 exam, reached twenty-five years of age, and had six years’ experience as a journeyman.<sup>295</sup> The *Stewart* plaintiffs were a group of small, independent electrical contractors, all with twelve or more years’ experience as electricians—just not as journeyman electricians—and they feared they would be bankrupted by being forced to employ supervising electricians who might have less practical experience than they did.<sup>296</sup> The lead plaintiff, for example, averaged only \$75 per contract and ran a lean business with little inventory.<sup>297</sup>

The ordinance was struck down on account of the eligibility requirements to become a supervising electrician, which were found to be “oppressive, arbitrary, and monopolistic, and not in the interests of safety to property or life.”<sup>298</sup> The court pointedly noted that several challenged aspects of the ordinance—the imposition of an electrical code, the requirement that there be a supervising electrician for every electrical installation in the first place, and the bonding requirement—were reasonably calculated to guarantee public safety and therefore within the legislature’s police power.<sup>299</sup> But an examination of the eligibility requirements for becoming a supervising electrician led to a contrary conclusion. The age requirement was higher than that for trained lawyers and doctors, without any reason to believe that “greater maturity is more essential” in electrical work than in law or medicine.<sup>300</sup> And the journeyman requirement did not accommodate experienced non-journeyman electricians, whose on-the-job training was “often equal or better than that under [the] tutorage” received by journeymen.<sup>301</sup> The city stipulated that the plaintiffs, who “had been operating as practical electricians or contractors . . . for twelve or more years,” would be “denied a license that would permit them to carry on their business, whereas some one [sic] who [may] have been in their employ for six years as a journeyman electrician may obtain a license.”<sup>302</sup> The effect would be to

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294. *City of Tucson v. Stewart*, 40 P.2d 72, 73 (Ariz. 1935).

295. *Id.*

296. *City of Tucson v. Stewart*, 40 P.2d 72, 76 (1935).

297. *Id.* at 73–74.

298. *Id.* at 76. The \$60 registration fee was also struck down as being imposed “for revenue and not in aid of the enforcement of the regulation or supervision” of electricians. *Id.* at 77.

299. *Id.* at 75–76, 78.

300. *Id.* at 76.

301. *Id.*

302. *Id.*

needlessly impoverish small contractors without raising their competence.<sup>303</sup> The ordinance therefore failed.

Two milk-regulation cases from 1937 round out the Arizona Supreme Court's early pronouncements on economic liberty. *State v. De Witt* is puzzling;<sup>304</sup> *City of Phoenix v. Breuninger* is not.<sup>305</sup> In *Breuninger*, a dairyman and a consumer brought suit to invalidate a Phoenix ordinance banning the sale of raw milk.<sup>306</sup> After finding that the city's power to regulate milk was not preempted by state law, the court upheld the ordinance against the plaintiffs' economic-liberty challenge based on the "well-known fact that milk is a product easily infected with bacterial life"—the court listed several pathogens long accepted by scientific consensus to be found in milk—and the "common scientific knowledge that . . . pasteurization was almost certain to destroy any of the . . . bacteria . . . without seriously affecting [milk's] value as food."<sup>307</sup> The pasteurization law was plainly intended to promote public health. *De Witt*, by contrast, reinstated a criminal information for selling milk in 1/3-quart bottles in violation of a statute requiring that milk bottles only come in specified sizes,<sup>308</sup> offering little constitutional analysis other than that the statute's purpose was to prevent fraud by standardizing weights and measures.<sup>309</sup> It cited no case law, and did not say whether *De Witt* mislabeled the bottle or otherwise duped his customer into thinking the bottle was a different size than it was. If he did, then *De Witt* is not an economic-liberty case: reasonable measures to prevent or punish fraud are legitimate under any theory of economic liberty. If *De Witt* did not misrepresent anything, then his case is an outlier.

In conclusion, the Arizona Supreme Court was not particularly "activist" during its early years. It struck down six laws: the arbitrary Sunday-closing ordinance in *Elliott*, the protectionist patent-medicine sales ban in *Childs*, the irrational law in *Atchison* that required telegraph experience to use a telephone, the unfair bidding process in *Prescott Courier*, the uneven licensing fees in *Gila Meat*, and the oppressive eligibility requirements in *Stewart*. Broad, health- and safety-based regulatory measures were upheld in cases like *Mosher* and *Breuninger* when justified by real reasons, and *Arizona Mortuary* upheld exclusionary zoning—now a common practice—in its most

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303. *See id.* at 76.

304. *State v. De Witt*, 65 P.2d 659 (Ariz. 1937).

305. *City of Phoenix v. Breuninger*, 72 P.2d 580 (Ariz. 1937).

306. *Id.* at 581.

307. *Id.* at 583.

308. *De Witt*, 65 P.2d at 659.

309. *Id.* at 660.

basic form. Federal case law from the *Lochner* strain was rarely, if ever, cited. The common thread was engagement of the facts and law,<sup>310</sup> with a particular focus on ensuring that ordinary people were not being imprisoned or drummed out of business simply for doing their job; *De Witt* is the only potential outlier. *Stewart* said it best: “Regulatory measures that affect the right of people to work and earn a livelihood should always be so drawn as to not unnecessarily hamper or destroy such right.”<sup>311</sup>

## 2. 1938–1955

The U.S. Supreme Court retreated from protecting economic liberty beginning with cases like *Nebbia* in the mid-1930s and through the announcement of tiered-scrutiny in *Carolene Products* in 1938.<sup>312</sup> But the Arizona Supreme Court continued to evaluate economic-liberty cases with the same even approach that had marked its pre-New Deal jurisprudence. Through 1955, the next milestone in our analysis,<sup>313</sup> the court would find three economic regulations unconstitutional: occupational licensure for photographers,<sup>314</sup> a county resolution compelling doctors to assist other doctors or lose access to the county hospital,<sup>315</sup> and a statewide minimum price for haircuts.<sup>316</sup> It would also sever an unconstitutionally vague definition from the Unfair Sales Act while upholding the Act generally.<sup>317</sup> But it would also uphold occupational licensure for travel agents<sup>318</sup> and chiropractors,<sup>319</sup> as well as a law requiring horsemeat to be labeled as such.<sup>320</sup>

In *Francis v. Allen*, the court upheld a licensure scheme for travel agents, specifically agents for motor carriers.<sup>321</sup> But even in upholding the law, the *Francis* court inquired further into whether each provision of the law was reasonably adapted to the goal of promoting public safety. *Francis* arose long before the introduction of wireless communication and even seat belts, and at

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310. The outlier, *De Witt*, does not undermine this Article’s refutation of the idea that the early Arizona Supreme Court was “activist.” *De Witt* reinstated a criminal proceeding based on a simple determination that the statute at issue applied. *De Witt*, 65 P.2d at 660.

311. *City of Tucson v. Stewart*, 40 P.2d 72, 79 (Ariz. 1935).

312. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

313. See discussion *infra* Section III.B.3.

314. *Buehman v. Bechtel*, 114 P.2d 227 (Ariz. 1941).

315. *Findlay v. Bd. of Supervisors*, 230 P.2d 526 (Ariz. 1951).

316. *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450 (Ariz. 1951).

317. *State v. Walgreen Drug Co.*, 113 P.2d 650 (Ariz. 1941).

318. *Francis v. Allen*, 96 P.2d 277 (Ariz. 1939).

319. *State v. Gee*, 236 P.2d 1029 (Ariz. 1951).

320. *State v. Double Seven Corp.*, 219 P.2d 776 (Ariz. 1950).

321. 96 P.2d at 278–79.

the time it was a “notorious fact” that automobile travel imposed a “danger to life and limb and property” and afforded ample opportunity “for holdups, robbery, kidnapping.”<sup>322</sup> The law, which largely took the form of a registration and bonding requirement, was therefore found to be within the police power. But the court struck down as “vague and indefinite” a provision that prohibited travel agents from working with motor carriers who were “conducting [their] business in a manner contrary to public interest.”<sup>323</sup>

Two years later, the court would strike down an occupational license because the facts showed it was not a public safety law. *Buehman v. Bechtel* dealt with the exact type of law that Arizona’s framers feared: an attempt by the established players in an industry to shut out their competition. The legislature had passed a law establishing a board of examiners in photography—photography!—requiring a \$25 exam as a condition of being granted a license to practice the art.<sup>324</sup> Violations were punishable by up to six months’ imprisonment for each offense.<sup>325</sup> Previously established photographers were exempted from the examination requirement, as were newspaper employees, amateurs, and students, so long as they did not sell their photographs.<sup>326</sup>

The *Buehman* court recognized the photography law for what it really was, as a sham that “does not pretend to regulate the practice of photography in the interests of the business or the public but, rather, in the interests of those professional photographers who are fortunate enough to obtain a license.”<sup>327</sup> After all, the court recognized, photography is “not inherently dangerous,” is “an entirely innocent occupation,” is “not supposed to be an unhealthy or insanitary business,” and “cannot harm those who pursue it nor anyone else.”<sup>328</sup> Nevertheless, the Board of Photographers, relying on *Nebbia*, argued the government had broad enough regulatory power to license the business of photography.<sup>329</sup> But the court rejected this contention, noting that *Nebbia* itself had warned that “a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort . . . because the reasonableness of each regulation depends upon the relevant facts.”<sup>330</sup> Photography, unlike

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322. *Id.* at 279 (quoting *Bowen v. Hannah*, 71 S.W.2d 672, 674 (Tenn. 1934)).

323. *Id.* at 280; *see also* *State v. Walgreen Drug Co.*, 113 P.2d 650, 654 (Ariz. 1941).

324. *Buehman v. Bechtel*, 114 P.2d 227, 228 (Ariz. 1941).

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at 230.

329. *Id.*

330. *Id.* 230–31 (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)) (internal quotations omitted).

milk, had nothing to do with “an essential diet.”<sup>331</sup> Reviewing the act in its entirety, it was clear that it primarily accomplished two things: “a complete internal control of the practice of photography by the interested members of that business,” and an arbitrary and irrational discrimination among who may sell “honestly and lawfully acquired” photographs.<sup>332</sup> The law was struck down.<sup>333</sup>

*Walgreen Drug*,<sup>334</sup> an action by the retailer to challenge a provision of the Unfair Sales Act prohibiting the sale of commodities “below cost,” was not a resounding endorsement of free-market principles, but neither was it a complete abdication of the court’s role in judging the rationality of economic regulations that was already becoming the norm in federal courts. The court quoted *Nebbia* at length in *Walgreen Drug* in upholding the “legislative right to fix prices to be charged by private business”—so long as the price control was not “an unnecessary and unwarranted interference with individual liberty.”<sup>335</sup> But the *Walgreen Drug* court still asked whether the provisions of the Unfair Sales Act were “so drawn that the method of enforcing the legitimate purpose of the legislature bec[ame] arbitrary, discriminatory or irrelevant.”<sup>336</sup> The court then found that a key definition of the Act was “so indefinite and uncertain that it is arbitrary and unreasonable and, therefore, unconstitutional.”<sup>337</sup>

The *Double Seven* case also affirmed that fraud-prevention measures—if reasonable—would be upheld.<sup>338</sup> In that case, the Double Seven Corporation faced criminal charges of selling horsemeat “under the trade name of hamburger” without labeling it as such, as well as possession of unstamped horse carcasses.<sup>339</sup> Among Double Seven’s defenses was an assertion that the horsemeat act was an unreasonable exercise of the police power.<sup>340</sup> The court upheld the charges, noting that the public interest served by the horsemeat act was the prevention of “deception and fraud,” and that the licensing and labeling requirements for horsemeat tended to “make it more difficult for the

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331. *Id.* at 230.

332. *Id.* at 232.

333. *Id.* at 233.

334. *State v. Walgreen Drug Co.*, 113 P.2d 650 (1941).

335. *Id.* at 652–53 (Ariz. 1941) (quoting *Nebbia v. New York*, 291 U.S. 502, 539 (1934)).

336. *Id.*

337. *Id.* at 654. The statutory definition of “cost” would have left a seller of “the utmost good faith” uncertain whether a price charged for goods would be “justified by prevailing market conditions.” *Id.*

338. *State v. Double Seven Corp.*, 219 P.2d 776, 780 (Ariz. 1950).

339. *Id.* at 777–78.

340. *Id.* at 779.

unscrupulous to sell horsemeat products in place of other meat products.”<sup>341</sup> In light of the company’s having sold horsemeat as “hamburger”—then as today understood to mean beef—the court’s finding was well-grounded in the facts.

Encroachments on economic liberty that had nothing to do with fraud prevention, however, continued to receive judicial skepticism. In *Findlay v. Board of Supervisors*, the court invalidated a Mohave County hospital regulation—promulgated by that county’s board of supervisors—that conditioned doctors’ hospital privileges on their compliance with any request by another doctor to “assist him professionally,” and which had been enforced against four of the five practicing doctors at the hospital.<sup>342</sup> In striking down the law, the court professed a commitment to the facts: the regulation was inconsistent with other county regulations giving patients a right to be treated at the hospital by a private physician of their own choice, and the provision at issue did not tend to promote the “orderly management of the hospital” or “protection of patients.”<sup>343</sup> The court also noted the hospital’s status as the only one in the county.<sup>344</sup> The court’s decision reflected a suspicion of the county board suddenly firing four out of the five physicians in the county; in effect, the board’s actions had created a monopoly in the rural county—exactly what Arizona’s framers had hoped to prevent.

*Edwards v. State Board of Barber Examiners* was a far clearer rejection of a protectionist law: another minimum-price provision.<sup>345</sup> Recall that the court had upheld price-fixing, as a general proposition, ten years earlier in *Walgreen Drug*.<sup>346</sup> The *Edwards* court similarly recognized the government’s power to set minimum prices,<sup>347</sup> but, like *Walgreen Drug*, stressed that the price set had to be reasonable and within constitutional limits on the police

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341. *Id.* at 780.

342. *Findlay v. Bd. of Supervisors*, 230 P.2d 526, 528, 531 (Ariz. 1951). Peculiarly, the *Findlay* opinion never specifies which constitutional provision had been violated. The special concurrence, by contrast, avoided the constitutional question by noting that the doctors had not been given an opportunity to be heard at the court below and would have reversed for lack of evidence. *Id.* at 531–32 (Phelps & De Concini, JJ., specially concurring). It is clear, however, that the majority opinion decided the case on economic substantive due process grounds. *Id.* at 530–31 (majority opinion) (concluding that “the regulation . . . invades the personal liberty and contractual rights of both the patient and the physician”).

343. *Id.* at 530–31.

344. *Id.* at 528.

345. *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450 (Ariz. 1951).

346. *State v. Walgreen Drug Co.*, 113 P.2d 650, 652–53 (Ariz. 1941) (quoting *Nebbia v. New York*, 291 U.S. 502, 539 (1934)).

347. *Edwards*, 231 P.2d at 451 (citing *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

power.<sup>348</sup> In *Edwards*, the State Board of Barber Examiners was allowed by statute to set prices on its own consideration or on the initiative of seventy-five percent of the registered barbers in a given district.<sup>349</sup> The board had established a minimum price of one dollar for haircuts in the city of Douglas—far higher than the prevailing price just across the border in Mexico.<sup>350</sup> The court’s analysis, like in *Francis, Buehman, Walgreen Drug*, and *Findlay*, focused on the fit between the price-fixing provision and the public health, safety, or general welfare, requiring that there be “an obvious and real connection between the actual provisions of a police regulation and its avowed purpose.”<sup>351</sup> The court quickly dispatched the minimum-price provision under this standard: the board had alleged no facts, real or possible, establishing a logical relationship between the minimum price and sanitation.<sup>352</sup> Meanwhile, the barber suing to declare the law unconstitutional had alleged that his business had decreased and livelihood been threatened by the law, which had caused most residents of Douglas to patronize the shops across the border.<sup>353</sup> The board’s complete failure to justify its actions required the trial court’s dismissal of the complaint to be reversed: price-fixing was unconstitutional absent actual evidence that it was necessary.<sup>354</sup>

Five months later, the court upheld a licensure scheme for chiropractors in *State v. Gee*.<sup>355</sup> The case was certified to determine whether the Basic Science Act, which required chiropractors to pass a science exam that the defendant had failed, was constitutional.<sup>356</sup> The exam consisted of ten questions each on anatomy, physiology, pathology, chemistry, bacteriology, and hygiene. Additionally, the Board of Chiropractors was to consist exclusively of University of Arizona faculty and the exam was to test the equivalent of one year’s “basic science” instruction at the university.<sup>357</sup> The court’s legal analysis upholding the law was cursory, presuming facts in the government’s favor and relying primarily on decisions from the Washington and Michigan Supreme Courts upholding less—and more—restrictive

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348. *Id.*; accord *Walgreen Drug*, 113 P.2d at 653.

349. *Edwards*, 231 P.2d at 451.

350. *Id.* at 450.

351. *Id.* at 452 (citing *Atchison, Topeka & Santa Fe Ry. Co. v. State*, 265 P. 602 (Ariz. 1928)).

352. *Id.* at 452–53.

353. *Id.* at 451.

354. *Id.* 453–54.

355. 236 P.2d 1029 (Ariz. 1951).

356. *Id.* at 1030.

357. *Id.* at 1030–31.

practice acts, respectively,<sup>358</sup> without analysis of whether pathology and bacteriology truly related to the work of chiropractors. But unlike the *Buehman* case, in which the photography-licensure scheme was struck down, there was no evidence in *Gee* that the faculty on the Board of Chiropractors were institutionally biased against new entrants into the profession or that previously established chiropractors would be exempted from the examination requirement.<sup>359</sup> So while *Gee*'s cursory review marked a slight retreat from the Arizona Supreme Court's protection of the right to earn a living, it was also not in any way an abandonment of the Arizona Supreme Court's commitment to guarding against monopolists masquerading as regulators.

In short, the cases described in this Section show that the Arizona Supreme Court's jurisprudence largely held fast on economic liberty well after the U.S. Supreme Court had abandoned it. To be sure, the Arizona court upheld a number of government intrusions into economic liberty, but the court was consistently on the lookout for arbitrary regulations that erected barriers to market entry without plausibly protecting public health, safety, or welfare. But as the U.S. Supreme Court continued its slide away from protecting economic liberty, the divergence between the two courts' approaches would soon become abundantly clear.

### 3. 1955–1981

The U.S. Supreme Court's *Lee Optical* decision in 1955 marked the next degradation of economic liberty in the federal courts. Much has been written about *Lee Optical* elsewhere.<sup>360</sup> As Justice Willett of the Texas Supreme Court recently put it, *Lee Optical* stands for the proposition that economic regulations are to be upheld if it is at all possible for the court to “conjure out of thin air any hypothetical reason why lawmakers *might* have enacted the law.”<sup>361</sup> But even after *Lee Optical*, the Arizona Supreme Court continued to issue strong decisions defending economic liberty against regulatory capture well into the 1960s and 1970s.

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358. *Id.* at 1033 (citing *People v. Lewis*, 206 N.W. 553 (Mich. 1925); *State v. Wehinger*, 47 P.2d 35 (Wash. 1935)).

359. *Compare id.* at 1032–34, with *Buehman v. Bechtel*, 114 P.2d 227, 232 (Ariz. 1941).

360. *See, e.g.*, Barnett, *supra* note 119.

361. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 111 (Tex. 2015) (Willett, J., concurring); *see also Lee Optical, Inc. v. Williamson*, 348 U.S. 483, 487 (1955) (“The legislature might have concluded . . . the legislature might have concluded . . . . Or the legislature may have concluded . . .”).

On May 28, 1958, the Arizona Supreme Court issued two opinions—*McDaniel* and *Beadle*—upholding the constitutionality of various aspects of the Technical Registration Act of 1935, including disciplinary actions thereunder.<sup>362</sup>

McDaniel, a licensed structural engineer, was charged by the Board of Technical Registration with “using his seal on plans other than Structural Engineering” and “practicing Architecture” without a license.<sup>363</sup> McDaniel argued that the definitions of “architect” and “engineer” were so similar as to not give him “a comprehensible notion of what he may or may not lawfully do” as a structural engineer.<sup>364</sup> McDaniel, a licensed professional trying to earn a living, was experiencing a real burden on his economic liberty with little benefit to the public health or safety. But the *McDaniel* court saw no problem, offering only that “an engineer place[s] his seal on engineering plans, and an architect place[s] his seal on architectural plans,”<sup>365</sup> even though the court found the definitions “very similar,” it was content to uphold the Board’s inefficient formalism because the Michigan Supreme Court had done so three years earlier and several other states had similar statutes on the books.<sup>366</sup> The *McDaniel* court demanded, citing a drug-prohibition case, to be “satisfied beyond a reasonable doubt” of an act’s unconstitutionality before so declaring.<sup>367</sup> The Board’s charges against McDaniel were upheld.<sup>368</sup>

*Beadle* involved the renowned architect Al Beadle, whose subdued rectangular designs still define many Phoenix neighborhoods today. Beadle was charged by the Board of Technical Registration with practicing

362. State Bd. of Tech. Registration v. McDaniel, 326 P.2d 348 (Ariz. 1958) (upholding disciplinary action against a licensed structural engineer whose practice incidentally overlapped with architecture, for which he did not have a license); State v. Beadle, 326 P.2d 344 (Ariz. 1958) (holding a structural designer was subject to prosecution as unlicensed architect even though the designer had not held himself out as a licensed architect or engineer).

363. *McDaniel*, 326 P.2d at 353.

364. *Id.* at 354.

365. *Id.*

366. *Id.* at 355–57 (citing *People v. Babcock*, 73 N.W.2d 521 (Mich. 1955)). *McDaniel*’s perfunctory analysis and citation to the Michigan Supreme Court may be an example of the danger of overreliance on precedent from a different jurisdiction. As Oregon Supreme Court Justice Hans Linde noted, “As one common law court among equals, a state supreme court is accustomed to being offered precedent from other states, too often without regard to differences in the other state’s written laws.” Linde, *supra* note 288, at 173.

367. *McDaniel*, 326 P.2d at 357 (citing *State v. Gastelum*, 255 P.2d 203, 273 (Ariz. 1953)). The Arizona Supreme Court has since explained that this “beyond a reasonable doubt” language “incorrectly states the standard” when considering the constitutionality of a statute and “therefore disapprove[d] the use of the ‘beyond a reasonable doubt’ standard for making constitutionality determinations.” *Gallardo v. State*, 336 P.3d 717, 720 (Ariz. 2014).

368. *McDaniel*, 326 P.2d at 358.

architecture without a license.<sup>369</sup> He had not held himself out to be a licensed architect and had warned his customers that he would not “design, represent, sell, or contribute any service with respect to the soundness or safety” of the structures he designed (his practice at the time extended only to “convenience, utility, cost and aesthetic proportion”).<sup>370</sup> After dismissing Beadle’s void-for-vagueness challenge under *McDaniel*’s terms, the court found that “design” implied a responsibility for the safety of the structure “regardless of the designer’s assumption of responsibility therefor”—in other words, the licensure scheme related to public safety because the board believed it did.<sup>371</sup> But even this holding required a finding by the court that “[t]here is no discriminatory favoritism or monopoly” in the Technical Registration Act; even as the court began shirking its duty to evaluate the government’s reasons for enacting a regulation, it still echoed its precedents stretching back to *Arizona Mortuary* that had condemned favoritism.<sup>372</sup>

Even though *McDaniel* and *Beadle* might reflect a willingness to accept health and safety fig-leaves to cover up encroachments on the right to earn a living, the court was not ready to follow its federal counterparts in completely disregarding that right. In fact, some of its strongest decisions were yet to come. The very next year—and just four years after *Lee Optical*—the Arizona Supreme Court struck down an Arizona law banning the sale or distribution of imitation milk products in *State v. A.J. Bayless*.<sup>373</sup> The government had conceded that the imitation milk products at issue were “nutritious, wholesome and healthful,” leaving the prevention of deception and fraud as the only legitimate interest the government had to try to justify the law.<sup>374</sup> Citing *Edwards*, the court reiterated that “legislation *must* bear some reasonable relationship to the object sought to be achieved.”<sup>375</sup> Questioning whether banning imitation milk kept consumers from being deceived, the court noted that the charge related only to “*adulterated* milk product”—i.e., a product with non-butterfat added, and clearly labeled as what it is.<sup>376</sup> There was no allegation of misbranding, and the court found that

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369. *State v. Beadle*, 326 P.2d 344, 345 (Ariz. 1958).

370. *Id.*

371. *Id.* at 346–47.

372. *Id.* at 348; *see supra* text accompanying note 281.

373. *State v. A.J. Bayless Mkts., Inc.*, 342 P.2d 1088, 1092 (Ariz. 1959). The *A.J. Bayless* court in dicta also relied on the U.S. Constitution, but its authority was not binding in that regard. *See id.*

374. *Id.* at 1089–90.

375. *Id.* at 1090 (emphasis added) (citing *Edwards v. State Bd. of Bar Exam’rs*, 231 P.2d 450 (Ariz. 1951)).

376. *Id.*

“no deception or fraud could possibly result . . . because full information . . . is given in various size types of print on both sides of the carton container.”<sup>377</sup> The legislation therefore was not reasonably related to preventing fraud or deception.<sup>378</sup> Evaluating a slew of cases from other jurisdictions ranging from 1910 to 1952, the court then rejected those decisions—including *Carolene Products*—insofar as they rested on the premise that imitation milk products by their nature “make it possible for fraud to be perpetrated upon the consumer public.”<sup>379</sup> Arizona courts were not to presume in the absence of evidence, as federal courts would, that a regulated product in a competitive marketplace tended to deceive the public.

*Killingsworth v. West Way Motors* struck down a requirement that new-car dealers operate out of an enclosed structure that contained enough space to display two cars inside.<sup>380</sup> West Way Motors, a used-car dealer, sued Killingsworth, the MVD’s Superintendent, after being denied a license as a new-car dealer for having insufficient indoor space.<sup>381</sup> The Arizona Automobile Dealers Association (AADA) intervened to help the State defend the law (which it had undoubtedly helped pass).<sup>382</sup> After reaffirming the *Edwards* rule that exercises of the police power must be “reasonable and not arbitrary” and bear “a reasonable relation” to their purpose,<sup>383</sup> the court analyzed the various provisions in the car-dealer licensing laws that West Way Motors challenged.<sup>384</sup> Most of the laws, which required car-dealers to register and communicate certain information about the cars they sold to customers and to the MVD, were upheld as reasonable attempts to prevent “the perpetration of fraud” which was then thought common among car dealers.<sup>385</sup> But the definition of “established place of business”—which

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377. *Id.*

378. *Id.*

379. *See id.* at 1090–92 (citing *Carolene Prods. Co. v. United States*, 323 U.S. 18 (1944); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *Hebe Co. v. Shaw*, 248 U.S. 297 (1919); *Rigbers v. City of Atlanta*, 66 S.E. 991 (Ga. Ct. App. 1910); *Carolene Prods. Co. v. McLaughlin*, 5 N.E.2d 447 (Ill. 1936); *People v. Carolene Prods. Co.*, 177 N.E. 698 (Ill. 1931); *State ex rel. Mitchell v. Sage Stores Co.*, 141 P.2d 665 (Kan. 1943); *Carolene Prods. Co. v. Thomson*, 267 N.W. 608 (Mich. 1936); *Carolene Prods. Co. v. Banning*, 268 N.W. 313 (Neb. 1936); *Carolene Prods. Co. v. Harter*, 197 A. 627 (Pa. 1938); *Dairy Queen of Wis. v. McDowell*, 51 N.W.2d 34 (Wis. 1952)).

380. *Killingsworth v. W. Way Motors, Inc.*, 347 P.2d 1098, 1105 (Ariz. 1959).

381. *Id.* at 1099.

382. *Id.*

383. *Id.* at 1100 (citing *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450, 452 (Ariz. 1951)).

384. *Id.* at 1102–05.

385. *Id.*

required new-car dealers, but not used-car dealers, to have room for two cars indoors—was skewered after the State and the AADA argued that the provision’s purpose “was to insure permanency and stability in the business of selling new cars.”<sup>386</sup> The contention that the provision was reasonably drawn to discourage “fly-by-night dealer[s]” was risible; the court noted that a new-car dealer could have no structure but own a valuable parking lot in fee and thereby have an incentive not to use sharp practices.<sup>387</sup> There was also no way to explain the law’s distinction between new- and used-car dealers other than as an attempt by the major auto dealers to monopolize the (more lucrative) market for new cars.<sup>388</sup> Understating “[w]hether its purpose was to prevent the defrauding of car purchasers by fly-by-night motor vehicle dealers or not,” the court found the provision “arbitrary, unreasonable and discriminatory” in violation of article 2, section 13 of the Arizona Constitution.<sup>389</sup>

*A.J. Bayless’s* skepticism of governmental justifications for rights-infringing laws surfaced again in *State ex rel. Willey v. Griggs*,<sup>390</sup> involving a challenge to a statute that accelerated the date on which the valuation would be taken for property condemned in eminent domain proceedings.<sup>391</sup> The court held that the statute deprived landowners of due process of law, as the just compensation offered by the state under the statute would be based on an earlier point in time at which the land would presumably be lower in value—and, importantly, before the property owner would receive notice of the condemnation through a summons.<sup>392</sup> The government defended the law, which had the potential to diminish property values and thereby effect a taking, as “a justifiable exercise of the state’s police power” to protect the public health, safety, or welfare.<sup>393</sup> Its ultimate argument was that by saving money, “admittedly at the property owner’s expense,” the state would be able to “make safer highway facilities.”<sup>394</sup> The court rightly skewered this invocation of the police power as a talisman: “Under the State’s reasoning, any regulation which conserves money . . . is a valid police measure, despite

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386. *See id.* at 1101.

387. *Id.* at 1102.

388. *See id.* at 1101–02.

389. *Id.* at 1102. The court also ruled in dicta that the law was unconstitutional under the Fourteenth Amendment. *See id.* at 1107.

390. *State ex rel. Willey v. Griggs*, 358 P.2d 174 (Ariz. 1960).

391. *Id.* at 175.

392. *Id.*

393. *Id.* at 176.

394. *Id.* at 177.

the disruptive effect which such regulation may have on individual rights.”<sup>395</sup> Under the Arizona test requiring “a real and substantial relation” between a law’s means and its end, the valuation law was unreasonable, oppressive, and unconstitutional.<sup>396</sup>

The Arizona Supreme Court handed down another great economic-liberty decision in *Visco v. State*.<sup>397</sup> The case concerned a statute requiring trash haulers to obtain a certificate of convenience and necessity (today referred to as a CON law, for certificate of need) from the Corporation Commission before being allowed to operate as a common (as opposed to contract) carrier.<sup>398</sup> Visco’s paper-reclamation business, Arizona Mill Supply, often rented bins and cleaned alleys in connection with its work salvaging paper and cardboard from the merchants it dealt with.<sup>399</sup> The bin-rental and cleaning business had proven popular, and so Arizona Mill Supply applied for (but was denied) a common-carrier trash hauling permit in 1955.<sup>400</sup> Visco then organized a separate corporation to act as Arizona Mill Supply’s contract carrier, which successfully applied for a permit but found that permit cancelled the next year.<sup>401</sup> Shortly thereafter, Arizona Mill Supply’s competitors filed a complaint with the Corporation Commission, and then in the courts, charging that Visco was operating as a common carrier of trash in violation of the CON law.<sup>402</sup> The lawsuits were consolidated to determine whether the common-carrier definition could constitutionally be applied to Visco’s incidental trash-hauling business.<sup>403</sup>

The court began its analysis by noting three separate types of government regulations: the power to fix prices for businesses affected with a public

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395. *Id.*

396. *Id.* (quoting *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450, 452 (Ariz. 1951)). In 2008, the Arizona Court of Appeals asserted that a later case, *Weintraub v. Flood Control District*, 456 P.2d 936 (Ariz. 1969), had “rejected . . . *Griggs sub silentio* and reached exactly the opposite conclusion: that the mere passage of an eminent domain resolution does not constitute a taking.” See *City of Scottsdale v. CGP-Aberdeen, L.L.C.*, 177 P.3d 1198, 1206 (Ariz. Ct. App. 2008). *Griggs*’s apparent abrogation by *Weintraub*, however, does not undermine *Griggs*’s holding that the government may not justify the infringement of a constitutional right purely on the basis of a desire to save money. That was not the issue in *Weintraub* or *City of Scottsdale*, which evaluated the more blunt question of when and whether a “taking” has occurred for the purposes of an inverse condemnation action. See *Weintraub*, 456 P.2d at 941; *City of Scottsdale*, 177 P.3d at 1206.

397. *Visco v. State ex rel. Pickrell*, 388 P.2d 155 (Ariz. 1963).

398. *Id.* at 155–56.

399. *Id.* at 156.

400. *Id.*

401. *Id.* at 156–57.

402. *Id.* at 157.

403. *Id.* at 156–58.

interest;<sup>404</sup> the police power to secure the public health, safety, and general welfare;<sup>405</sup> and the power to grant monopolies.<sup>406</sup> The court quickly identified the CON law as the modern form by which the government granted monopolies, noting that the monopoly power was contemplated by the Arizona Constitution but also disfavored.<sup>407</sup> The court examined how CON laws had been treated in other jurisdictions as well as in other industries.<sup>408</sup> Truly common carriers, such as bus lines, had been held subject to CON laws by virtue of their involvement with the public interest, but the court also cited with approval the U.S. Supreme Court's rejection of a California CON law for private trucking companies in *Frost Trucking Company v. Railroad Commission*.<sup>409</sup> The *Visco* court also noted that it had narrowly construed the CON law for alarm-system maintenance companies so as to avoid constitutional problems,<sup>410</sup> and that the (private) alarm system was, unlike *Visco's* trash hauling, connected with the vital "public obligation to put out fires."<sup>411</sup> It had also recently ordered the Corporation Commission to grant a contract carrier permit to an oil-service company, which industry was—unlike trash hauling—expressly designated a common carrier under the Arizona Constitution.<sup>412</sup> Though trash hauling was "a clear example of the type of industry to which all manner of health regulations might be applied," the CON law was not designed to address public health but was instead a "flagrant" attempt to grant *Visco's* competitors an "individual monopoly."<sup>413</sup> As such, the CON law was "no[t] authorized by the Arizona Constitution."<sup>414</sup>

*Visco* was followed by *Arizona Corporation Commission v. Continental Security Guards*, which extended *Visco's* logic to strike down the Corporation Commission's statutory authority to condition contract carrier certificates "upon limitations, terms and conditions the commission

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404. *Id.* at 158 (citing *Munn v. Illinois*, 94 U.S. 113 (1876)).

405. *Id.* at 158–59 (citing *Edwards v. State Bd. of Barber Exam'rs*, 231 P.2d 450 (Ariz. 1951)).

406. *Id.* at 159 (citing *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 567 (1837)).

407. *Id.* at 159 & n.1 (citing ARIZ. CONST. art. XIV, § 15, but noting that "[i]t might be doubted if the power to grant monopolies could survive at all in a free society").

408. *See id.* at 162–65.

409. 271 U.S. 583, 599 (1926), *cited in Visco*, 388 P.2d at 160.

410. *Gen. Alarm, Inc. v. Underdown*, 262 P.2d 671 (Ariz. 1953), *quoted in Visco*, 388 P.2d at 161–62).

411. *Visco*, 388 P.2d at 162.

412. *Id.* at 163 (citing *Cantlay & Tanzola, Inc. v. Senner*, 373 P.2d 370 (Ariz. 1962)); *see also* ARIZ. CONST. art. XV, § 10 ("All . . . corporations, for the transportation of . . . oil . . . are declared to be common carriers and subject to control by law.").

413. *Visco*, 388 P.2d at 164 (citing *Edwards v. State Bd. of Barber Exam'rs*, 231 P.2d 450 (Ariz. 1951)).

414. *Id.* at 165.

prescribes.”<sup>415</sup> As in *Visco*, an enforcement action had been brought against a company—Continental Security Guards—at the request of two of that company’s competitors, “who previously enjoyed a monopoly” due to the CON law.<sup>416</sup> The Commission responded by protecting its regulated entities, rather than the public, and ordering Continental to cease and desist.<sup>417</sup> The court was not amused. Although the Commission had constitutional authority to regulate common carriers and even to require permits from non-common carriers, Continental was a *contract* carrier that did not hold its services out to the public.<sup>418</sup> In order to ensure the Commission did not unconstitutionally create and enforce monopolies, the court interpreted its power narrowly to “specifically exclude[] control over a contract carrier’s rates, schedules, routes, etc., and specifically exclude[] the power to refuse a permit to such carrier for the sole reason that another carrier holds a certificate of convenience and necessity.”<sup>419</sup>

Between *Visco* and *Continental Security Guards*, the court issued a decision upholding a requirement that funeral directors demonstrate an adequate knowledge of embalming,<sup>420</sup> an endorsement of a barrier to entry in a business notorious for capturing legislatures.<sup>421</sup> But in doing so, the court still affirmed *Edwards*’s “reasonable relationship” analysis as the touchstone of constitutional analysis and made an effort to engage the facts.<sup>422</sup> There had been a historical need for and common practice in Arizona of embalming dead bodies quickly, since the heat tended to accelerate their decomposition and attendant spread of pathogens.<sup>423</sup> So although very deferential, the court had not yet backed away from its consistent stance that government regulations had to be supported by real and not imagined reasons.

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415. *Ariz. Corp. Comm’n v. Cont’l Sec. Guards*, 443 P.2d 406, 410 (Ariz. 1968) (quoting ARIZ. REV. STAT. § 40-602(C) (1960)).

416. *Id.* at 407.

417. *Id.*

418. *Id.* at 415–16.

419. *Id.* at 414.

420. *McKinley v. Reilly*, 393 P.2d 268, 272 (Ariz. 1964).

421. *See, e.g., St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (adjudicating requirement that casket sellers obtain funeral directors’ license); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (same); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (same); *see also St. Joseph Abbey*, 712 F.3d at 218–19 (discussing history of Federal Trade Commission’s “Funeral Rule,” promulgated because it “could not rely on state funeral licensing boards to curb” unfair or deceptive practices of funeral providers “because the state boards were ‘dominated by funeral directors’”) (quoting Trade Regulation Rule; Funeral Industry Practices, 47 Fed. Reg. 42,260, 42,289 (Sept. 24, 1982)).

422. *See McKinley*, 393 P.2d at 271.

423. *See id.* at 270–71 (citing *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450 (Ariz. 1951)).

The court struck down an economic regulation even as late as 1975, invalidating a requirement that fire and casualty insurers become members of a special nonprofit guaranty corporation that would have the power to create a “plan of operation” and require dues payments from its members.<sup>424</sup> The court found the law unconstitutional under article 14, section 2 of the Arizona Constitution, requiring that corporations be formed “under general laws” and not by special acts.<sup>425</sup> The Court of Appeals had recognized that article 14, section 2 was meant to “remov[e] the danger of favoritism and corruption in the creation of corporations” but had upheld the law as an exercise of the police power because it did not think the law “grant[ed] a privilege to any group.”<sup>426</sup> The Arizona Supreme Court, however, reversed, noting that, while the government had the power to regulate and control the insurance industry, such power did not justify the formation of a corporation by a special act.<sup>427</sup> The court was troubled that the board of directors of the guaranty corporation had to be representatives of the member companies and were essentially given regulatory powers without any government official having oversight authority.<sup>428</sup> But the court insisted that if the government wanted to regulate, it has to create an entity that was “governed and controlled by public officials,”<sup>429</sup> rather than leave government power in private hands.

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*Buehman*, *Edwards*, and *Visco* stand out to the authors as the best examples of judicial engagement in twentieth-century Arizona jurisprudence. It is remarkable that these cases were all handed down during the nadir of substantive due process in the federal courts: *Carolene Products* had signaled the decline of economic substantive due process in 1938, *Lee Optical* had killed it in 1955, and the U.S. Supreme Court would not revive the doctrine for privacy rights until 1965.<sup>430</sup> *Visco*, *Edwards*, *Buehman*, and numerous other cases teach us that the Arizona Supreme Court was confident in its *ability* to determine whether an economic regulation really tended to promote

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424. *Fireman’s Fund Ins. Co. v. Ariz. Ins. Guar. Ass’n*, 536 P.2d 695, 696 (Ariz. 1975).

425. *Id.* at 695, 697 (citing ARIZ. CONST. art. XIV, § 2).

426. *Fireman’s Fund Ins. Co. v. Ariz. Ins. Guar. Ass’n*, 528 P.2d 839, 842, 847 (Ariz. Ct. App. 1974), *rev’d*, 536 P.2d 695 (Ariz. 1975).

427. *Fireman’s Fund*, 536 P.2d at 697.

428. *Id.* at 696.

429. *Id.* at 697 (quoting *Bd. of Regents of Univ. of Ariz. v. Sullivan*, 42 P.2d 619, 623 (Ariz. 1935)).

430. *See Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965).

the public health, safety, and welfare, as opposed to promoting private economic interests, and its constitutional *duty* to do so.

But as this survey shows, the middle three decades of the twentieth century were not a special outlier either. The court had been evaluating economic regulations since 1919,<sup>431</sup> striking them down since 1926,<sup>432</sup> and was willing to do so as late as 1975—some sixty-three years after statehood.<sup>433</sup> The practice of judicial engagement spanned multiple generations, reflected many more generations' worth of territorial experience with special interest trickery and regulatory capture, and was a necessary component of the protections against naked preferences placed in the Arizona Constitution by its western progressive framers. The court's resistance to *Lee Optical*-level abdication—for an entire generation dating from 1955—was praiseworthy. For whatever reason, however, the court would soon abandon its commitment to judicial engagement and yield to the “lockstep” approach to economic substantive due process. That abandonment, in the *Arizona Downs* case, was to be a judicial tragedy.

#### IV. THE ARIZONA SUPREME COURT'S TACIT ADOPTION OF FEDERAL ECONOMIC LIBERTY JURISPRUDENCE HAS NOT BEEN ADEQUATELY EXPLAINED BY THE COURT OR BY COMMENTATORS

Today, every Arizona state-court opinion dealing with a “non-fundamental” constitutional claim or defense includes a paragraph or two reciting the version of the rational-basis test that federal courts have frequently used since the New Deal. Consider a recent example:

Because Panos concedes he is not a member of a suspect class and there is no fundamental right at issue, we will uphold the statute so long as it is “rationally related to a legitimate government purpose.” The rational basis test does not require the legislature to choose “the least intrusive, nor most effective, means of achieving its goals.” Nor does it require “[a]bsolute equality and complete conformity of legislative classifications.” Thus “[e]ven if the classification results in some inequality, it is not unconstitutional if it rests on some reasonable basis.”

In sum, the challenger of a statute's constitutionality may overcome a presumption that the statute is rational “only by a clear showing of arbitrariness or irrationality.” Only if a statute is “wholly

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431. *Mosher v. City of Phoenix*, 181 P. 170 (Ariz. 1919).

432. *Elliott v. State*, 242 P. 340, 342 (Ariz. 1926).

433. *Fireman's Fund*, 536 P.2d at 697.

irrelevant’ to the achievement of a legitimate governmental objective” will it violate equal protection.<sup>434</sup>

This passage, littered with citations and quotation marks (the better to convey judicial orthodoxy), is designed to excuse the foregone conclusion that inevitably follows: “Applying these standards, we conclude the statute to be constitutional.”<sup>435</sup>

The Arizona courts’ regurgitation of the constitutional buzzwords “rational basis” and “fundamental right” is a recent development. Though they have been commonplace in federal courts since *Carolene Products*’ announcement of tiered scrutiny,<sup>436</sup> they were both relatively rare in Arizona opinions late into the twentieth century, during which time the Arizona courts treated all rights with respect<sup>437</sup> and required “an obvious and real connection between . . . a police regulation and its avowed purpose.”<sup>438</sup>

That changed in 1981, when the Arizona Supreme Court ushered in the lockstep approach to Arizona economic liberty protections by quoting *Lee Optical* at length in its *Arizona Downs* decision.<sup>439</sup> Until *Arizona Downs*, *Lee Optical* had been ignored by the Arizona courts.<sup>440</sup> Though the Arizona Supreme Court would not acknowledge it—its opinion overturned no Arizona precedents—*Arizona Downs* permanently shifted the way Arizona courts talk about constitutional rights. This is shown in the following Ravel Law visualized search results for Arizona cases discussing the terms “rational basis” and “fundamental right”<sup>441</sup>:

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434. *State v. Panos*, 366 P.3d 1006, 1008–09 (Ariz. Ct. App. 2016) (alterations in original) (citations omitted) (quoting and citing a depressing array of Arizona cases going back to 1981).

435. *Id.* at 1009.

436. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938).

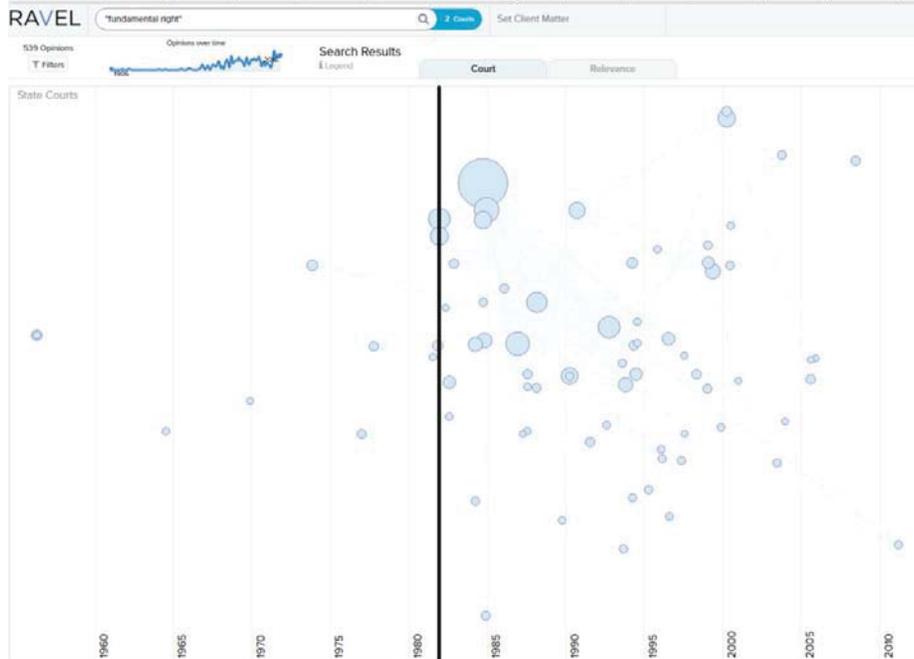
437. *See, e.g.*, *Buehman v. Bechtel*, 114 P.2d 227, 231 (Ariz. 1941) (defending “the right to earn a living” against an “unreasonable and arbitrary” exercise of the police power).

438. *E.g.*, *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450, 452 (Ariz. 1951).

439. *Ariz. Downs v. Ariz. Horsemen’s Found.*, 637 P.2d 1053, 1059–60 (Ariz. 1981) (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955)).

440. The Arizona Supreme Court had only cited *Lee Optical* three times in the twenty-six years between that case and *Arizona Downs*, and never at length. *Eastin v. Broomfield*, 570 P.2d 744, 753 (Ariz. 1977); *State v. Doss*, 568 P.2d 1054, 1060 (Ariz. 1977); *In re Bates*, 555 P.2d 640, 643 (Ariz. 1976), *rev’d*, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). The Court of Appeals had also only cited *Lee Optical* three times. *Ariz. State Liquor Bd. of Dep’t of Liquor Licenses & Control v. Ali*, 550 P.2d 663, 665 (Ariz. Ct. App. 1976); *Fireman’s Fund Ins. Co. v. Ariz. Ins. Guar. Ass’n*, 528 P.2d 839, 848 (Ariz. Ct. App. 1974), *rev’d on other grounds*, 536 P.2d 695 (Ariz. 1975); *State v. Superior Court*, 409 P.2d 742, 745 (Ariz. Ct. App. 1966). Of these six cases, only *Bates*, *Ali*, and *Firemen’s Fund* arguably involved business or occupation regulations and each case ultimately ended in the regulation being struck down.

441. RAVEL, <http://www.ravellaw.com> (search in search bar once for “rational basis” and next for “fundamental right”) (last visited May 2, 2017). The authors have drawn a line through the *Arizona Downs* decision in both infographics.



In *Arizona Downs*, a nonprofit corporation of horse owners and breeders challenged the constitutionality of a statutory horse-racing duopoly.<sup>442</sup> The Arizona Racing Commission had been granted the power to issue racing permits and set (up to a maximum of 150) the number of “racing days” on which horse-racing could occur in Maricopa County.<sup>443</sup> The statute also guaranteed permits to operators who had been permitted to conduct races the previous year, which, in conjunction with the cap on racing days, effectively gave two corporations the exclusive privilege to conduct races in the county.<sup>444</sup> In addition to preventing the plaintiff from obtaining a racing permit, another statute denied the plaintiff the right to build its own racetrack because of “the economic effect of such a [racetrack] on existing tracks and permittees.”<sup>445</sup>

The superior court ruled the horse-racing statutes unconstitutional, but the Arizona Supreme Court reversed.<sup>446</sup> On appeal, the court addressed the plaintiff’s equal protection and special-law claims.<sup>447</sup> The court began its analysis by asserting, disingenuously, that its “research ha[d] disclosed no cases which indicate that entry into the regulated industry of racing constitutes a fundamental right or involves a suspect class”<sup>448</sup>—never mind that the court had historically not emphasized tiered scrutiny in its economic liberty cases. But *Arizona Downs*, without mentioning the line of cases discussed in Part III.B, relied on a preponderance of federal and extra-jurisdictional case law (along with an Arizona case suggesting that the abolition of an evidentiary rule did not impinge on any fundamental right) to emphasize that tiered scrutiny and the rational-basis test were “particularly appropriate to judge statutes in the areas of economics and social welfare.”<sup>449</sup>

Predictably, the court’s next step was to rationalize a basis for the horse-racing duopoly. Because the Fourth Circuit believed that West Virginia’s regulation of horse racing related to “protection of its revenues and protection of patrons from fraud,” the Arizona Supreme Court imputed those rationales

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442. *Ariz. Downs*, 637 P.2d at 1055–56.

443. *See id.* at 1056 (describing law as applicable to counties with populations over 400,000).

444. *Id.*

445. *Id.* at 1061.

446. *Id.* at 1055–56.

447. *Id.* at 1057. The court also addressed an impermissible-delegation claim, state-law antitrust claim, and noted that the plaintiff had brought a due process claim. This Article will not address the delegation or antitrust claims, and the court did not analyze the due process claim at all distinguishably from its treatment of the equal-protection claim. *See id.* at 1058–60, 1062.

448. *Id.* at 1058.

449. *Id.* (citing *City of New Orleans v. Duke*, 427 U.S. 297 (1976); *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977); and others).

to the legislature and then hypothesized how they might justify the racing-days cap and new-track prohibition.<sup>450</sup>

The court justified the racing-days cap as a way to help the state “develop the maximum amount of revenue.”<sup>451</sup> This was so, even though the opinion makes it plain that the cap had the effect of limiting the supply of races below what the market demanded: the cap forced horse-racing organizations to “compet[e] for a finite number of horse racing days,” and that finite amount of permits was maxed out every year by the two existing horse-racing corporations.<sup>452</sup> The plaintiff’s desire to obtain racing permits, as evidenced by the existence of the lawsuit, would have expanded the market and *increased* the permitting fees received by the state. But no matter. The artificial constraint on supply, the court held, was legitimate as “an incentive to investment”—i.e., a handout—that was “necessary to provide some assurance of continuity and predictability so that prospective operators can plan on having a certain number of annual racing days in which to recoup their investment.”<sup>453</sup> As the special concurrence recognized, this was the sort of crony regulation, designed to “insulate the two industry members from the rigors imposed by a new competitor,” that the framers of the Arizona Constitution and the early Arizona Supreme Court would have recognized as an affront to a free and equal society.<sup>454</sup> But according to the *Arizona Downs* court, the legislature could have rationally believed that a twenty-five-year-old duopoly’s continued insulation might boost the state’s revenue, and therefore, somehow, “there is no violation of due process or equal protection.”<sup>455</sup>

As to the effective ban on the construction of new horse-racing tracks—which was never defended on health, safety, or even nuisance grounds—the court’s only excuse was that “[t]he racing industry necessarily involves gambling which by its nature is more attractive to fraudulent schemes.”<sup>456</sup> It offered no evidence of fraud in the Arizona racing industry, and did not address why the legal restrictions on the duopoly’s shared racetrack could not

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450. *Id.* at 1059 (citing *Hubel v. W. Va. Racing Comm’n*, 513 F.2d 240, 243 (4th Cir. 1975)).

451. *Id.* at 1058.

452. *Id.*

453. *Id.*

454. *See id.* at 1064 (Gordon, J., specially concurring). Justice Gordon would have denied the plaintiff’s lawsuit based on evidence in the record that the plaintiff was “somehow affiliated” with one of the two existing corporations. *Id.* The majority opinion, as is common in rational-basis opinions, did not address the evidence at all.

455. *Id.* at 1059–60 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be . . . logically consistent with its aims to be constitutional.”)).

456. *Id.* at 1062.

be enforced as to a second racetrack. “[A]lthough admittedly restrictive of competition,” the court said, the ban on new tracks was “necessary to control the possibility of serious abuses”; “[w]hether the decision of the legislature is the correct . . . way to achieve the desired goal *is not for the courts to determine.*”<sup>457</sup> Economic regulations, in other words, were beyond the scope of judicial review.

*Arizona Downs* cannot possibly be correct as a statement of Arizona law. First, the court has already recognized the *Arizona Downs* standard is insufficient to protect against the naked preferences prohibited by certain provisions of the Arizona Constitution, and logically is insufficient under the Arizona Due Process and Equal Protection Clauses as well. Second, it did not address or overturn the line of cases, exemplified by *Buehman*, *Edwards*, and *Visco*, that require judicial engagement, not abdication, when considering restraints on economic liberty and which are irreconcilable with *Arizona Downs*.<sup>458</sup>

The Arizona Supreme Court has already partially retreated from the *Arizona Downs* standard of review because it is insufficient to guarantee rights. The *Arizona Downs* plaintiff claimed the horse-racing statutes, in addition to violating due process and equal protection, were unconstitutional “special laws” prohibited by article 4, part 2, section 19 of the Arizona Constitution.<sup>459</sup> Such laws are prohibited by the Arizona Constitution because, as the *Childs* case—which was never cited by the *Arizona Downs* court—recognized, special laws “secure[] monopolies and exclude[] competition” under the “mask of sanitary legislation,” i.e., police powers.<sup>460</sup> The *Arizona Downs* court rejected the special laws argument based on the

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457. *Id.* at 1062 (emphasis added).

458. In addition—though this point does not go directly to the propriety of adopting the *Lee Optical* rational-basis standard to the guarantees of the Arizona Constitution—*Arizona Downs* even got the application of the federal rational basis standard wrong. Recall that *Arizona Downs* imagined—in the absence of any evidence—that the legislature rationally believed that allowing one racetrack, but prohibiting a second, was “necessary to control the possibility of serious abuses” (because: “gambling”). *Id.* But the U.S. Supreme Court had rejected a similar dishonest invocation of the specter of fraud in *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973). There, in dealing with a provision that denied food stamps to otherwise-eligible households whose members were unrelated to each other based on the asserted interest in “minimizing fraud,” the Court held that even if “wholly unsubstantiated assumptions” about the relative threat of fraud in unrelated-households were accepted, the numerous provisions that dealt with fraud directly “necessarily casts considerable doubt upon the proposition that the [law] could rationally have been intended to prevent those very same abuses.” *Id.* at 535–37. The *Arizona Downs* decision, however, never bothered to explain how the quantity of horse-racing tracks related to the threat of fraud when fraud could be regulated directly.

459. *Ariz. Downs*, 637 P.2d at 1057.

460. *State v. Childs*, 257 P. 366, 369 (Ariz. 1927).

federal rational basis standard, yet it recognized that a law might be “special” if it “look[ed] to no broader application in the future.”<sup>461</sup> In *Republic Investment Fund* in 1990, the court used that language to announce a heightened standard of review for constitutional challenges under article 4, part 2, section 19, requiring not only that there be a rational basis for a legislative classification (as required for due process and equal protection challenges), but also that the classification “encompass[] all members of the relevant class” and that it “allow[] members to move into and out of the class.”<sup>462</sup> Though the *Republic Investment Fund* court declined to rule on whether the unconstitutional deannexation statute at issue also violated equal protection—such a ruling would have been dicta—it is fairly interpreted as recognizing that the level of deference contemplated by *Arizona Downs* is logically untenable.

A more notable—and certainly more puzzling—aspect of *Arizona Downs*, however, is its abject failure to engage the long line of Arizona cases calling for meaningful scrutiny of economic regulations. It is clear that *Arizona Downs* changed the way Arizona courts evaluate such regulations,<sup>463</sup> but it did so without overruling or abrogating any previous Arizona case. *Buehman*, *Edwards*, and *Visco*—the true heart of Arizona’s economic-liberty jurisprudence—remain good law even after *Arizona Downs*. The Court of Appeals cited *Buehman* and *Edwards* with approval in a recent decision upholding the power of the State Board of Cosmetology to ban a nail technician from performing fish pedicures.<sup>464</sup> That power was upheld based on actual evidence, introduced by the plaintiff’s own expert, that the fish used in those procedures could cause bleeding, potentially leading to the transmission of communicable diseases.<sup>465</sup> *Visco*, for its part, shows no negative treatment whatsoever in a Westlaw search, and was cited with

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461. *Ariz. Downs*, 637 P.2d at 1060–61.

462. *Republic Inv. Fund I v. Town of Surprise*, 800 P.2d 1251, 1257 (Ariz. 1990).

463. See *supra* charts accompanying note 441. Tiered scrutiny, which had not been a prominent feature of Arizona law before *Arizona Downs*, has since become a regular feature in substantive due process cases. See, e.g., *Governale v. Lieberman*, 250 P.3d 220, 225, 227 (Ariz. Ct. App. 2011) (upholding a statutory restriction on the use of expert witnesses in medical malpractice cases); *Phx. Newspapers, Inc. v. Purcell*, 927 P.2d 340, 344, 347 (Ariz. Ct. App. 1996) (upholding fees charged to newspaper for information provided for free to political parties); *Smith v. City of Tucson*, 736 P.2d 1184, 1185–86 (Ariz. Ct. App. 1987) (upholding ordinance restricting parking on public right-of-way to neighbors and qualified visitors).

464. *Vong v. Aune*, 328 P.3d 1057, 1061 (Ariz. Ct. App. 2014) (“Prohibitions on economic pursuits may lack a rational basis if they are unrelated to legitimate police powers.”).

465. *Id.* at 1062.

approval as recently as 1996.<sup>466</sup> It seems implausible that these three cases could coexist alongside *Arizona Downs*. Yet that is the state of the law.

Just as the courts have never adequately explained the jurisprudential shift that *Arizona Downs* set in motion, the commentators haven't either. The last comprehensive survey of Arizona's economic-liberty jurisprudence, which presented the Court of Appeals' wildly pro-deference decision in *Fireman's Fund Insurance Company v. Arizona Insurance Guaranty Association* as the decision of the Arizona Supreme Court<sup>467</sup>—actually, the Arizona Supreme Court reversed the Court of Appeals and struck down the law under the constitutional prohibition against creating corporations by special acts<sup>468</sup>—notes that *Arizona Downs* “diverges markedly from how Arizona courts have traditionally interpreted the Arizona Constitution,” but concludes that the court's “commitment to continue such restraint is unclear.”<sup>469</sup> The leading treatise on the Arizona Constitution also notes the court's modern-day adoption of deferential standards of review, but adopts the economic-liberty survey's conclusion that the court was simply “inconsisten[t]” in its first several decades.<sup>470</sup>

If there is an inconsistency in Arizona case law on how far the government may go in infringing its residents' economic rights or how far the courts will bend over backwards to approve such infringements, *Arizona Downs* is the source of that inconsistency. The Arizona Supreme Court had a rich tradition of taking those rights seriously by striking down laws that create needless and sometimes sinister barriers to entry, and *Arizona Downs* broke with that tradition by turning a blind eye to such a law without so much as a word about its own precedents. The court should return to that tradition by overruling *Arizona Downs*.

#### V. ARIZONA COURTS SHOULD RECLAIM THE ORIGINAL SOPHISTICATED AND MEANINGFUL PROTECTION OF ECONOMIC LIBERTY

The Arizona courts were more willing than their federal counterparts to protect economic liberty from at least 1938 through 1981. This difference is wholly attributable to the federal courts' abandonment of factual inquiry and neutral adjudication in economic liberty cases. The Arizona Supreme Court,

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466. See *Mohave Disposal, Inc. v. City of Kingman*, 922 P.2d 308, 311 (Ariz. 1996).

467. Smith, *supra* note 9, at 339.

468. *Fireman's Fund Ins. Co. v. Ariz. Ins. Guar. Ass'n*, 536 P.2d 695, 697 (Ariz. 1975), *rev'g* 528 P.2d 839 (Ariz. Ct. App. 1974); see also ARIZ. CONST. art. 14, § 2.

469. Smith, *supra* note 9, at 341, 343.

470. Leshy, *supra* note 8, at 59 (citing Smith, *supra* note 9); see also *id.* at 75–76 (noting tiered scrutiny for equal-protection cases under ARIZ. CONST. art. II, § 13).

by comparison, continued to insist—as it had before 1938—on actual facts and an obvious and real connection between the challenged regulation and a legitimate government interest. The court did not mandate that judges become advocates for the government in such cases. And the court insisted on retaining its traditional tests and duties in economic liberty cases because the court was well aware of the threat of naked preferences and recognized the Arizona Constitution protected all rights against them. The Arizona Supreme Court never purported to overrule its pre-1981 case law when (or after) it retreated to federal-style rational-basis review for economic regulations in *Arizona Downs*. Its adoption of federal-style rational-basis review has led to a confused state of affairs in which Arizona courts invent laughable justifications for anticompetitive special-interest legislation<sup>471</sup> and waste time discussing whether explicit provisions of the Arizona Constitution qualify as fundamental rights.<sup>472</sup>

The Arizona Supreme Court should resolve this confusion and clarify that “there must be an obvious and real connection between the actual provisions of a police regulation and its avowed purpose.”<sup>473</sup> This is not a call to have the courts sit as super-legislatures or strike down every economic regulation with which they disagree. Meaningful judging, as shown in cases like *Arizona Mortuary*, *Breuninger*, and *Francis*, still leaves the political branches’ legitimate policy decisions intact.<sup>474</sup> The key is that meaningful judging protects against illegitimate policy decisions, such as decisions that enact naked preferences.

The Arizona Declaration of Rights recognizes “[a] frequent recurrence to fundamental principles” as being “essential to the security of individual rights

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471. See, e.g., *Ariz. Downs v. Ariz. Horsemen’s Found.*, 637 P.2d 1053, 1059 (Ariz. 1981) (speculating, on Legislature’s behalf, that insulating a duopoly from competition will grow the overall market).

472. See, e.g., *Kenyon v. Hammer*, 688 P.2d 961, 966, 971–75 (Ariz. 1984) (concluding after five pages that ARIZ. CONST. art. XVIII, § 6 is a “fundamental right,” i.e., that courts should strictly scrutinize whether the right of action to recover damages for injuries has been abrogated when the constitution says “[t]he right of action to recover damages for injuries shall never be abrogated”).

473. *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450, 452 (Ariz. 1951).

474. See *Francis v. Allen*, 96 P.2d 277, 279, 281 (Ariz. 1939) (upholding bonding and registration requirement for travel agents based on judicial knowledge of common dangers in 1930s automotive transport); *City of Phoenix v. Breuninger*, 72 P.2d 580, 584 (Ariz. 1937) (upholding ordinance prohibiting sale of unpasteurized milk based on evidence that unpasteurized milk can transmit foodborne pathogens); *City of Tucson v. Ariz. Mortuary*, 272 P. 923, 928, 930 (Ariz. 1928) (upholding zoning ordinance based on evidence that residential neighborhood had quickly organized through political channels to enact the ordinance before it could be said to have “acquiesced” in establishment of mortuaries within neighborhood).

and the perpetuity of free government.”<sup>475</sup> And Justice Brennan, fearing an impending decline in federal protection for rights he preferred, stressed that federal jurisprudence “[is] not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”<sup>476</sup> The federal courts’ attitude toward the right to earn a living, which *Arizona Downs* adopted, rarely results in meaningful judging. Yet for decades, the Arizona courts took a consistent approach to economic-liberty cases that was deeply rooted in Arizona’s history and resulted in broader protection than the U.S. Supreme Court’s Fourteenth Amendment jurisprudence. Since 1981, the Arizona Supreme Court has wavered from (but never renounced) that approach. It should stop wavering and return to the role that Arizona’s framers envisioned: finding actual facts, determining actual reasons, and deciding whether those facts and reasons support an exercise of the police power that encroaches on the right to earn a living.

The Texas Supreme Court recently provided a stellar example of how a state court can (and should) rediscover its own constitutional history to protect economic liberty without usurping the legislature’s role in *Patel v. Texas Department of Licensing & Regulation*.<sup>477</sup> *Patel* involved the practice of eyebrow threading—the use of a single piece of cotton thread, tightly wound between fingers and brushed along the hairline to remove hair and shape brows—a practice common in South Asian and Middle Eastern communities and increasingly common in commercial establishments across the U.S.<sup>478</sup> Texas required “threaders” to take at least 750 hours of instruction in cosmetology before practicing their trade.<sup>479</sup> But the *Patel* plaintiffs introduced evidence that “as many as 710 of the required 750 training hours” had nothing to do with hygiene or sanitation, while even the State conceded that “as many of 320 of the curriculum hours” were irrelevant to eyebrow threading.<sup>480</sup> The cost of this training averaged between \$3,500 and \$9,000, all to learn (together with hundreds of hours of pointless instruction) how to discard used thread, clean a workstation, and wash one’s hands.<sup>481</sup>

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475. ARIZ. CONST. art. II, § 1.

476. Brennan, *supra* note 1, at 502; *see also* Bolick, *supra* note 3, at 507 (“Those who believe in federalism and freedom should strongly advocate the primacy and independent interpretation of the Arizona Constitution.”).

477. *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015).

478. *Id.* at 73.

479. *Id.*

480. *Id.* at 89.

481. *Id.* at 89–90, 130.

The Texas Constitution includes a “due course of law” provision that guarantees what lawyers today call substantive due process.<sup>482</sup> The *Patel* court highlighted that this provision had long been held to have some force against economic legislation, but that (like the Arizona courts today) the Texas courts had “mixed and matched three different standards of review through the years”: “real and substantial,” “rational basis including consideration of evidence,” and “no-evidence rational basis.”<sup>483</sup> Looking to decades of its own decisions much as this Article invites the Arizona Supreme Court to do, the Texas Supreme Court found that the due-course-of-law provision “for the most part[] align[s] with the protections found in the Fourteenth Amendment,” *but also* that its protection of economic rights “includes an accompanying consideration . . . whether the statute’s effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest.”<sup>484</sup> This distinguishes the Texas substantive due process standard from the low standard of *Lee Optical*, but, the court stressed, is not a radical departure. There still remains in Texas “the presumption that legislative enactments are constitutional” and the “high burden on parties claiming a statute is unconstitutional.”<sup>485</sup> The Texas approach differs from the federal standard primarily in rejecting its most indefensible characteristic: in Texas, the inquiry “will in most instances require the reviewing court to consider the entire record, *including evidence offered by the parties.*”<sup>486</sup>

Applying the Texas standard to the actual (rather than imagined) facts set forth in the record, the *Patel* court concluded that the plaintiffs had “met their high burden” and that the 750-hour requirement was beyond “unreasonable or harsh” and “so oppressive that it violates” the due course of law provision.<sup>487</sup> Although it struck down the entire licensing scheme as applied to eyebrow threaders, the court did not take issue with “the rationality of the State’s requiring [threaders] to be licensed, nor the requirement that they take

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482. TEX. CONST. art. I, § 19 (“No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.”).

483. *Patel*, 469 S.W.3d at 80.

484. *Id.* at 86–87.

485. *Id.* at 87.

486. *Compare id.* (emphasis added), *with* *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (“[I]t is entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature.”).

487. *Patel*, 469 S.W.3d at 90. In a concurring opinion, Justice Willett rightly pointed out that any version of rational-basis review which requires the court to disregard the facts is “tantamount to no test at all.” *Id.* at 99 (Willett, J., concurring).

training in subjects such as sanitation and hygiene.”<sup>488</sup> The legislature in Texas may still enact a licensing scheme for eyebrow threaders so long as it is not oppressive. *Patel* is not an invitation to usurp legislative power; it rests on the modest premise that “rational basis” ought to actually be rational.<sup>489</sup>

*Patel* closely resembles midcentury Arizona jurisprudence in this regard. *Buehman* rightly noted that the Arizona Constitution protects “the right to earn a living.”<sup>490</sup> *Edwards* emphasized that police regulations must not be “oppressive.”<sup>491</sup> *Visco* reaffirmed the Arizona Supreme Court’s role in enforcing the Arizona framers’ skepticism of concentrated power by questioning the “fallacy” that a valid health concern always justifies an economic regulation.<sup>492</sup> *Patel* would fit right in as precedent in Arizona.<sup>493</sup>

As was true in *Patel*, moreover, Arizona’s older economic-liberty jurisprudence is still recognized today.<sup>494</sup> This just isn’t always clear, in light of the massive boost *Arizona Downs* gave to tiered scrutiny in the Arizona courts. And as long as Arizonans are going into business and the government is regulating them, another economic liberty case is bound to reach the Arizona Supreme Court. When it does, the justices should look to *Patel*’s example.

#### CONCLUSION

There is no reason to believe that the original understanding of the Arizona Constitution was to follow later federal jurisprudence in lockstep. Modern federal economic liberty jurisprudence, with its “look ma, no judging” rational-basis standard, has led to judicial rubber-stamping of special interest legislation—naked preferences, regulatory capture and rent seeking, etc.—

488. *Id.* at 91 (majority opinion).

489. *See id.* at 99 n.46 (Willett, J., concurring) (pointing out that the *Patel* majority’s reasoning “tracks [Justice Harlan’s] *Lochner* dissent,” which upheld the right to contract but simply found the maximum-hours law rational, “more than the *Lochner* majority”).

490. *Buehman v. Bechtel*, 114 P.2d 227, 231 (Ariz. 1941).

491. *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450, 452 (Ariz. 1951) (quoting *Myers v. City of Defiance*, 36 N.E.2d 162, 169 (Ohio Ct. App. 1940)).

492. *Visco v. State ex rel. Pickrell*, 388 P.2d 155, 164 (Ariz. 1963).

493. *See Patel*, 469 S.W.3d at 110 (Willett, J., concurring) (“The Court recognizes that Texans possess a basic liberty . . . to earn a living.”); *id.* at 87 (majority opinion) (holding that an economic regulation may not be “so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest”); *id.* at 89–90 (finding that the low number of required instruction hours plausibly relating to any health concern, together with the “associated costs” and “delayed employment opportunities” for would-be threaders, makes the factual finding regarding whether required instruction relates to health “highly relevant to whether the licensing requirements as a whole . . . are oppressive”).

494. *See Vong v. Aune*, 328 P.3d 1057, 1061 (Ariz. Ct. App. 2014) (citing *Buehman* and *Edwards* with approval).

under the guise of protecting “public health, safety, and welfare.” The threat of such laws was well known to the framers of the Arizona Constitution, who included several provisions in our constitution to protect against such laws. They intended these provisions to have meaning.

The first decades of Arizona economic liberty jurisprudence—from shortly after statehood through the 1970s—reflect Arizona’s unique history, which led the framers to guard against economic favoritism masquerading as police regulation. The Arizona Supreme Court consistently insisted on an obvious and real connection between a police regulation and its avowed purpose. The court insisted on actual facts to support intrusions upon economic rights, and was consistently aware of the threat of naked preferences and special laws, which could secure monopolies and exclude competition under the guise of the police power. Much to its credit, the Arizona Supreme Court kept up this approach to judging economic regulations for decades in the face of contrary federal jurisprudence demanding willful blindness to this well-known threat. After all, nothing in the Arizona Constitution “requires judges to turn a blind eye to transparent rent-seeking that bends government power to private gain, thus robbing people of their innate right—antecedent to government—to earn an honest living.”<sup>495</sup>

But then the Arizona Supreme Court abandoned this approach without explanation. Modern Arizona jurisprudence—which is in lockstep with current federal jurisprudence—cannot be squared with the original Arizona jurisprudence. The court’s ill-explained adoption of the lockstep approach, in the face of contrary Arizona precedent and a history of taking a primacy approach in this same field, was a disservice to the Arizona Constitution and the Arizona public.

Remarkably, the court’s original jurisprudence still stands as good (if often forgotten) law. As state constitutions continue to gain prominence for their role in restraining state action where the U.S. Constitution might not, the Arizona Supreme Court would do well to revive Arizona’s constitutional protections for economic liberty. *Arizona Downs*, which wrongly followed federal case law in denying meaningful review for “judg[ing] statutes in the areas of economics and social welfare,”<sup>496</sup> was an aberration and should be overruled. The older, engaged cases like *Edwards*, *Buehman*, and *Visco*, which simply treat the economic rights of ordinary entrepreneurs with respect, ought to be reaffirmed.

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495. *Patel*, 469 S.W.3d at 98 (Willet, J., concurring).

496. *Ariz. Downs v. Ariz. Horsemen’s Found.*, 637 P.2d 1053, 1058 (Ariz. 1981).

The right to earn an honest living, free of unreasonable government interference, is an individual right just as important as any other. Arizona's framers envisioned a free society in which the courts had a meaningful role in protecting Arizonans from laws that restrict economic liberty without any obvious or real connection to the public health, safety, or welfare—*especially* when those laws serve the interests of a favored few. Arizona courts fulfilled that role for decades, but backed off in the 1980s without ever really explaining why or even formally repudiating its role. When the Arizona Supreme Court is inevitably presented with another challenge to the validity of an economic regulation, it should return to this fundamental principle: that the Arizona Constitution is Arizonans' primary protection against unreasonable intrusions on their economic liberty.