

# Judicial Abdication and the Rise of Special Interests

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*The history of the human race is one long story of attempts by certain persons and classes to obtain control of the power of the State, so as to win earthly gratifications at the expense of others.*

William Graham Sumner<sup>1</sup>

## I. INTRODUCTION

Interest group politics is a problem that has plagued American government since the nation was founded. The Constitution itself was drafted and adopted in large part because of the intractable problems that interest group politics, or the problem of “faction” as James Madison described it, posed for the states under the Articles of Confederation.<sup>2</sup> “Complaints are everywhere heard,” Madison stated in *The Federalist Papers* No. 10, “that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”<sup>3</sup>

Madison’s comment could just as easily be applied to the state of our politics today. Washington, D.C. and the state capitols are filled with lawyers and lobbyists, who work tirelessly to ensure that the special interests they represent will benefit from the myriad new laws and regulations that are passed each year.<sup>4</sup> In short, modern government has a lot to offer, and its constituents are increasingly all too eager to pursue it.<sup>5</sup> As a result, as journalist

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1 WILLIAM GRAHAM SUMNER, *WHAT SOCIAL CLASSES OWE TO EACH OTHER* 88 (Caxton Printers Ltd. 1954) (1883).

2 See *THE FEDERALIST* No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

3 *Id.*

4 The number of lawyers and lobbyists in Washington, D.C. more than tripled between 1972 and 1987, the number of corporations with Washington, D.C. offices increased tenfold between 1961 and 1982, and the number of associations quadrupled. See JONATHAN RAUCH, *GOVERNMENT’S END: WHY WASHINGTON STOPPED WORKING* 42, 46, 84, 86–87 (1999).

5 *Id.* at 57–59.

Jonathan Rauch puts it, “[g]roupism has exploded, not only along ethnic lines but along all lines.”<sup>6</sup>

The experience of the Institute for Justice confirms this state of affairs. For more than a decade now the Institute has litigated on behalf of individuals seeking to protect their rights to property and economic liberty from onerous and unreasonable regulations, and in nearly all of its cases, the Institute’s clients are opposed by entrenched private interests who benefit from the laws the clients challenge.<sup>7</sup> Clients of the Institute have challenged laws preventing individuals from selling caskets without a funeral director’s license;<sup>8</sup> barring African hair braiders from plying their trade without becoming licensed cosmetologists;<sup>9</sup> banning independent taxi cab, jitney van, and limousine companies from competing in metropolitan markets;<sup>10</sup> prohibiting wineries from shipping their products directly to consumers rather than through licensed wholesalers;<sup>11</sup> and taking private property through eminent domain and handing it over to private developers.<sup>12</sup> In each of these cases, the challenged laws directly benefited some powerful or entrenched private interest. In several of them, the private interests intervened in the cases to defend the laws.<sup>13</sup> In short, despite the efforts of the framers to combat it, faction is still a serious problem today.

The purpose of this article is to examine the role that courts have played in exacerbating the problem of faction and its modern incarnation, special interest legislation. This article argues that special interest legislation flourishes when courts refuse to play their proper role of policing the political branches of government. The problem of special interest legislation is most evident in the regulation of economic affairs and property. As Jonathan Rauch puts it, people pursue government favors for the same reason that Willie Sutton pursued banks: because that’s “where the money is.”<sup>14</sup> Yet, paradoxically, this is the area in which courts have assigned themselves the smallest role. The predictable result is that

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6 *Id.* at 40.

7 For additional information about the Institute’s cases and its clients, see <http://www.ij.org>.

8 *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

9 *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260 (S.D. Cal. 1997).

10 *See, e.g., Jones v. Temmer*, 829 F. Supp. 1226 (D. Colo. 1993).

11 *Swedenburg v. Kelly*, 232 F. Supp. 2d 135 (S.D.N.Y. 2002).

12 *See, e.g., Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998).

13 *See, e.g., Swedenburg v. Kelly: Basic Facts About the Case*, Institute for Justice, at [http://www.ij.org/cases/economic/nyc\\_wine.shtml](http://www.ij.org/cases/economic/nyc_wine.shtml) (last visited Mar. 10, 2003) (wine wholesalers immediately intervened once suit was filed); *Case Summary: Las Vegas Limousines*, Institute for Justice, at [http://www.ij.org/cases/economic/lasvegas\\_text.shtml](http://www.ij.org/cases/economic/lasvegas_text.shtml) (licensed limousine companies were permitted to intervene in *Clutter v. State of Nevada*).

14 RAUCH, *supra* note 4, at 52–53.

the problem of faction and its primary manifestation, special interest legislation, has grown. One solution, this article argues, is for courts to play a more active role in striking down legislation that benefits private interests at the expense of everyone else.

While the framers may or may not have agreed with a more active role for the judiciary in dealing with special interest legislation, they certainly would have predicted the frequency with which such legislation is passed today. For Madison, wealth and property were both the primary causes of faction—because they lead to differing, and often opposing, interests in society—and one of the primary concerns of government.<sup>15</sup> Because government was necessarily involved in the protection and regulation of these rights and interests,<sup>16</sup> “the spirit of party and faction” was involved in the “necessary and ordinary operations of government.”<sup>17</sup> In short, governments control things that a large number of people would like to see controlled for their own benefit. The potential for abuse is obvious. As Madison put it in a letter to Thomas Jefferson, “[w]herever there is an interest and power to do wrong, wrong will generally be done.”<sup>18</sup> This indeed was the seminal problem with which the framers were concerned. As Madison famously wrote in *The Federalist Papers* No. 51:

[W]hat is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>19</sup>

The framers’ solution was to be found in structural constraints. They divided power among three competing branches of government and provided each with important checks on the powers of the others.<sup>20</sup> Power was also divided between state and fed-

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15 THE FEDERALIST NO. 10, *supra* note 2, at 78–79. See also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in JAMES MADISON: WRITINGS 142, 150 (Jack N. Rakove ed., 1999) [hereinafter Madison, 1787 Letter] (factions form around interests relating to wealth and property).

16 See James Madison, Property, in JAMES MADISON: WRITINGS 515, 515 (Jack N. Rakove ed., 1999) [hereinafter Madison, Property] (“Government is instituted to protect property of every sort . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”).

17 THE FEDERALIST NO. 10, *supra* note 2, at 78–79.

18 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JAMES MADISON: WRITINGS 418, 421 (Jack N. Rakove ed., 1999) [hereinafter Madison, 1788 Letter]. See also Madison, 1787 Letter, *supra* note 15, at 151–52 (neither honesty nor character can be relied upon to prevent majorities from oppressing minorities).

19 THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

20 *Id.* at 321–23. See also James Madison, Government of the United States, in JAMES MADISON: WRITINGS 508, 508 (Jack N. Rakove ed., 1999) [hereinafter Madison, Govern-

eral governments, and the whole scheme was spread over an area that encompassed a variety of diverse interests that would tend to cancel one another out, decreasing the likelihood that any one faction would gain a foothold.<sup>21</sup> Finally, the framers included a secondary level of protection for liberty in the form of a Bill of Rights.<sup>22</sup>

In the twentieth century, these structural constraints have broken down, largely as a result of the courts' refusal to enforce them. The original constitutional plan gave Congress narrow and discrete regulatory powers.<sup>23</sup> Today, courts interpret the limitations on power as narrow and discrete, and Congress's powers to regulate as virtually plenary.<sup>24</sup> State regulatory power has grown as well.<sup>25</sup> The impact of the growth of government power on individual rights has been profound. Today there are few areas of life that government regulation does not affect in some way, and fewer still that government regulation is barred in principle from affecting.

One result is the political spoils system. Give government a great deal of power to control wealth and property, and people will soon be seeking benefits for themselves. Indeed, the modern view of government, with its emphasis on providing goods and services and solving problems, virtually ensures this.<sup>26</sup> Government is often viewed as a gigantic private services organization with the voters and taxpayers as its customers.<sup>27</sup> It should not be surprising that the customers constantly clamor for more and better services and politicians constantly clamor to provide them. In a democracy, it is the politicians' job to react to voters' concerns, and, like anyone, politicians want to remain employed.<sup>28</sup> Thus, the modern campaign finance movement, in its efforts to remove

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ment] ("Power being found by universal experience liable to abuses, a distribution of it into separate departments, has become a first principle of free governments.")

21 THE FEDERALIST NO. 10, *supra* note 2, at 83–84.

22 U.S. CONST. amends. I–X.

23 U.S. CONST. art. I, § 8. *See also infra* notes 59–69 and accompanying text.

24 *See infra* notes 70–76 and accompanying text.

25 *See infra* note 71 and accompanying text.

26 RAUCH, *supra* note 4, at 3, 47–48.

27 GORDON TULLOCK ET AL., GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 71 (2002).

28 *See* Todd R. Overman, *Shame on You: Campaign Finance Reform Through Social Norms*, 55 VAND. L. REV. 1243, 1249–50 (2002) (stating that public choice theory argues that legislative behavior is motivated by the desire to get reelected, and that interest group politics play a key role in this process). Further, as public choice economists have reminded us, if it is cost effective for businesses to gain a competitive advantage through government favors rather than by hard work, that is what they will often do, especially if that is what their competitors are doing. *See* TULLOCK, *supra* note 27, at 45–51.

money from politics, has it exactly backwards.<sup>29</sup> The problem is not that money controls politics, but that politics controls money.

Modern reform efforts, to the extent they focus on the demand for government favors, as campaign finance laws do, are thus doomed to fail.<sup>30</sup> As Madison recognized, the causes of faction are “sown in the nature of man”<sup>31</sup> and a few new laws are not likely to change this. The solution to interest group influence lies not in attempting to resist the natural desire of human beings to influence the political process, much less their right to do so, nor to rely on legislators to resist that influence, but to control the results of that influence. We cannot, as Madison understood, control the causes of faction, but we can control its effects.<sup>32</sup> To do so, we must recall the framers’ original plan. We must, if not actually return to first principles, at least start paying attention to them.

One way to do that is to reexamine the role of courts. The framers envisioned the courts as a significant check on the power of legislatures, yet in the area of property and economic rights, they have for much of the twentieth century been largely absent. While courts still accord substantial protection for certain civil rights such as rights to free speech and privacy,<sup>33</sup> they give short shrift to economic and property rights.<sup>34</sup> Today, it is extraordinarily difficult to convince a court to overturn laws that infringe such rights. As Bernard Siegan has put it, the rational basis review by which the Supreme Court has instructed such laws to be judged requires a law to be upheld unless the legislature was “in a complete state of lunacy” when the law was passed.<sup>35</sup> State courts have by and large followed the same approach.<sup>36</sup>

This article seeks to make the case that a large and active government requires an active judiciary to counter its excesses—or, at the least, to urge recognition of the fact that without an active judiciary, politics will be ruled by faction and special interest legislation. Part II introduces two cases the Institute for Justice

29 See Tom Delay, Remarks at a Policy Forum for the Future of Campaign Finance Reform (July 20, 2000), Cato Institute (transcript discussing how to effectively reform campaign finances) (on file with Chapman Law Review).

30 Overman, *supra* note 28, at 1246–47.

31 THE FEDERALIST NO. 10, *supra* note 2, at 79.

32 *Id.* at 80.

33 See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990); *Katz v. United States*, 389 U.S. 347 (1967).

34 See *infra* notes 72–84 and accompanying text.

35 BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 121, 265–66 (1980) [hereinafter SIEGAN, ECONOMIC LIBERTIES].

36 See, e.g., *Aviation W. Corp. v. Wash. State Dep’t of Labor & Indus.*, 980 P.2d 701 (Wash. 1999) (en banc) (holding that the Department of Labor was not required to explain its rationale in passing a regulation against smoking in private workplaces since the regulation could have been passed for a rational reason); *Yeoman v. Commonwealth*, 983 S.W.2d 459 (Ky. 1998) (holding that a tax provision in a health care reform bill was rationally related to a state interest). See also cases cited *infra* note 84.

has litigated that place the limitations of the courts' extremely deferential approach to economic and property rights in sharp relief. Part III then reviews in greater detail the changes in constitutional law that led to this extremely deferential approach, as well as its rationales, and argues that it is inconsistent with the framers' constitutional plan. Part IV examines the consequences of judicial abdication and argues that it adversely impacts not only the political process, by increasing the likelihood of special interest legislation, but the judicial process as well. Lastly, Part V suggests a better approach that would limit the ability of legislatures to pass laws that benefit particular private parties at the expense of everyone else.

## II. A CASE STUDY IN SPECIAL INTEREST LEGISLATION

Nathaniel Craigmiles did not set out to make a political point or to take on entrenched interests in his community. Neither did Kim Powers. Both are entrepreneurs who saw a need for a product for which there is obvious demand but little affordable supply and they attempted to fill it. They sell caskets. Craigmiles operates the Casket Supply in Chattanooga, Tennessee.<sup>37</sup> Powers, along with her business partner, Dennis Bridges, operates Memorial Concepts Online out of Ponca City, Oklahoma.<sup>38</sup> Both sell caskets for substantially less than funeral homes, which are their primary competitors. This sounds like a viable business, except for one thing. Laws in both Tennessee<sup>39</sup> and Oklahoma<sup>40</sup> prevent anyone other than licensed funeral directors from selling caskets. Becoming a licensed funeral director is not cheap. Potential licensees in Tennessee and Oklahoma must devote two years to a combination of schooling and apprenticeship at a cost of roughly \$10,000 in tuition and more in lost income.<sup>41</sup> The result was that neither Craigmiles nor Powers could afford to go into business offering a product for which there was an obvious market. Both decided to challenge these laws in court.

Craigmiles and Powers were up against an industry with a long history of attempting to consolidate economic power through the use of licensing laws. Like many industries in this country, the funeral industry organized in the late nineteenth century and supported professional licensing laws.<sup>42</sup> The putative rationale for licensing laws was, of course, public health, but the funeral indus-

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37 *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 660 (E.D. Tenn. 2000).

38 *Powers v. Harris*, No. CIV-01-445-F, slip op. at 4 (W.D. Okla. Dec. 12, 2002).

39 TENN. CODE ANN. §§ 62-5-101(3)(A)(ii), 62-5-303 (Michie 1997 & Supp. 2002).

40 OKLA. STAT. ANN. tit. 59, §§ 396.2.2(d), 396.2.10, 396.3(A), 396.6(A) (West 2000).

41 See *Craigmiles*, 110 F. Supp. 2d at 660; TENN. CODE ANN. § 62-5-305 (1997 & Supp. 2002); *Powers*, slip op. at 5, 9-10; OKLA. STAT. ANN. tit. 59, §§ 396.3(B) (West 2000), 396.11(B) (West 2000 & Supp. 2003); OKLA. ADMIN. CODE § 235:10-3-1 (2000).

42 LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 455-56 (1985).

try, like many industries at the time, seems to have been much more interested in self-protection.<sup>43</sup> According to historian Lawrence Friedman, licensing “was all part of one general movement, to give tone and economic strength to the occupation, in short, to ‘professionalize’ these doctors of the dead.”<sup>44</sup>

Laws restricting casket sales to licensed funeral directors are a more recent phenomenon, but their benefit to funeral directors is clear. Casket sales are extremely lucrative for funeral directors. They are by far the most expensive item in a funeral and offer the highest profit margin for the funeral director.<sup>45</sup> It is not uncommon for markups to run as high as 500 percent, meaning that funeral directors can charge as much as \$3000 for a casket that wholesales for around \$600.<sup>46</sup> Casket retailers, by contrast, offer the same types of caskets for substantially less.<sup>47</sup> Not surprisingly, funeral directors are not terribly fond of this competition. This is nothing new. In 1884, the National Funeral Directors Association resolved to “condemn the manufacture of covered caskets at a price less than fifteen dollars for an adult size.”<sup>48</sup> What is relatively new is that funeral directors have managed to get this sentiment enacted into law.<sup>49</sup>

This is not to say there are never good reasons for licensing laws or that there are not at least arguable health and safety or

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43 According to Lawrence Friedman, the point of much professional licensing was “to protect local merchants and drive away . . . pesty [sic] competitors.” FRIEDMAN, *supra* note 42, at 455. While the justification was often public health, “the real motivation, or part of it, was economic. Trade groups were anxious to control competition.” *Id.* at 456. Thus, regulatory boards were usually made up of members of the licensed profession whose “aim was to drive out marginal competition, to raise the prestige of the trade, and to move toward the status of a self-perpetuating guild, made up of respectable professionals.” *Id.* at 456–57. For further historical, economic, and legal analysis of occupational licensing, see DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (2001) and S. DAVID YOUNG, *THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA* (1987).

44 FRIEDMAN, *supra* note 42, at 456.

45 Miriam Horn, *The Deathcare Business: The Goliaths of the Funeral Industry Are Making Lots of Money Off Your Grief*, U.S. NEWS & WORLD REP., Mar. 23, 1998, available at 1998 WL 8126504.

46 *Id.*

47 *Craigsmiles v. Giles*, 110 F. Supp. 2d 658, 664 (E.D. Tenn. 2000).

48 JESSICA MITTFORD, *THE AMERICAN WAY OF DEATH REVISITED* 158 (Alfred A. Knopf, Inc. 1998) (1963).

49 Many of the legislators who sponsored the bill that restricted sales of caskets in Tennessee to licensed funeral directors were themselves funeral directors. At least one argued during the debates on the bill that the purpose of the restriction was to prevent funeral directors from losing income from casket sales. See Transcript of taped floor debates of the Tenn. Legis. on S.B. 1452, Pub. ch. 553 (Mar. 14, 1972), at 22 (comments of Rep. Coffey) (on file with Chapman Law Review). In a similar vein, one of the members of the Tennessee funeral board, himself a licensed funeral director, testified for the State during the trial in *Craigsmiles* that competition from unlicensed casket retailers would cause licensed funeral directors to try to increase prices of services to make up for their losses. See Transcript of Proceedings in *Craigsmiles v. Giles*, No. 1:99-CV-304 (E.D. Tenn. Aug. 9, 2000), at 286 (testimony of Robert Gribble). Alternatively, the same premise is expressed in the Tennessee floor debate transcript, without reference to the *Craigsmiles* case.

consumer protection rationales for licensing funeral directors. But having a rationale for licensing funeral directors is not the same as having a rationale for granting them the exclusive right to sell caskets. Shorn of all the fancy trimmings, a casket is really just a box. It is essentially a consumer item the purchase of which, like many consumer items, is governed by considerations of price and style.<sup>50</sup> Neither Oklahoma nor Tennessee regulates the manufacture or use of caskets. It is permissible in both states to use any casket one wants or no casket at all, to have one built by a friend or to build one yourself.<sup>51</sup> About the only thing a person may not do with a casket in Tennessee or Oklahoma is sell it without a license.

It is probably safe to say that there is less specialized knowledge and less danger to consumers involved in a casket purchase than there is in the purchase of a toothbrush or a mattress. Unfortunately, the reasons states have not restricted sales of the latter to licensed dentists or chiropractors have less to do with inherent limitations on the power of government than on political reality. At any given moment, toothbrushes and mattresses have a broader constituency of consumers than caskets, and dentists and chiropractors are probably doing fine without monopolizing trade in these items. But that doesn't mean there aren't equally plausible reasons, in theory anyway, for restricting the sale of toothbrushes and mattresses in the same manner that sales of caskets are restricted in many states. That is, one can certainly imagine that the threat of having one's chiropractic or dentistry license revoked might help to ensure minimum standards of conduct in selling mattresses or toothbrushes and perhaps even motivate sellers to inform consumers about the problems of gum disease or back pain. One can imagine the same remedial considerations applying to the sale of caskets. Indeed, the states and the funeral directors imagined precisely this in defending such laws.

The problem, as both Craigmiles and Powers discovered when they challenged these laws, is that the constitutional standard for judging them allows—indeed requires—courts to imagine rationales for the laws right along with those who defend them.<sup>52</sup> Their lawsuits reveal much about the problems with the courts' approach to economic liberty. Before we turn to their cases, though, it is useful to examine this approach and its genesis in a bit more detail.

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<sup>50</sup> Powers v. Harris, No. CIV-01-445-F, slip op. at 5, 9–10 (W.D. Okla. Dec. 12, 2002); *Craigmiles*, 110 F. Supp. 2d at 662–63.

<sup>51</sup> See *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002); *Craigmiles*, 110 F. Supp. 2d at 662–63; *Powers*, slip op. at 11.

<sup>52</sup> *Craigmiles*, 110 F. Supp. 2d at 662; *Powers*, slip op. at 15.

## III. THE GENESIS OF JUDICIAL ABDICATION

Other than in a few limited circumstances—where states attempt to regulate interstate commerce, for instance, or where a particular activity can be characterized as free speech—modern courts have essentially committed the regulation of economic activity and property to legislative discretion. As the Supreme Court stated in *Nebbia v. New York* nearly seventy years ago:

[A] state is 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. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.<sup>53</sup>

A few years after the decision in *Nebbia*, the Court made clear that the same essential approach applied to federal regulations of economic affairs as well.<sup>54</sup>

The founders were a bit more committed to the protection of economic and property rights. They gave us a Constitution that was designed to ensure that those rights, among others, would be protected, primarily from abuses by the legislature, but more generally from abuses by any branch of government.

As James Madison stated in *The Federalist Papers* No. 10, protection of property rights “is the first object of government.”<sup>55</sup> By property rights, Madison did not mean rights to tangible things only, but to “every thing to which a man may attach a value and have a right.”<sup>56</sup> Within the sweep of this broad concept, Madison included an individual’s rights to his “opinions and the free communication of them,” “the safety and liberty of his person,” and “the free use of his faculties and free choice of the objects on which to employ them.”<sup>57</sup> That Madison included economic liberty within the rights of individuals is clear from his views on how governments often abuse rights:

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest . . . where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupa-

53 291 U.S. 502, 537 (1934).

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

55 *THE FEDERALIST* No. 10, *supra* note 2, at 78.

56 James Madison, *Property*, *supra* note 16, at 515.

57 *Id.*

tions, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.<sup>58</sup>

For the framers, the branch of government most likely to abuse rights was the legislature. According to Madison, "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex" and it is therefore "against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."<sup>59</sup> To protect against the abuse of power, both legislative and otherwise, the framers established a constitutional system in which the powers of government were strictly limited and divided. As an additional protection, they added a Bill of Rights.<sup>60</sup>

Both James Madison and Alexander Hamilton, the primary authors of *The Federalist Papers*, envisioned a significant role for the courts in restraining government and protecting individual liberty.<sup>61</sup> Writing in *The Federalist Papers* No. 78, Hamilton described the courts as "bulwarks of a limited Constitution against legislative encroachments."<sup>62</sup> In Hamilton's view, "the courts were designed to be an intermediate body between the people and the legislature,"<sup>63</sup> both to enforce constitutional limits on the power of the legislature and to guard the rights of individuals.<sup>64</sup> As Hamilton put it, constitutional limitations on the legislative power:

[C]an be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.<sup>65</sup>

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58 *Id.* at 516.

59 THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961). Thomas Jefferson concurred with Madison's view of the danger of legislatures, as did a number of delegates to the Constitutional Convention. *Id.* at 310-11 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA).

60 U.S. CONST. amends. I-X.

61 Madison expressed his view of the role of the courts in Federalist No. 44, where, in answering the claim that Congress might abuse its power under the Necessary and Proper Clause, Madison responded:

I answer the same as if they should misconstrue or enlarge any other power vested in them . . . the same, in short, as if the State legislatures should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts . . . .

THE FEDERALIST NO. 44, at 285-86 (James Madison) (Clinton Rossiter ed., 1961).

62 THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

63 *Id.* at 467.

64 *Id.* at 467-69.

65 *Id.* at 466.

Accordingly, judicial power had to be coextensive with that of the legislature. Wherever legislatures can legislate, in other words, the courts can and should be there to restrain them and to protect the rights of the people.<sup>66</sup>

For much of the country's history, constitutional adjudication proceeded on the assumption that government powers were narrow and individual rights were broad, and that courts had a significant role in maintaining this basic framework. Courts first asked whether Congress was empowered to legislate in a particular area and second whether the means chosen were both necessary and proper—which is to say whether they were appropriately narrow and did not violate individual rights.<sup>67</sup> Adjudication of state laws proceeded in similar fashion, with courts determining whether a particular law was within the state's police power and whether it violated an individual's rights.<sup>68</sup> To be sure, this is a somewhat oversimplified version of an approach to constitutional adjudication that was not always consistently applied. At bottom, however, government powers were generally regarded during the late eighteenth and nineteenth centuries as limited in principle to those specifically enumerated on the federal level and those necessary and appropriate to bring order to society and protections to individuals from nuisance and harm at the state level.<sup>69</sup> Consis-

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<sup>66</sup> *Id.* at 467–68 (discussing the absurdity of the notion that the people's representatives could exercise power that the people did not delegate to them and contending that the judiciary's role is to ensure that this does not happen). Madison echoed this point in his speech to the Virginia ratifying convention. James Madison, Speech in the Virginia Ratifying Convention on the Judicial Power, in JAMES MADISON: WRITINGS 393, 394 (Jack N. Rakove ed., 1999) [hereinafter Madison, Speech in the Virginia Ratifying Convention] (“With respect to the laws of the union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to.”).

<sup>67</sup> Roger Pilon, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999, 1007 (1996). See generally Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 765 (1997) [hereinafter Barnett, *Necessary*].

<sup>68</sup> See, e.g., *Milbau v. Sharp*, 27 N.Y. 611, 611 (1863) (holding that “[t]he corporate authorities of the city of New York have no power to confer upon individuals, by contract for an indefinite period, the franchise of constructing and operating a railroad in the public streets, for their private advantage”); *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19 (1856) (holding that the exclusive grant of authority to one company to lay gas pipes was monopolistic and rendering the grant non-exclusive). See also SIEGAN, *ECONOMIC LIBERTIES*, *supra* note 35, at 41–46, 55–58; JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 61–62 (2d ed. 1998); Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511, 511–12 (2000).

<sup>69</sup> See, e.g., *Glenn v. Baltimore*, 5 G. & J. 424 (Md. 1833) (upholding a ban on new distilleries and the rebuilding of old ones on the grounds that they constituted a nuisance, but suggesting that a ban on existing distilleries would be improper); *Austin v. Murray*, 33 Mass. (16 Pick.) 121 (1834); (striking down a law requiring the licensing law requiring the licensing of funeral directors and establishing mandatory burial grounds as an unreasonable business regulation); *Wreford v. People*, 14 Mich. 41 (1865) (striking down a law prohibiting the slaughter of animals in a particular part of town on the grounds that a town can only ban nuisances and cannot declare non-nuisances to be nuisances); *Pierce v. State*, 13 N.H. 536 (1843) (upholding the licensing of liquor sales on the ground that the law was a regulation as opposed to a prohibition); *Wynehamer v. People*, 13 N.Y. 378 (1856) (striking

tent with this approach, individual rights were construed broadly and received robust protection from the courts.

This framework was essentially reversed during the 1930s. With the advent of progressivism and the notion that government should become an active problem solver rather than a mere protector of rights, the Supreme Court in a handful of cases interpreted the powers of the federal government broadly and protections for individuals very narrowly.<sup>70</sup> State police power evolved from the power to protect rights to the power to provide positive “public goods” limited almost exclusively by majority or legislative will.<sup>71</sup> The judicial approach to laws that affect individual rights tracked these broad changes. The first question in cases challenging such laws today is not whether the government possesses the power to regulate in a certain area or manner—such power is generally presumed to exist—but whether and to what extent the exercise of that broad power infringes a particular right.<sup>72</sup> This change in emphasis from limited powers to limited rights alone significantly narrowed the protections for individual rights, but the Supreme Court went a step further and divided rights into two categories, “fundamental” and “non-fundamental.”<sup>73</sup> Fundamental rights—such as rights to free speech, to privacy, and to vote—receive significant protection from the courts.<sup>74</sup> Non-fundamental rights—primarily economic and property rights—receive very little judicial protection at all.<sup>75</sup> This distinc-

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down an alcohol prohibition law as destroying a property interest); *Mayor of Hudson v. Thorne*, 7 Paige Ch. 261 (N.Y. Ch. 1838) (striking down as unreasonable and discriminatory an ordinance prohibiting the building of wooden barns without a town resolution that the structure would not be a fire hazard on the ground that the common council could enjoin a nuisance but did not have power to make a blanket prohibition of building barns); *Dunham & Daniels v. Rochester*, 5 Cow. 462 (N.Y. Sup. Ct. 1826) (striking down an ordinance requiring the licensing of grocers as an unreasonable restraint on trade); *People v. Berberrich*, 20 Barb. 168 (N.Y. Gen. Term. 1855) (striking down an alcohol prohibition law as destroying a property interest); *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805) (striking down a North Carolina law that reversed a land grant to the University); *Mayor of Memphis v. Winfield*, 27 Tenn. (8 Hum.) 707 (1848) (voiding a curfew on blacks because it was oppressive and prevented them from earning a living). See also Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 236 (2003).

<sup>70</sup> See ELY, *supra* note 68, at 101–134; Pilon, *supra* note 67.

<sup>71</sup> See Reynolds & Kopel, *supra* note 68, at 511.

<sup>72</sup> See Pilon, *supra* note 67. See also *Wickard v. Filburn*, 317 U.S. 111 (1942) (interpreting the Commerce Clause broadly to allow regulation of anything that affects interstate commerce); *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (holding that courts should defer to Congress as to whether an expenditure under the General Welfare Clause was general or particular); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (interpreting the Commerce Clause as an affirmative grant of power to Congress to regulate commerce); *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (interpreting the General Welfare Clause as granting Congress an independent power to spend for the general welfare).

<sup>73</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>74</sup> See *supra* note 33. See also *Montgomery v. Carr*, 101 F.3d 1117, 1121–23 (6th Cir. 1996) (discussing the dichotomy between fundamental and non-fundamental rights and different tiers of scrutiny that apply to each).

<sup>75</sup> See *Carr*, 101 F.3d at 1121–23. See also ELY, *supra* note 68, at 132–34.

tion between fundamental and non-fundamental rights prevails among state courts as well.<sup>76</sup>

Today, if one is unlucky enough to be subject to a law that affects one of these “non-fundamental” rights—which cover many of the most important activities in life, such as the right to earn a living, to use and dispose of property, and to contract—one’s chances of having the courts take a serious look at the law are slim. The courts’ approach to laws that infringe economic liberty gives legislatures and administrative agencies virtually complete discretion to regulate in this area. This approach is known as rational basis review. Under this standard, courts presume that a law is constitutional, and will overturn it only if the challenging party can refute “every conceivable basis which might support it.”<sup>77</sup> Legislatures are under no obligation to “actually articulate at any time the purpose or rationale” for the law and those defending it have no obligation to produce evidence to support it.<sup>78</sup> “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.”<sup>79</sup> Legislative decisions may be “illogical” and “unscientific,”<sup>80</sup> and it makes no difference to the constitutionality of the law if the assumptions that underlie it are “probably not true” or even not true at all.<sup>81</sup> Nor is consistency required under the rational basis test. “Legislatures may implement their program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations”<sup>82</sup> or they may “select one phase of one field and apply a remedy there, neglecting the others.”<sup>83</sup> The rational basis test is, to put it mildly, a very easy standard for legislatures to meet.<sup>84</sup>

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76 See, e.g., *Regency Servs. Corp. v. Bd. of County Comm’rs*, 819 P.2d 1049, 1057 (Colo. 1991) (en banc) (“Although we have recognized that the right to work and receive the fruits of one’s labor is an important right, we have never held that an individual has a fundamental constitutional right to pursue a specific occupation or business unfettered by governmental regulations that do not satisfy strict judicial scrutiny.”) (citations omitted); *People v. Cully*, 675 N.E.2d 1017, 1022 (Ill. App. Ct. 1997) (“The right to pursue a profession is not a fundamental right for due process purposes.”); *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 69 (Tex. App. 1995) (“The right to sell contact lenses in Texas is not a fundamental right, and unlicensed optometrists are not a suspect class.”). See also cases cited *infra* note 84.

77 *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

78 *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992)).

79 *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

80 *Heller*, 509 U.S. at 321.

81 *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991).

82 *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

83 *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

84 Many, if not most, state courts apply rational basis scrutiny to economic laws. See, e.g., *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 614 (Cal. 1994); *Belk-James, Inc. v.*

There are two generally accepted rationales for treating economic rights as constitutional second-class citizens. The first is that economic rights are not specifically enumerated in the Constitution and courts thus lack any textual basis for enforcing them.<sup>85</sup> This argument ignores the Ninth Amendment, however, which makes clear that the enumeration of rights in the Bill of Rights is not to be "construed to deny or disparage" other rights that are not enumerated.<sup>86</sup> Indeed, it was to prevent precisely this narrow interpretation of rights that the Ninth Amendment was included in the Bill of Rights in the first place.<sup>87</sup> The argument similarly ignores the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment, whose purpose was to protect a broad range of rights of national citizenship, including economic and property rights, that might be violated by the states.<sup>88</sup>

Moreover, courts have given less protection even to economic and property rights that are enumerated in the constitution. For instance, the Supreme Court has interpreted the "public use" limitation in the Takings Clause of the Fifth Amendment to mean, in essence, whatever a legislature says it means, which has allowed local and state governments to transfer property from one private owner to another.<sup>89</sup> The Contracts Clause of Article I, Section

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Nuzum, 358 So. 2d 174, 175 (Fla. 1978); *Alamo Rent A Car, Inc. v. Ryan*, 643 N.E.2d 1345, 1349 (Ill. App. Ct. 1994); *Blue Hills Cemetery, Inc. v. Bd. of Registration*, 398 N.E.2d 471, 475-76 (Mass. 1979); *State Farm Mut. Auto. Ins. Co. v. State*, 590 A.2d 191 (N.J. 1991); *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 520 N.E.2d 528, 530-31 (N.Y. 1988); *Hayes v. Erie Ins. Exch.*, 425 A.2d 419, 421-22 (Pa. 1981); *Mass. Indem. & Life Ins. Co. v. Tex. State Bd. of Ins.*, 685 S.W.2d 104, 114 (Tex. App. 1985). See also cases cited *supra* note 36.

<sup>85</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 39-40 (1990).

<sup>86</sup> U.S. CONST. amend. IX.

<sup>87</sup> Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 9-11 (1988) [hereinafter Barnett, *Reconceiving*].

<sup>88</sup> See CLINT BOLICK, *UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY* 53, 57, 64 (1990); Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 25-27 (1998); BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT* 2-3, 36-37, 266 (2001) [hereinafter SIEGAN, *PROPERTY RIGHTS*]. The Fourteenth Amendment's drafters originally intended the Privileges or Immunities Clause to carry most of the substantive weight of the amendments' protections, but the Supreme Court virtually gutted the clause in the aptly-named *Slaughter-House Cases*. This left succeeding courts to utilize the Due Process and Equal Protection Clauses to do the work that the Privileges or Immunities Clause was intended to do.

<sup>89</sup> See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240-42 (1984) (stating that courts will not substitute their judgment for the legislature's in determining what is a public use unless that determination is "palpably without reasonable foundation" and approving the transfer of land from owners to tenants for the purpose of eliminating "oligopoly" in land holdings); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (stating that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive" and allowing property to be taken under the Fifth Amendment and transferred to a private developer for the purpose of redevelopment).

10,<sup>90</sup> which prohibits states from “impairing the Obligation of Contracts”<sup>91</sup> has been similarly diluted.<sup>92</sup> Finally, modern courts have vigorously protected rights, such as the rights to abortion and privacy, that are no more clearly set forth in the constitution than economic liberty. Clearly, something more than a failure to enumerate these rights has motivated courts to abandon them.

The key is to be found in the second rationale for treating economic liberties as inferior to other rights. Simply put, giving economic rights less protection than other so-called civil rights is more consistent with the societal values that gained ascendancy during and since the Progressive Era and the New Deal. This time period was characterized by faith in government’s ability to solve problems and a willingness to grant it greater powers to do so. The progressives of the time were fairly open about their desire to remove constitutional impediments to their version of good government.<sup>93</sup> Courts, of course, were a bit more circumspect, but their assumptions were essentially the same. Limitations on government inhibit its ability to be creative and to solve problems.<sup>94</sup> Legislatures should be permitted wide latitude to deal with what they perceive to be societal evils with only certain narrow rights carved out that would not otherwise be protected through the democratic process.<sup>95</sup> Allowing courts to protect economic liberty and property rights would establish them as super legislatures, which would be anti-democratic.<sup>96</sup> “For protection against abuses by legislatures,” the Supreme Court has often said, “the people must resort to the polls, not to the courts.”<sup>97</sup> In other words, de-

<sup>90</sup> U.S. CONST. art. 1, § 10, cl. 1.

<sup>91</sup> *Id.*

<sup>92</sup> See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 401–06 (4th ed. 1991); Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 *HASTINGS CONST. L.Q.* 525, 540–45 (1987).

<sup>93</sup> See William J. Novak, *The Legal Origins of the Modern American State*, in *LOOKING BACK AT LAW’S CENTURY* 249, 269 (Austin Sarat et al. eds., 2002).

<sup>94</sup> See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“Legislative bodies have broad scope to experiment with economic problems. . . .”); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (“[T]he state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare . . . .”). See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”) (Brandeis, J., dissenting).

<sup>95</sup> See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390, 397–98 (1937) (reexamining previous case that invalidated minimum wage law because the state’s police power must be judged in the light of supervening economic conditions and upholding similar law because legislatures must be permitted to adopt laws that reduce the “evils of the ‘sweating system’”).

<sup>96</sup> See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88 (1955); See also *Ferguson*, 372 U.S. at 732 (“[R]elief, if any be needed, lies not with us but with the body constituted to pass laws for the State . . . .”).

<sup>97</sup> *Williamson*, 348 U.S. at 488; accord *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

mocracy, not judicial protections for individual rights, is the appropriate corrective measure for bad government.<sup>98</sup>

The problem with this view is that it is inconsistent with the constitutional plan. It is not true, as Robert Bork and other scholars have argued, that "in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities."<sup>99</sup> The founders were deeply suspicious of majority rule, and they gave us a constitution that restrained majorities in significant ways to ensure the protection of individual rights.<sup>100</sup> In short, the Supreme Court's dictum quoted above is only half right. For protections against abuses by legislatures, the people need not resort only to the polls, they may resort to the Constitution as well. The courts' duty is to ensure the individual's ability to do so.

Nevertheless, the view that majorities are entitled to rule without substantial restraint and that courts exceed their authority when they overrule legislatures endures. A large part of the reason for this seems to be the view that democracy is synonymous with good government. That assumption, in any event, lies at the root of the judiciary's refusal to engage in serious review of economic regulations. As argued in the next section, good government is far from what has been achieved.

#### IV. THE IMPACT OF JUDICIAL ABDICATION

In the face of roughly seventy years of judicial antipathy toward economic rights, it might seem impossible that Nathaniel Craigmiles or Kim Powers could hope to prevail against the casket licensing laws that prevented them from conducting their busi-

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<sup>98</sup> See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.") (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) ("The forum for the correction of ill-considered legislation is a responsive legislature.").

<sup>99</sup> BORK, *supra* note 85, at 139.

<sup>100</sup> Madison announced his concerns about democracy forcefully during the debates at the Constitutional Convention:

In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. . . . We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man. What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the majority number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is that where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure.

James Madison, Speech in the Federal Convention on Factions, in JAMES MADISON, WRITINGS 92, 92-93 (Jack N. Rakove ed., 1999) (hereinafter Madison, Speech in the Federal Convention).

nesses. However, the Supreme Court has not put the last nail, so to speak, in the coffin of economic liberty yet. Despite the sweeping statements of the rational basis test cited above, and the fact that courts almost always find economic regulations constitutional under the test, the Supreme Court itself has on occasion struck down laws under this standard.<sup>101</sup> As the Court has stated, “even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.”<sup>102</sup> Thus, the rational basis test arguably has some bite, even if the Supreme Court has not exactly squared its sweeping statements of the standard with the few instances in which it has decided the standard was exceeded.

Craigsmiles and Powers hoped to capitalize on whatever bite the rational basis test might have, by demonstrating that the laws at issue in their cases had absolutely *no* footing in the realities of the subject of casket retailing. Both brought claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and argued that there was no conceivable rational basis for requiring them to obtain a funeral director’s license in order to sell caskets. As discussed earlier, caskets have no health or safety function, Tennessee and Oklahoma do not regulate their use, and there is a great deal of merchandise related to funerals, such as graves, grave markers and stones, cards, flowers and the like, that consumers may purchase from unlicensed individuals.<sup>103</sup> Add to this the fact that the only interests these licensing laws would seem to serve are those of funeral directors, and Craigsmiles and Powers had about as strong a case as one can make under the rational basis test.

Despite the strength of their cases, only *Craigsmiles* was successful. The United States District Court for the Eastern District of Tennessee ruled that the licensing law violated his and his co-defendants’ rights to due process and equal protection and struck it down as applied to casket retailers.<sup>104</sup> The Sixth Circuit affirmed.<sup>105</sup> Powers lost in the district court and her case is currently on appeal.<sup>106</sup> The judge in her case took what one might refer to as the standard approach to cases under the rational basis test. He cited the sweeping statements of the standard and concluded, in essence, that there is little for a court to do other than to imagine a rationale for the law and then to uphold it.<sup>107</sup> The

101 See *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

102 *Heller v. Doe*, 509 U.S. 312, 321 (1993).

103 See *supra* notes 50–51 and accompanying text.

104 *Craigsmiles v. Giles*, 110 F. Supp. 2d 658, 667 (E.D. Tenn. 2000).

105 *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002).

106 *Powers v. Harris*, No. CIV-01-445-F, slip op. at 34 (W.D. Okla. Dec. 12, 2002).

107 *Id.* at 33.

rationale that the court came up with is that the law furthers consumer protection. It is part of a comprehensive regulatory scheme that “evinces an intent to forego laissez faire treatment” of the sale of funeral merchandise and services in the State of Oklahoma.<sup>108</sup> Licensing and the possibility of disciplinary action it entails might be said to deter inappropriate conduct.<sup>109</sup> Accordingly, Oklahoma’s casket licensing law has a conceivably rational basis and is constitutional.<sup>110</sup>

By contrast, the district court and Sixth Circuit in *Craigmiles* emphasized that even economic legislation must have some basis in the realities of the subject at issue.<sup>111</sup> If this is true, there must be some limit to the burdens a state can impose on private economic activity, both in absolute terms and, more importantly, in terms of the relation of those burdens to some arguable state interest. To determine whether that limit has been exceeded courts must examine the facts and circumstances of both the law and the subject it deals with and make a practical determination as to whether one is related to the other—whether, in other words, the means chosen by the legislature actually further the ends the law is said to serve. That is precisely what the district court and the Sixth Circuit did in *Craigmiles* and precisely what the district court in *Powers* failed to do.

That is not to say that the *Powers* decision is not defensible. One does not have to read between the lines too carefully to conclude that the Supreme Court really does not want courts to overturn economic legislation, and virtually any decision that upholds such a law is going to be defensible. But that is precisely the problem. Many of the Supreme Court’s statements of the rational basis test render it less a judicial standard than an excuse to avoid judgment altogether. As Professor Richard Epstein has described it, the rational basis test:

[C]ompletely abandons the idea that serious intellectual discussion can yield right and wrong answers on matters of political organization and constitutional interpretation. Courts simply give up before they try, and embrace an appalling sort of ethical noncognitivism. Anything legislatures do is as good as anything else they might have done; we cannot decide what is right or wrong, so it is up to Congress and the states to determine the limitations of their own power—which, of course, totally sub-

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<sup>108</sup> *Id.* at 24.

<sup>109</sup> *Id.* at 24–25.

<sup>110</sup> *Id.* at 33.

<sup>111</sup> See *Craigmiles v. Giles*, 312 F.3d 220, 225–29 (6th Cir. 2002); *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 664–65 (E.D. Tenn. 2000). These decisions are addressed in more detail below. See *infra* notes 184–90 and accompanying text.

verts the original constitutional arrangement of limited government.<sup>112</sup>

The *Powers* decision provides a good example of this “ethical noncognitivism” at work. If one simply assumes, as the court did, that all licensing schemes protect consumers by providing the state with an enforcement mechanism, then the conclusion that a particular licensing scheme protects consumers follows as a matter of course. At a sufficient level of generality, any statutory scheme can be said to serve a state purpose. But reciting a tautology is not the same thing as examining whether a particular legislative choice is within the bounds of its constitutional authority. It is little more than a rationalization for government action dressed up as judicial review.

This approach to law has consequences. One is an inevitable loss of confidence in our judicial system. To quote Richard Epstein again, “[w]hen [courts] use transparent arguments to justify dubious legislation, they cannot raise the level of debate. When courts . . . hold that the state has the right to say X, when they know X is wrong, they fritter away their own political authority on an indefensible cause.”<sup>113</sup> Of course, many scholars and commentators have argued that it is judicial activism that damages the credibility of the judiciary.<sup>114</sup> That argument is correct as far as it goes. Blatantly political decisions by the courts are indeed indefensible. But the opposite extreme is equally pernicious. When courts refuse to scrutinize laws at all, they end up attaching their reputations to whatever absurdity a legislature is willing to embrace. A rubber stamp is just as damaging to judicial credibility as a sledgehammer.

A more serious consequence of the rational basis test is its institutional effect. Extreme deference to legislatures prevents the courts from enforcing constitutional limitations and places legislatures in charge of determining the extent of their own power. This would be bad enough in any area of life, but it is particularly problematic in the realm of economic affairs given the obvious conflicts and temptations that legislatures are likely to face in this area. As James Madison observed:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same

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112 Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 39, 42–43 (James A. Dorn & Henry G. Manne eds., 1987).

113 *Id.* at 43.

114 See BORK, *supra* note 85, at 173, 353–54; EUGENE W. HICKOK & GARY L. McDOWELL, *JUSTICE VS. LAW* 189–90 (1993).

time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?<sup>115</sup>

One of the purposes of an independent judiciary was to ensure that judges would not be subject to the same public pressures and temptations as legislators. Echoing the danger of faction that Madison expressed in *The Federalist Papers* Nos. 10 and 51,<sup>116</sup> Hamilton stated in *The Federalist Papers* No. 78 that independent federal judges would be more likely to:

[G]uard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.<sup>117</sup>

Countering the dangers of faction was thus an important virtue of judicial review for the authors of *The Federalist Papers*.<sup>118</sup> This virtue was not confined simply to striking down unconstitutional laws, but also included deterring their passage in the first place: "[I]t is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society."<sup>119</sup> Such "unjust and partial laws," as Hamilton pointed out, often only affect "the private rights of particular classes of citizens."<sup>120</sup> Equally important for Hamilton was the effect of judicial review on the legislative process itself:

[T]he firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the

115 THE FEDERALIST NO. 10, *supra* note 2, at 79.

116 See THE FEDERALIST NO. 51, *supra* note 19, at 323 ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.").

117 THE FEDERALIST NO. 78, *supra* note 62, at 469.

118 Noted nineteenth century jurist and scholar James Kent echoed this view:

The Courts of Justice which are organized with peculiar advantages to exempt them from the baneful influence of Faction, and to secure at the same time, a steady, firm and impartial interpretation of the Law, are therefore the most proper power in the Government to keep the Legislature within the limits of its duty, and to maintain the Authority of the Constitution.

James Kent, *An Introductory Lecture to a Course of Law Lectures*, in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, 936, 942 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

119 THE FEDERALIST NO. 78, *supra* note 62, at 470.

120 *Id.*

legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.<sup>121</sup>

The framers, and particularly Madison and Hamilton, are often cited because they provide authoritative commentary on the meaning of, and the intent behind, the Constitution's provisions and overall design. But there is another good reason for doing so. The framers were accomplished statesmen and political philosophers. *The Federalist Papers* contain some of the most insightful and trenchant political philosophy in history. In short, the framers were not only authoritative, *they were right*. Human beings often seek to benefit themselves at the expense of others. They do not perform much better when they organize themselves into groups and call themselves "legislatures." Factions and interest groups can commit grave injustices and wreak havoc on individuals and on a nation. Limited, constitutional government is an effective solution to this problem. Yet if the constitutional balance is upset, if a whole branch of government effectively abdicates its assigned role, certain consequences are inevitable. Judging from the framers' views on the subject, those consequences would include infractions of the constitution and factional politics. Judging from contemporary experience, that is exactly what has happened. A few examples from cases the Institute for Justice has litigated demonstrate as much.<sup>122</sup>

#### A. Transportation Fiefdoms

In most heavily populated areas of this country, owning a car and being able to drive it would seem to guarantee an industrious person a ready source of income. This is a country constantly on the move, yet many people lack the transportation to get where

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<sup>121</sup> *Id.*

<sup>122</sup> The Institute for Justice has published studies of business barriers to entry in several large and mid-sized cities that show that this problem is widespread. See Dana Berliner, *How Detroit Drives Out Motor City Entrepreneurs*, available at [http://www.ij.org/publications/city\\_study/citstud\\_detr\\_rep.html](http://www.ij.org/publications/city_study/citstud_detr_rep.html) (last visited Feb. 25, 2003); Dana Berliner, *Running Boston's Bureaucratic Marathon*, available at [http://www.ij.org/publications/city\\_study/citstud.gifs/citstud\\_bost\\_exsm.html](http://www.ij.org/publications/city_study/citstud.gifs/citstud_bost_exsm.html) (last visited Feb. 25, 2003); Clint Bolick, *Brightening the Beacon: Removing Barriers to Entrepreneurship in San Diego*, available at [http://www.ij.org/publications/city\\_study/citstud\\_sandieg\\_rep.html](http://www.ij.org/publications/city_study/citstud_sandieg_rep.html) (last visited Feb. 25, 2003); Clint Bolick, *Entrepreneurship in Charlotte: Strong Spirit, Serious Barriers*, available at [http://www.ij.org/publications/city\\_study/citstud\\_charl\\_rep.html](http://www.ij.org/publications/city_study/citstud_charl_rep.html) (last visited Feb. 25, 2003); Scott G. Bullock, *Baltimore: No Harbor for Entrepreneurs*, available at [http://www.ij.org/publications/city\\_study/citstud\\_balt\\_rep.html](http://www.ij.org/publications/city_study/citstud_balt_rep.html) (last visited Feb. 25, 2003); Donna G. Matias, *Entrepreneurship in San Antonio: Much to Celebrate, Much to Fight For*, available at [http://www.ij.org/publications/city\\_study/citstud\\_SanAn\\_rep.html](http://www.ij.org/publications/city_study/citstud_SanAn_rep.html) (last visited Feb. 25, 2003); William Mellor, *Is New York City Killing Entrepreneurship?*, available at [http://www.ij.org/publications/city\\_study/CitStud\\_NY\\_rep.html](http://www.ij.org/publications/city_study/CitStud_NY_rep.html) (last visited Feb. 25, 2003).

they want to go. Private taxi, limousine, and van services are a testament to the fact that people are often willing to pay for a ride. Like the transportation industry in general, these businesses are among the most heavily regulated in the country, and thus the most difficult for independent businessmen to break into. Most cities have reasonable health and safety requirements that ensure such businesses possess adequate insurance, operate safe vehicles, and employ competent drivers. However, far too many have erected onerous licensing regimes that have nothing to do with protecting the public and everything to do with protecting entrenched interests.<sup>123</sup>

Denver is a typical example, as Leroy Jones discovered when he attempted to start a small taxicab company there in 1992. Jones drove a cab for two years for one of the three officially-approved cab companies in Denver, but decided to start his own business after becoming fed up with their treatment of drivers.<sup>124</sup> He banded together with a handful of other experienced cab drivers and started Quick Pick Cabs, but soon found that breaking into the business was next to impossible due to a web of restrictive regulations and a near insurmountable application process.<sup>125</sup> In Denver, as in many cities, new cab companies must obtain a certificate of public convenience and necessity in order to operate their business.<sup>126</sup> To obtain a certificate, new cab companies must meet a near impossible standard—they must demonstrate that existing companies are not meeting demand and could not do so if given the chance.<sup>127</sup> To make matters more difficult, existing companies may intervene in the application process and demand documents and information from the new company, which they can use to oppose the applications.<sup>128</sup> This increases both the time and the costs of the application process.

John West and Ed Wheeler faced a similar situation when they tried to start independent limousine businesses that challenged the status quo in Las Vegas. Like Leroy Jones, West and Wheeler faced the burdensome public convenience and necessity

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123 See generally MARK W. FRANKENA & PAUL A. PAUTLER, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION, FEDERAL TRADE COMMISSION BUREAU OF ECONOMICS STAFF REPORT (1984). See also Sandra Rosenbloom, *The Taxi in the Urban Transport System*, in URBAN TRANSIT: THE PRIVATE CHALLENGE TO PUBLIC TRANSPORTATION 181, 181-84 (Charles A. Lave ed., 1985).

124 See *Challenging Denver's Taxicab Monopoly, Litigation Backgrounder: The Current Controversy*, Institute for Justice, at <http://www.ij.org/cases/economic/denverbk.shtml> (last visited Apr. 15, 2003).

125 *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995), *vacating as moot* 829 F. Supp. 1226 (D. Colo. 1993).

126 See COLO. REV. STAT. ANN. § 40-5-102 (West 1997). See also *Jones*, 829 F. Supp. at 1229.

127 See, e.g., *RAM Broad. of Colo., Inc. v. Pub. Util. Comm'n*, 702 P.2d 746, 750 (Colo. 1985); *Ephraim Freightways, Inc. v. Pub. Util. Comm'n*, 380 P.2d 228, 229-30 (Colo. 1963).

128 See COLO. REV. STAT. ANN. §§ 40-5-103, 40-6-102 (West 1997).

standard as well as entrenched interests and a compliant regulatory board that were determined to prevent new entrants into the market. West and Wheeler also eventually decided to sue to vindicate their right to earn a living.

The onerous regulatory regimes that these men faced were outgrowths of a system that dates back to the beginnings of urban mass transit in the late nineteenth century.<sup>129</sup> When cable and trolley services emerged, most cities granted exclusive franchises to particular companies for all city services.<sup>130</sup> In exchange for what amounted to a monopoly in mass transit, the cities capped the rates these companies could charge their customers.<sup>131</sup> With inherent route limitations and rate caps, the companies were unable to respond to changes in demand and the need for more flexible and individualized services.<sup>132</sup> As cities grew, jitney van and taxi services arose to meet this demand.<sup>133</sup> In response, cable and trolley car companies lobbied for restrictions on this competition and found city governments, who were partial to the tax revenues that their franchisees generated and enjoyed the ease of regulating them, all too willing to help.<sup>134</sup> The result was restrictions on the rates that taxi, car, and van companies could charge, and, more importantly, the number of companies that could operate and the routes they could serve.<sup>135</sup> In some cases, companies were run out of business altogether.<sup>136</sup> Today, in many cities, these industries resemble the monopolized urban mass transit businesses with which they evolved to compete. Heavy restrictions and high costs of entry have resulted in only a few companies in many large metropolitan areas and little likelihood that competitors will emerge.

The problem, of course, for anyone like Leroy Jones, John West, and Ed Wheeler is that courts approach these laws in the same way that they approach all economic regulations. Courts defer almost completely to the government's decision to treat transportation industries as "regulated monopolies" and to bar new entrants who cannot demonstrate an additional "need" in the community for their services.<sup>137</sup> Indeed, under the deferential rational

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129 George W. Hilton, *The Rise and Fall of Monopolized Transit*, in *URBAN TRANSIT: THE PRIVATE CHALLENGE TO PUBLIC TRANSPORTATION* 31, 34-37 (Charles A. Lave ed., 1985).

130 *Id.* at 34-35.

131 *Id.*

132 *Id.* at 35-36.

133 *Id.* at 36-37. See also Rosenbloom, *supra* note 123, at 183.

134 Hilton, *supra* note 129, at 37, 41.

135 *Id.* at 36.

136 *Id.* at 38.

137 See, e.g., *Jones v. Temmer*, 829 F. Supp. 1226, 1234-35 (D. Colo. 1993), *vacated by* 57 F.3d 921 (10th Cir. 1995); *Pub. Serv. Co. of Colo. v. Pub. Utilities Comm'n*, 765 P.2d 1015, 1021-22 (Colo. 1988); *Rocky Mtn. Airways, Inc. v. Pub. Util. Comm'n*, 509 P.2d 804, 805, 807 (Colo. 1973).

basis test, demonstrating that a regulatory board's decision on these vague issues is irrational becomes impossible. The predictable result is that the regulatory agencies and existing companies treat these industries like little fiefdoms.

In Denver, for instance, three taxicab companies dominated the industry for over fifty years. During that time period, the city's population grew tremendously, yet the Public Utility Commission, which is the agency with authority over the industry, allowed no new companies to compete with the big three.<sup>138</sup> The industry finally opened up only after the legislature modified the standard for new entrants in the wake of Leroy Jones's lawsuit.<sup>139</sup> The lawsuit itself was not successful,<sup>140</sup> but it generated a lot of attention. The legislature relaxed the standards for new entrants while the case was on appeal.<sup>141</sup> Since then, two new companies have entered the cab business in Denver. The company Jones started employs nearly one hundred people under a new name: Freedom Cabs.

In Las Vegas, when John West and Ed Wheeler applied for permission to run their limousine services, the application process resembled a gauntlet in which existing companies attempted to increase a new applicant's costs and deplete its resources. In the initial process, applicants submit detailed personal and financial information to the Transportation Services Authority ("TSA"), which often requests additional information, conducts interviews, and inspects vehicles.<sup>142</sup> The real costs do not begin to mount until after the application is filed, however, when existing companies are permitted to intervene and demand detailed information from the new applicant, which they then use to oppose the application.<sup>143</sup> This information can include customer lists, tax returns, accounting records, and even where they buy gas and who repairs their cars. In many cases, new applicants must produce this information to several intervenors at a time.<sup>144</sup> Intervenors are also given the right to appear at hearings, introduce evidence, cross-examine witnesses, and make and argue motions.<sup>145</sup> Court reporting and transcribing fees associated with such hearings are borne by the applicant, who, of course, must also pay an attorney to appear on his behalf.<sup>146</sup> The entire process can take up to a year,

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138 *Break the Stranglehold on Taxicab Entrepreneurs*, DENV. POST, Feb. 7, 1993, at 2D.

139 *See Jones v. Temmer*, 57 F.3d 921 (10th Cir. 1995).

140 *See Jones*, 829 F. Supp. at 1234-36 (dismissing plaintiffs' Due Process and Equal Protection Claims under the deferential rational basis standard).

141 COLO. REV. STAT. ANN. 40-10-105(2)(a) (West 1997).

142 NEV. ADMIN. CODE ch. 703, § 165 (1984 & Supp. 2002).

143 *Id.* § 580.

144 *Id.* § 600. *See also* John L. Smith, *Bell Owner Fights to Keep His Big Share of Limousine Market*, LAS VEGAS REV. J., July 19, 1996, at 1B.

145 NEV. ADMIN. CODE ch. 703, § 500 (1984 & Supp. 2002).

146 NEV. REV. STAT. ANN. 706.2873 (Michie 1998).

during which time the new applicant faces fines of \$2,500 and possible impoundment of vehicles for operating his limousines without authorization.<sup>147</sup> One prospective applicant spent roughly \$250,000 enduring this process, only to have its application rejected.<sup>148</sup> The impact of this process is predictable. When West and Wheeler filed their applications in 1998, Las Vegas had roughly 1.3 million residents and over 30 million visitors per year, but only six limousine companies.<sup>149</sup>

West and Wheeler achieved a measure of success in their legal challenges to this system, although at an incredibly high cost. Applying the rational basis test, the court rejected their claim that the public convenience and necessity standard violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>150</sup> It did, however, conclude that their treatment at the hands of the TSA and existing companies violated their procedural due process rights.<sup>151</sup> Of the five plaintiffs in the lawsuit, only Wheeler had the financial wherewithal to endure the remainder of the application process. His application was ultimately approved and he currently operates a small limousine service in Las Vegas. Bill Clutter, another plaintiff in the suit, ultimately took a job driving for one of the existing limousine companies. West was forced to give up and is now a mechanic in New Mexico.

## B. Eminent Domain for Hire

In a country whose founders fought a revolution in large part to prevent arbitrary seizures of property, it is no small irony that today state and local governments regularly take land from private owners and sell it to well-connected developers and private businesses on the grounds that their use of the property is deemed

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<sup>147</sup> See Bill Gang, *Limo Service Sues PSC Over Competitor*, LAS VEGAS SUN, Oct. 19, 1989, at 2B.

<sup>148</sup> John L. Smith, *Bell Trans Always Gives Rough Rides to Limousine Applicants*, LAS VEGAS REV. J., July 17, 1996, at 1B. Another prospective service fought a multi-year court battle with existing companies and spent more than \$200,000 before it received approval to operate. See *Public Service Commission Reviews "Limousine Wars,"* LAS VEGAS SUN, Oct. 20, 1985, at 6B; Julie Penn, *Las Vegas Limousine Rivalry in High Gear*, LAS VEGAS REV. J., Oct. 20, 1986, at 1C.

<sup>149</sup> See *The Fight for a Free Market: Opening the Las Vegas Limousine Monopoly, Litigation Backgrounder: The Problem*, Institute for Justice, at [http://www.ij.org/cases/economic/lv\\_limos/background.shtml](http://www.ij.org/cases/economic/lv_limos/background.shtml) (last visited Apr. 15, 2003). See also *Metropolitan Las Vegas Tourism Statistics*, The Center for Business and Economic Research, University of Nevada, Las Vegas, available at [http://www.unlv.edu/Research\\_Centers/cber/tour.html](http://www.unlv.edu/Research_Centers/cber/tour.html); Las Vegas Chamber of Commerce, *Demographics Statistics*, available at [http://www.lvchamber.com/las\\_vegas/demographics.htm](http://www.lvchamber.com/las_vegas/demographics.htm) (last visited Apr. 19, 2003).

<sup>150</sup> *Clutter v. Transp. Servs. Auth. of Nev.*, No. A387827, slip op. at 3, 6 (D.C. Nev. May 16, 2001).

<sup>151</sup> *Id.* at 11–12.

more beneficial to the “public.”<sup>152</sup> In 1829, Supreme Court Justice Joseph Story decried the very idea of transferring private land from one owner to another:

That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. . . . We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union.<sup>153</sup>

New York’s highest court echoed this sentiment roughly fifty years later when it stated that private uses cannot become public merely by “legislative fiat.”<sup>154</sup> Today, state and local governments regularly condemn private land on little more than legislative fiat and courts too often allow them to get away with it.<sup>155</sup>

Federal and state constitutions all provide that private property may be taken only for a “public use.”<sup>156</sup> Unfortunately, courts have allowed this restriction to be diluted to near irrelevance. The process began in the early 1950s when the Supreme Court approached the public use limitation in much the same way that courts approach due process and equal protection limitations on government power found in the Fifth and Fourteenth Amendments—by deferring almost completely to legislatures. In *Berman v. Parker*, the District of Columbia condemned several parcels of land for the ostensive purpose of eradicating “blight.”<sup>157</sup> The owners of one of these parcels opposed the condemnation on the ground that it violated the public use limitation in the Takings Clause because the land was to be transferred to a private developer.<sup>158</sup> The Supreme Court upheld the condemnations, however, ruling that whether the use of the land was “public” was entirely up to Congress.

[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining

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<sup>152</sup> See Dana Berliner, *Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain*, 1, 2–7 (Apr. 2003), available at [http://www.castlecoalition.org/report/pdf/ED\\_report.pdf](http://www.castlecoalition.org/report/pdf/ED_report.pdf).

<sup>153</sup> *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657–58 (1829).

<sup>154</sup> *In re Jacobs*, 98 N.Y. 98, 111 (1885).

<sup>155</sup> See generally Berliner, *supra* note 152 (documenting over 10,000 properties in forty-one states that were threatened with condemnation by state and local governments for the benefit of private parties from 1998 through 2002).

<sup>156</sup> U.S. CONST. amend. V.

<sup>157</sup> 348 U.S. 26, 33 (1954).

<sup>158</sup> *Id.* at 31.

whether that power is being exercised for a public purpose is an extremely narrow one.<sup>159</sup>

Thirty years later, the Supreme Court made clear that there was little a legislature could not do with the power of eminent domain. In *Hawaii Housing Authority v. Midkiff*,<sup>160</sup> the Supreme Court upheld the transfer of thousands of acres of private land from owners to their tenants that the State claimed was necessary to eliminate what it characterized as a “land oligopoly.”<sup>161</sup> When the plaintiffs pointed out that the State of Hawaii was simply transferring land from one private owner to another—exactly what Justice Story had condemned as unjust 150 years earlier—the Court responded that it was for the legislature to determine what constitutes a public use, not the courts.<sup>162</sup> In short, the Court “will not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”<sup>163</sup> State courts have by and large followed this extremely deferential approach to the public use determination.

The results have been predictable. A power that was originally designed to be used only for necessary public or governmental purposes, has today become a license for local planning boards to realize their visions of the good society. Local governments have condemned land for shopping centers, industrial parks, factories, hotels, health clubs, marinas, office buildings, golf courses, and casinos, to name just a few examples.<sup>164</sup> Governments often justify these condemnations as public uses because they increase tax revenues.<sup>165</sup> Many courts have upheld takings on these grounds, meaning that virtually anything can be considered a public use.

Worse still, but equally predictable, governments often use the power of eminent domain to dole out special favors or to lure preferred businesses to their areas. In 1980, Detroit condemned thousands of homes so General Motors (“GM”) could build a new factory when the company threatened to leave town.<sup>166</sup> Toledo, Ohio did the same for Chrysler a few years ago, as did Mississippi for Nissan.<sup>167</sup> In 2000, New London, Connecticut delegated its power of eminent domain to a private development corporation to

<sup>159</sup> *Id.* at 32 (citations omitted).

<sup>160</sup> 467 U.S. 229 (1984).

<sup>161</sup> *Id.* at 241–42.

<sup>162</sup> *Id.* at 244.

<sup>163</sup> *Id.* at 241 (quoting *United States v. Gettysburg Elec. R.R. Co.*, 160 U.S. 668, 680 (1896)).

<sup>164</sup> See Berliner, *supra* note 152.

<sup>165</sup> *Id.* at 5.

<sup>166</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

<sup>167</sup> See Dana Berliner, *Government Theft: The Top 10 Abuses of Eminent Domain*, 9–10 (Mar. 2002), available at [http://www.castlecoalition.org/top\\_10\\_abuses/top\\_10\\_report.pdf](http://www.castlecoalition.org/top_10_abuses/top_10_report.pdf).

condemn over a dozen homes on prime waterfront property so a private developer could put up a shopping center and hotel to complement a Pfizer office complex.<sup>168</sup> In West Orange, New Jersey, a private developer was having difficulty obtaining land for a road through a residential development he was building.<sup>169</sup> When negotiations broke down he turned to the city, which promptly condemned the land.<sup>170</sup> When Donald Trump needed to build a parking lot in 1996 near one of his Atlantic City casinos, the city condemned three nearby properties.<sup>171</sup>

In one of the worst examples of abuse in this area, a local agency literally hired out its power of eminent domain. The Southwestern Illinois Development Authority ("SWIDA") advertised that it would condemn land for "economic development," and even provided boxes on the appropriate application to be checked for "public use" or "private use" condemnations.<sup>172</sup> For "private use" condemnations, SWIDA charged a commission of about six percent of the value of the project.<sup>173</sup> When a local raceway owner failed to convince a nearby scrap yard to sell land it needed for a parking lot, the raceway paid SWIDA to condemn the land.<sup>174</sup> In the ensuing court battle, the raceway admitted that it could have built the parking lot on its own property, but that doing so would have been more expensive than paying SWIDA \$50,000 to condemn its neighbor's land.<sup>175</sup> The Illinois Supreme Court initially upheld the condemnation as a proper public use, but reversed itself on rehearing and determined, in a five-to-two decision, that renting out the power of eminent domain was simply going too far.<sup>176</sup>

Most property owners are not as fortunate as the plaintiffs in the SWIDA case. The Michigan Supreme Court upheld Detroit's condemnation of homes for GM on the grounds that it was the legislature's prerogative to determine what constitutes a public use.<sup>177</sup> The New Jersey Supreme Court upheld West Orange's condemnation of land for a private road on the same grounds.<sup>178</sup> The property owners in New London won a partial victory in the trial

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168 *Id.* at 2.

169 *Township of W. Orange v. 769 Assoc., L.L.C.*, 800 A.2d 86, 89 (N.J. 2002).

170 *Id.*

171 *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 106-07 (N.J. Super. Ct. Law Div. 1998).

172 *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 710 N.E.2d 896, 898-99 (Ill. App. Ct. 1999).

173 *Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 4 (Ill. 2002).

174 *Southwestern Ill. Dev. Auth.*, 710 N.E.2d at 902.

175 *Id.* at 903.

176 *Southwestern Ill. Dev. Auth.*, 768 N.E.2d at 3.

177 *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458-59 (Mich. 1981).

178 *Township of W. Orange v. 769 Assocs., LLC*, 800 A.2d 86, 93 (N.J. 2002).

court on the narrow grounds that the city had not specified the uses to which some of the properties would be put.<sup>179</sup> The court declined to hold that the condemnations served only private rather than public uses.<sup>180</sup> The case is currently on appeal before the Connecticut Supreme Court. Similarly, Atlantic City's effort to hand property over to Donald Trump was struck down on the narrow ground that nothing ensured the land would be used for a public purpose.<sup>181</sup> The court declined to rule as a matter of law that condemning land for a casino parking lot was not a public use.<sup>182</sup>

The eminent domain and transportation cases discussed above are only a few examples of areas in which courts defer almost completely to legislative discretion, but they resoundingly demonstrate one thing: legislatures that are permitted to regulate without limits all too often exceed and abuse their powers.

## V. THE SOLUTION TO JUDICIAL ABDICATION

If the extreme judicial deference epitomized by the rational basis test is the wrong approach to economic legislation, what is the right approach? One answer is that economic rights should not be treated any differently in principle than the so-called "fundamental" rights that courts do protect. Scholars such as Bernard Siegan, Randy Barnett, and Richard Epstein have covered that subject in detail and have offered comprehensive theories of judicial review that are properly grounded in the structure of the Constitution as well as the political and moral principles on which it is based.<sup>183</sup> Their approaches would require fundamental changes to government, which are certainly preferable, but not likely to occur anytime soon. In the meantime, courts can, and should, apply a standard of scrutiny that would remain within the existing framework of judicial review, but would rein in some of the worst abuses by the political branches of government.

The *Craigmiles* decision is a step in the right direction. As noted earlier, the district court in *Craigmiles* held that the law as applied to casket retailers violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>184</sup> The Sixth Circuit affirmed, concluding that restricting sales of caskets to li-

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179 *Kelo v. City of New London*, No. 557299, 2002 WL 500238, at \*60 (Conn. Super. Ct. Mar. 13, 2002).

180 *Id.* at \*112.

181 *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998).

182 *Id.*

183 See generally SIEGAN, *ECONOMIC LIBERTIES*, *supra* note 35, at 248–64, 318–31; Barnett, *Reconceiving*, *supra* note 87; RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

184 110 F. Supp. 2d at 667.

censed funeral directors did not promote either public health or consumer protection.<sup>185</sup> While the Sixth Circuit recognized that the quality of a particular casket could conceivably protect health and safety, restricting casket sales to licensed funeral directors did not further that purpose because the State does not regulate the quality of caskets or require particular types of caskets to be used in any particular situation.<sup>186</sup> Consumers are free to purchase any casket they wish or to dispense with a casket altogether, and funeral directors are still free to advise consumers on what sort of casket they should purchase regardless of the source of the casket.<sup>187</sup> The court similarly concluded that the law does not promote consumer protection because the anti-fraud provisions of the funeral act are essentially the same as those available to consumers in general.<sup>188</sup> In other words, Tennessee law creates no incentive for licensed funeral directors to behave more honorably than other merchants. At bottom, the court recognized that the licensing law was well suited for only one conceivable purpose: "protecting the monopoly rents that funeral directors extract from consumers."<sup>189</sup> Merely "protecting a discrete interest group from economic competition," however, is not a legitimate state purpose.<sup>190</sup> Accordingly, the law could not withstand scrutiny even under the rational basis test.

One might take issue with the Sixth Circuit's claim that economic protectionism is not a legitimate state interest under existing Supreme Court precedent—indeed, the court in *Powers*, which was decided after the *Craigmiles* appeal, did exactly that.<sup>191</sup> If courts are going to accept economic protectionism as a legitimate state interest, however, we ought to recognize that our approach to government has truly come full circle and ended up precisely where the framers began. What is "economic protectionism" after all but the basest example of factional politics? Economic protectionism by the states is precisely what motivated the framers to convene a constitutional convention and draft a new constitution.<sup>192</sup> If courts embrace economic protectionism as a le-

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185 *Craigmiles v. Giles*, 312 F.3d 220, 225–26 (6th Cir. 2002).

186 *Id.* at 225.

187 *Id.* at 225–26.

188 *Id.* at 226–27.

189 *Id.* at 229.

190 *Id.* at 224. The court cited *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949), and *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983), for this proposition, but it is also supported by *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 882–83 (1985), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984).

191 See *Powers v. Harris*, No. CIV-01-445-F, slip op. at 26–27 (W.D. Okla. Dec. 12, 2002).

192 See, e.g., Madison, Speech in the Federal Convention, *supra* note 100, at 92; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) ("If there was any one object riding over

gitimate state purpose, they will end up achieving precisely what the framers sought to avoid.

Yet courts can rein in legislative abuses only if they engage in a more searching analysis than the extremely deferential review epitomized by the court in *Powers* and most rational basis cases. Courts must look behind the stated rationales for a law, and use common sense to determine what in fact the legislature was attempting to accomplish. As the Supreme Court stated over a century ago:

The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.<sup>193</sup>

The Supreme Court has applied the rational basis test in precisely this manner. In *Romer v. Evans*, for instance, the Court cited a number of cases that upheld laws under the rational basis test and stated:

The laws challenged in the cases just cited were narrow enough in scope and *grounded in a sufficient factual context* for us to ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.<sup>194</sup>

In *City of Cleburne v. Cleburne Living Center*, the Court struck down a zoning ordinance that required a home for the mentally retarded to obtain a special use permit to operate in a specific location.<sup>195</sup> Finding that “the record does not reveal any rational basis for believing that the . . . home would pose any special threat to the city’s legitimate interests,” the Court concluded that the law violated the Equal Protection Clause because it treated the home differently than it treated similar buildings, such as apartments and hospitals.<sup>196</sup> In both of these cases, the Supreme Court gave substance to the rational basis test by requiring some connection based in actual facts between the stated purposes of a law and the

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every other in the adoption of the constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints.”).

193 *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

194 517 U.S. 620, 632–33 (1996) (emphasis added).

195 473 U.S. 432, 450 (1985).

196 *Id.* at 448 (emphasis added).

means chosen to achieve it.<sup>197</sup> Other lower courts besides the Sixth Circuit have applied the rational basis test in a similar manner.<sup>198</sup>

If courts are to perform their proper function of enforcing constitutional limitations on government and protecting individual rights, this more searching form of review must become the rule, rather than the exception. First, courts must be prepared to declare some ends, such as economic protectionism, illegitimate. Second, in order to separate legitimate from illegitimate ends, and to ensure that legislatures do not regulate too broadly or legislate for the benefit of private parties, courts must require some fit between means and ends that is based in fact, rather than fancy. Certainly courts should not assume a roving commission to second-guess a legislature's motives, but neither should they ignore the obvious. It does not take a terribly penetrating analysis to see the real reason behind laws that require a license to sell caskets, or permission from existing limousine or taxi companies in order to compete with them, or that hand private land to Donald Trump so he can build a casino parking lot.<sup>199</sup> Courts make such common sense judgments in other constitutional contexts—for instance when they review laws under the First Amendment and the Dor-

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<sup>197</sup> State courts during the nineteenth century often scrutinized economic laws in similar fashion. See, e.g., *Chaddock v. Day*, 42 N.W. 977, 978 (Mich. 1889); *In re Jacobs*, 98 N.Y. 98, 110–11 (1885), and cases cited *supra* notes 68–69. Anything approaching substantive scrutiny of economic laws is often derided as “Lochnerism,” but the Supreme Court scrutinized economic laws in this manner well before the so-called *Lochner* era. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 365–66 (1886) (striking down a local ordinance that prohibited the operation of laundry businesses in wooden buildings without permission from the city because the law was being enforced only against Chinese immigrants in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323–24, 327–28 (1866) (striking down state law requiring an oath of loyalty to the United States as a condition of employment as unconstitutional bills of attainder and *ex post facto* laws because the requirements were punishments for acts taken when they were legal (i.e., supporting secession) rather than appropriate professional standards); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 355–58 (1866) (upholding the same principles as *Cummings* with respect to federal law).

<sup>198</sup> See, e.g., *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440–41 (S.D. Miss. 2000) (striking down retail casket licensing law under Due Process and Equal Protection Clauses of Fourteenth Amendment); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999) (stating that “[t]here are limits to what the State may require before its dictates are deemed arbitrary and irrational” and striking down law requiring African hair braiders to become licensed cosmetologists); *Santos v. City of Houston*, 852 F. Supp. 601, 608–09 (S.D. Tex. 1994) (striking down an anti-jitney law); *Brown v. Barry*, 710 F. Supp. 352, 355–56 (D.D.C. 1989) (holding a ban on street corner shoeshine stands unconstitutional).

<sup>199</sup> Indeed, as David Bernstein has demonstrated, the effect, if not the purpose, of many occupational licensing and other economic laws during the late nineteenth and early twentieth centuries was to exclude disfavored groups such as African Americans and other minorities. Courts’ recognition of this fact and their greater scrutiny of these laws during the *Lochner* era thus benefited minorities by opening many fields from which they would otherwise have been precluded. See BERNSTEIN, *supra* note 43, at 28–45.

mant Commerce Clause.<sup>200</sup> There is no reason to avoid doing so in the economic context as well.

## VI. CONCLUSION

That the problem of faction still exists today, despite the framers' efforts to avoid it, should serve as a warning sign. Something has gone wrong in our constitutional system. Courts bear a large part of the responsibility. They have allowed government to grow far beyond its intended size and scope. With government doing as much as it does today, the opportunities for abuse are many. If courts are not going to limit the size of government, they must be prepared at the very least to limit its abuses. Yet they cannot discharge this vital responsibility if they refuse to judge. It is no small irony that in a time allegedly characterized by judicial realism, the one thing that courts consistently refuse to be realistic about is governments' tendency to abuse power when wealth and property are at stake.

In short, to play their proper constitutional role, courts must become a little more realistic in their assessment of the political branches of government and a little less skeptical of their own abilities to counter abuses. In 1889, the Supreme Court of Michigan noted:

It is quite common in these later days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts.<sup>201</sup>

This is sage advice. If courts are to play their proper role of enforcing constitutional limitations, they ought to heed it.

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<sup>200</sup> See, e.g., *Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1507 (2002) (holding that FDA advertising ban for compounded drugs violated First Amendment's protections for commercial speech, stating that "regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try"); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (finding that town ordinance requiring all recycling to be performed at a local transfer station hoarded a resource for the benefit of local businesses, and violated the Dormant Commerce Clause).

<sup>201</sup> *Chaddock v. Day*, 42 N.W. 977, 978 (Mich. 1889).