

WHEN RATIONAL BASIS REVIEW BIT

INTRODUCTION

Like many widows, Sandy Meadows faced economic uncertainty after her husband passed away.¹ She, however, had a knack for arranging flowers and found a job in the floral department of her local Albertsons grocery store.² Sandy excelled, earned a promotion, and effectively ran the entire department.³ But then the Louisiana Horticulture Commission came knocking.⁴ The Commission informed the store that it had to hire a *licensed* florist or shut down the department.⁵

Louisiana is the only state in the Union that imposes occupational licensing requirements on florists.⁶ Prior to reforms in 2024,⁷ getting licensed was no small task. Would-be florists were required to pass a notoriously difficult exam — fewer than fifty percent made the cut.⁸ Sandy failed this exam five times,⁹ but it wasn't because her floral skills were lacking; her job performance was exemplary.¹⁰ She failed because currently licensed florists decided who passed and who failed.¹¹ Fox, meet henhouse.

Sandy's story doesn't have a happy ending. When she couldn't get a license, Albertsons fired her and replaced her with a licensed florist.¹²

¹ CLARK M. NEILY III, *TERMS OF ENGAGEMENT 1* (2013); SUSAN HAGOOD LEE, U.S. WOMEN'S CAUCUS, CSW 68 GENDER AND POVERTY BRIEF: OLDER WOMEN, WIDOWS, AND POVERTY 1 (2024), <https://www.uswomenscaucus.org/wp-content/uploads/2023/10/Lee-Widows-and-Older-Women.pdf> [<https://perma.cc/LW6P-FFAA>]; Shoshana Weissmann & C. Jarrett Dieterle, Opinion, *Louisiana Is the Only State that Requires Occupational Licenses for Florists. It's Absurd.*, USA TODAY (Mar. 28, 2018, 7:00 AM), <https://www.usatoday.com/story/opinion/2018/03/28/louisiana-only-state-requires-occupational-licenses-florists-its-absurd-column/459619002> [<https://perma.cc/HGR2-9BPN>].

² NEILY, *supra* note 1, at 1.

³ Clark Neily, *Flower Power*, INST. FOR JUST. (Feb. 1, 2004), <https://ij.org/ll/flower-power> [<https://perma.cc/63ZL-C9AR>].

⁴ NEILY, *supra* note 1, at 1.

⁵ *Id.*

⁶ *Id.*; Eric Boehm, *Louisiana Finally Fixes America's Dumbest Licensing Requirement*, REASON (May 30, 2024, 12:15 PM), <https://reason.com/2024/05/30/louisiana-finally-fixes-america-s-dumbest-licensing-requirement> [<https://perma.cc/5K4V-TDFD>] (noting that despite recent reforms, Louisiana is still unique in that it licenses florists).

⁷ See Act of June 11, 2024, No. 643, §§ 1, 3, 2024 La. Sess. Law Serv. 643 (West) (codified at LA. STAT. ANN. § 3:3805 (2024)). Most importantly, Louisiana removed its requirement that aspiring florists pass an exam. *Id.* The state still licenses florists, but the license now just requires payment of a fee. *Id.* § 1.

⁸ Weissmann & Dieterle, *supra* note 1. To put this figure in context, the Louisiana floral exam had a substantially lower pass rate than did the state's bar exam; seventy-five percent of test takers passed the Louisiana bar on their first try in July 2024. *Bar Exam Results by Jurisdiction*, NAT'L CONF. OF BAR EXAM'RS (Jan. 2, 2025, 11:50 AM), <https://www.ncbex.org/statistics-research/bar-exam-results-jurisdiction> [<https://perma.cc/F9NF-TK9D>].

⁹ NEILY, *supra* note 1, at 1.

¹⁰ Neily, *supra* note 3.

¹¹ See NEILY, *supra* note 1, at 1.

¹² *Id.*

She couldn't afford a phone or car, and the power company eventually shut off the electricity to her home.¹³ Shortly thereafter, Sandy died in poverty, alone.¹⁴

Before her death, Sandy — along with a few other aspiring florists — challenged Louisiana's licensing scheme¹⁵ with the help of attorney Clark Neily, who recounts Sandy's story in his book *Terms of Engagement*.¹⁶ They lost, felled by a familiar foe in constitutional adjudication: rational basis review. No matter that the women had a constitutional right to pursue their chosen profession¹⁷ or that even a Supreme Court Justice has recognized that rational basis review is “tantamount to no review at all.”¹⁸ Because Louisiana presented conceivable justifications for its licensing scheme,¹⁹ the court upheld the regulations.²⁰ And Sandy's livelihood vanished.

Rational basis review wasn't always this farcical. For about twenty years, between the Court's decisions in *United States v. Carolene Products Co.*²¹ — which established rational basis review²² — and *Williamson v. Lee Optical of Oklahoma, Inc.*²³ — which redefined rational basis review as a hyper-deferential standard²⁴ — the courts applied a meaningful means-end scrutiny to restrictions on economic activity that gave legislatures wide latitude to exercise their police power while protecting a baseline level of economic liberty. (This Note refers to that time period as the *Carolene Products* era.) That blend of interrogation and deference was the right approach. Many scholars have called on courts to give economic rights their due;²⁵ this Note offers a proven mechanism

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Meadows v. Odom*, 360 F. Supp. 2d 811, 814 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006) (per curiam).

¹⁶ NEILY, *supra* note 1, at 1–2.

¹⁷ *Meadows*, 360 F. Supp. 2d at 813. Although this right may be reasonably regulated, *id.*, the Supreme Court has recognized its constitutional footing for over a century, see Evan Bernick, Essay, *Towards a Consistent Economic Liberty Jurisprudence*, 23 GEO. MASON L. REV. 479, 479 (2016).

¹⁸ *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in the judgment).

¹⁹ See *Meadows*, 360 F. Supp. 2d at 823–24; see also *infra* Part IV, pp. 1862–64 (analyzing these justifications).

²⁰ *Meadows*, 360 F. Supp. 2d at 825.

²¹ 304 U.S. 144 (1938).

²² See *infra* notes 31–33 and accompanying text.

²³ 348 U.S. 483 (1955).

²⁴ See *infra* notes 34–38 and accompanying text.

²⁵ See, e.g., RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT* 292–94 (2021); Clark Neily, *One Test, Two Standards: The On-and-Off Role of “Plausibility” in Rational Basis Review*, 4 GEO. J.L. & PUB. POL'Y 199, 201–02 (2006); Randy E. Barnett, *Judicial Engagement Through the Lens of Lee Optical*, Keynote Remarks at the George Mason University School of Law Symposium: *Judicial Engagement and the Role of Judges in Enforcing the Constitution* (Mar. 22, 2012), in 19 GEO. MASON L. REV. 845, 860 (2012); Marc P. Florman, Comment, *The Harmless Pursuit of Happiness: Why “Rational Basis With Bite”*

for doing so: reviving the *Carolene Products*–era approach to rational basis review.

This Note proceeds in four parts. Part I discusses the evolution of rational basis review. Part II excavates the history of meaningful rational basis review in the lower courts during the *Carolene Products* era and distills the doctrine’s essence. Part III argues that *Carolene Products*–era rational basis review appropriately balanced individuals’ constitutional rights and states’ police power. And Part IV applies meaningful rational basis review to Sandy Meadows’s case to show how courts could implement this form of review today.

I. THE RATIONAL BASIS REVIEW STORY

Rational basis review emerged as a doctrinal framework in the 1930s. Over the prior quarter century — the *Lochner*²⁶ era — the Court had aggressively scrutinized economic regulations under the Due Process Clauses of the Fifth and Fourteenth Amendments, invalidating Progressive Era reforms that aimed to sand the rough edges of late-nineteenth-century capitalism.²⁷ But beginning in 1931, the Court backed off. That year, in *O’Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,²⁸ the Court held that an insurance regulation enjoyed a “presumption of constitutionality.”²⁹ *O’Gorman & Young* signaled a retreat from Lochnerian activism — in the words of Professor Walton Hamilton, the decision “reverse[d] the rules of presumption and proof in cases involving the control of industry.”³⁰

Seven years later, in *Carolene Products*, the Court took *O’Gorman & Young*’s presumption of constitutionality to its logical conclusion. *Carolene Products* established that regulations of all “ordinary commercial transactions” were presumptively valid and would be reviewed under the rational basis test.³¹ Although parties could still attack an economic

Review Makes Sense for Challenges to Occupational Licenses, 58 LOY. L. REV. 721, 757–58 (2012). Lest this come across as just a libertarian project, see Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 416 (2016).

²⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁷ See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 492–93 (1997); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 1–4 (1993). According to one estimate, the courts invalidated more than 200 statutes governing economic activity between 1900 and 1937. Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. REV. 1501, 1503 (1999).

²⁸ 282 U.S. 251 (1931).

²⁹ *Id.* at 257–58. This was a far cry from the *Lochner* era’s “presumption of liberty.” Barnett, *supra* note 25, at 860.

³⁰ Walton H. Hamilton, *The Jurist’s Art*, 31 COLUM. L. REV. 1073, 1074–75 (1931).

³¹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

regulation as irrational, they would have to prove its unreasonableness with facts.³² Legislation got the benefit of the doubt.³³

The Court's 1955 decision in *Lee Optical* turbocharged judicial deference under rational basis review. *Lee Optical* shared *Carolene Products*'s philosophical underpinnings,³⁴ but its application of the rational basis test charted new territory. The case involved an Oklahoma law that prohibited opticians from fitting glasses or replacing lenses without a prescription from an optometrist or ophthalmologist.³⁵ The law effectively prevented opticians from performing work they were perfectly capable of doing, serving little purpose beyond shielding optometrists and ophthalmologists from competition.³⁶ Nevertheless, the Court unanimously upheld the statute.³⁷ In doing so, it articulated what remains the core of rational basis review: A law will be upheld if "there is an evil at hand for correction, and . . . it might be thought that the particular legislative measure [is] a rational way to correct it."³⁸

"Might be thought" are the operative words. On its face, this phrasing isn't far off from *Carolene Products*'s instruction that "where the legislative judgment is drawn in question," a court's inquiry "must be restricted to the issue whether any state of facts either known *or which could reasonably be assumed*" supports the legislature's determination.³⁹ But in practice, the two approaches diverge. In *Carolene Products*, the Court emphasized that "[w]here the existence of a rational basis" hinged upon certain facts, a court could properly inquire into those facts.⁴⁰ And a statute grounded in certain facts could be assailed "by showing to the court that those facts have ceased to exist."⁴¹ Not so in *Lee Optical*, where the Court's analysis was divorced from facts on the ground. The Court went so far as to hypothesize potential justifications for the law that the state hadn't advanced, suggesting the legislature might have

³² *Id.* at 153–54 (citing *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194 (1934); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 349, 351–52 (1935); *Whitney v. California*, 274 U.S. 357, 379 (1927); *Morf v. Bingaman*, 298 U.S. 407, 413 (1936)).

³³ *See id.* at 152.

³⁴ *See* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 314 (1989).

³⁵ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 485 (1955). Some terminology is in order. Ophthalmologists are medical doctors specializing in eye care; optometrists are professionals who detect — but do not treat — eye diseases, fill prescriptions, and sell glasses; opticians perform the technical work of fitting glasses and act as salespeople. *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 131 n.3 (W.D. Okla. 1954), *aff'd in part, rev'd in part*, 348 U.S. 483 (1955).

³⁶ *See* Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1151 (1992) (describing the law at issue as "irrational[ly] protectionist"). The Court acknowledged that the law provided little public value, conceding it "may exact a needless, wasteful requirement in many cases." *Lee Optical*, 348 U.S. at 487.

³⁷ *See Lee Optical*, 348 U.S. at 491.

³⁸ *Id.* at 488; *see also, e.g., Sheffield v. City of Fort Thomas*, 620 F.3d 596, 614 (6th Cir. 2010) (characterizing the rational basis test along these lines); Joshua Park, Comment, *Economic Protectionism: Irrationally Constitutional*, 45 PEPP. L. REV. 149, 161 (2018).

³⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (emphasis added).

⁴⁰ *Id.* at 153 (citing *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194 (1934)).

⁴¹ *Id.* (citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924)).

concluded that updated prescriptions were needed often enough to justify the regulation.⁴² As Professors Randy Barnett and Evan Bernick have noted, *Lee Optical* marked a shift from a “realistic evidence-based inquiry” to a “formalist hypothetical inquiry.”⁴³ And in this world of “‘conceivable’ basis review,”⁴⁴ the government nearly always wins.⁴⁵

In the seventy years since *Lee Optical*, the Court has consistently embraced this neutered form of rational basis review. In *FCC v. Beach Communications, Inc.*,⁴⁶ for example, the Court reaffirmed that under rational basis review, “those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it,’”⁴⁷ and that “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”⁴⁸ Under this doctrine, challenges to economic regulations are effectively dead on arrival.⁴⁹

In reviewing economic regulations, the Supreme Court has swerved from intervention to deference. But those aren’t the only options. This Note’s next Part details a third approach — articulated by the Supreme Court in *Carolene Products* and fleshed out through lower court decisions — that protects constitutional rights while recognizing that policy decisions are the sole province of the political branches.

⁴² *Lee Optical*, 348 U.S. at 487.

⁴³ BARNETT & BERNICK, *supra* note 25, at 296.

⁴⁴ *Id.* (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in the judgment)).

⁴⁵ Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 73 (1989).

⁴⁶ 508 U.S. 307 (1993).

⁴⁷ *Id.* at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

⁴⁸ *Id.* (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). Eight Justices signed on to these expansive statements. *Id.* at 308. Only Justice Stevens, concurring in the judgment, thought that the majority’s “formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could *not* be supported by a ‘reasonably conceivable state of facts.’” *Id.* at 323 n.3 (Stevens, J., concurring in the judgment) (quoting *id.* at 313 (majority opinion)).

⁴⁹ Many jurists and scholars have noted that this version of rational basis review effectively rubber stamps government activity. *See, e.g., id.* at 323 n.3 (Stevens, J., concurring in the judgment) (calling rational basis review “tantamount to no review at all”); BARNETT & BERNICK, *supra* note 25, at 296; Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 492 (2011). To be sure, litigants sometimes prevail under rational basis review. *See* Dana Berliner, *The Federal Rational Basis Test — Fact and Fiction*, 14 GEO. J.L. & PUB. POL’Y 373, 378 nn.28–29 (2016) (collecting cases). Although rational basis review *can* bite, it rarely does when economic liberty is at stake. *See* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2076 & n.34 (2015) (identifying eighteen cases where the Court applied enhanced rational basis scrutiny, none of which involved economic police power regulation). We have a two-tiered system of rational basis review, with economic rights treated as the law’s least-favored nation.

II. *CAROLINE PRODUCTS*—ERA RATIONAL BASIS REVIEW

Rational basis review during the *Caroline Products* era involved two steps. First, courts determined whether an economic regulation's ends were legitimate objects of the police power. Class legislation was impermissible, although courts allowed legislation that incidentally benefited a specific group. If the ends were proper, courts applied a forgiving — but not toothless — form of means-end scrutiny. This analysis started from a presumption of validity and required a reasonable — but not perfect — fit between means and ends.

A. *The Police Power's Boundaries*

During the *Caroline Products* era, courts meaningfully policed the boundaries of states' police power. As one Michigan Supreme Court justice put it: "Business practices which have no detrimental effect on public health, morals, safety and public welfare may not be prohibited by the legislative body, for such prohibition would result in the deprivation of liberty and property without due process of law."⁵⁰ Most often, a law was held germane to the public welfare — even legislatures acting pretextually seemed to know they needed a police-power hook.⁵¹ Every once in a while, however, courts declared a regulation's rationale beyond the scope of the police power. For example, a federal court in California determined that the state could not leverage the police power to protect "aesthetic or sentimental considerations."⁵² But these cases were few and far between.

A few types of regulations unequivocally fell within the scope of the police power. First were laws promoting public health, including statutes aimed at nutrition and sanitation.⁵³ This category is not surprising — after all, "public health" is one of the police-power buckets that has been recognized since the early days of the Republic.⁵⁴ Second were

⁵⁰ *Ritholz v. City of Detroit*, 13 N.W.2d 283, 285 (Mich. 1944) (Butzel, J., dissenting). Despite articulating this limit on the police power, Justice Butzel would have upheld the regulation in question. *Id.* at 285, 289. The majority struck down the regulation, applying a stringent form of judicial review more reminiscent of *Lochner* than of *Caroline Products*. *See id.* at 283–84 (majority opinion).

⁵¹ Cf. Anthony Edward Falcone, Comment, *Law and Limits: How Categories Construct Constitutional Meaning*, 8 U. PA. J. CONST. L. 1005, 1019 (2006) (highlighting the risk of legislatures pretextually using the police power to enrich favored constituencies).

⁵² *Merced Dredging Co. v. Merced County*, 67 F. Supp. 598, 607 (S.D. Cal. 1946) (citing *Welch v. Swasey*, 214 U.S. 91, 107 (1909); *St. Louis Poster Advert. Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919); *Varney & Green v. Williams*, 100 P. 867 (Cal. 1909); *Abbey Land & Improvement Co. v. San Mateo County*, 139 P. 1068, 1070 (Cal. 1914)).

⁵³ *See, e.g., Setzer v. Mayo*, 9 So. 2d 280, 282 (Fla. 1942) (nutrition); *Jersey Maid Milk Prods. Co. v. Brock*, 91 P.2d 577, 587 (Cal. 1939) (same); *Caroline Prods. Co. v. Mohler*, 102 P.2d 1044, 1049 (Kan. 1940) (same); *Poole & Creber Mkt. Co. v. Breshears*, 125 S.W.2d 23, 27 (Mo. 1938) (same); *Publix Cleaners, Inc. v. Fla. Dry Cleaning & Laundry Bd.*, 32 F. Supp. 31, 34 (S.D. Fla. 1940) (sanitation).

⁵⁴ *See* David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 510 (2004).

laws aiming to protect consumers, particularly by preventing fraud.⁵⁵ Especially when the health rationale for a law was dubious — as in the case of filled milk prohibitions — courts often looked to the risk of fraud as a backstop.⁵⁶ Third were laws designed to mitigate environmental harms, particularly those caused by industrial mining or dredging.⁵⁷ Of course, regulations in these categories did not always survive rational basis review — they still had to be appropriately tailored.⁵⁸ But they invariably satisfied the first requirement that the object of regulation be germane to the police power.

On the other hand, courts consistently deemed one type of law beyond the police power: class legislation. Courts have long suggested that class legislation — “a law that takes property from A. and gives it to B.”⁵⁹ — violates due process.⁶⁰ Early in the Republic, Justice Chase condemned the practice in *Calder v. Bull*.⁶¹ Opposition to class legislation became particularly pronounced during the *Lochner* era, animated by concerns that Progressive Era economic legislation transferred wealth from capital to labor.⁶²

During the *Carolene Products* era, courts didn’t shed their aversion to class legislation. For example, in holding that minimum prices for barber services violated due process, the Oregon Supreme Court determined that the legislation did not “hav[e] a well-recognized and direct bearing upon the health, happiness, and well-being of the public as a whole,” but instead was “a price fixing statute of primary interest to the barber trade itself.”⁶³ In a similar vein, the lower court in *Lee Optical* found that the optometry law “divert[ed] from the optician a very substantial, as well as profitable, part of his business” and gave it to optometrists and ophthalmologists.⁶⁴ Legislation that served only parochial interests could never satisfy rational basis review.

Carolene Products–era courts, however, would uphold laws that incidentally benefited discrete groups but bore a rational relationship to the public health, safety, or morals. In this sense, the prohibition on

⁵⁵ See *Slome v. Godley*, 23 N.E.2d 133, 136 (Mass. 1939); *Commonwealth v. Ferris*, 25 N.E.2d 378, 380 (Mass. 1940).

⁵⁶ See *Mohler*, 102 P.2d at 1049; *Poole & Creber*, 124 S.W.2d at 27. Fraud concerns also cropped up with regard to artificial sweeteners. See *Cott Beverage Corp. v. Horst*, 110 A.2d 405, 408 (Pa. 1955).

⁵⁷ See, e.g., *Md. Coal & Realty Co. v. Bureau of Mines*, 69 A.2d 471, 474 (Md. 1949); *Merced Dredging Co.*, 67 F. Supp. at 607–08.

⁵⁸ See, e.g., *Edwards v. State Bd. of Barber Exm’rs*, 231 P.2d 450, 453 (Ariz. 1951) (quoting *State Bd. of Barber Exm’rs v. Cloud*, 44 N.E.2d 972, 977 (Ind. 1942)).

⁵⁹ BARNETT & BERNICK, *supra* note 25, at 271 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.)).

⁶⁰ See *id.* at 274–75.

⁶¹ 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.).

⁶² See LAWRENCE LESSIG, *FIDELITY & CONSTRAINT* 127–29 (2019).

⁶³ *Christian v. La Forge*, 242 P.2d 797, 807 (Or. 1952).

⁶⁴ *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 135 (W.D. Okla. 1954), *aff’d in part, rev’d in part*, 348 U.S. 483 (1955).

class legislation was softer than during the *Lochner* era. The district court in *Lee Optical*, for example, observed that a “statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good.”⁶⁵ Put differently, if legislation could objectively survive means-end scrutiny, it would not be invalidated on class-legislation grounds.

Two cases from the early 1950s illustrate how *Carolene Products*-era courts approached questions of whether a regulation was impermissible class legislation. First, in *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*,⁶⁶ the Supreme Court of California held that setting price schedules for dry cleaning services violated due process.⁶⁷ The court acknowledged that “legislation which aims to protect [the] general welfare through an initial protection of an industry is within the scope of the police power,” but concluded that fixing prices for dry cleaning served to protect the interests of only “a small segment of the general public.”⁶⁸ Since the court was unable to find a reasonable connection between price fixing and a legitimate object of the police power — it evidently did not find persuasive the argument that higher prices promoted sanitation⁶⁹ — it concluded the law impermissibly benefited dry cleaners at the expense of the general public.⁷⁰ And that was the exact opposite of a proper exercise of the police power, which promoted the interests of the public as a whole.

Second, in *Reingold v. Harper*,⁷¹ the Supreme Court of New Jersey upheld the state’s prohibition on self-service gasoline stations against a due process challenge.⁷² The court addressed concerns about class legislation, asserting that the police power “is not invocable for the economic protection alone of particular individuals or groups of individuals.”⁷³ But after reviewing testimony from the legislative hearings leading to the law’s enactment, the court concluded that plausible safety concerns underpinned the ban on self-service gas.⁷⁴ Given gasoline’s flammability, the legislature could act to prevent the negligent operation of gas pumps, including by requiring that gas station attendants fill drivers’ tanks.⁷⁵ The fact that the law benefited gas station

⁶⁵ *Id.* at 132.

⁶⁶ 254 P.2d 29 (Cal. 1953).

⁶⁷ *See id.* at 36.

⁶⁸ *Id.* at 35.

⁶⁹ *See id.* at 39 (Traynor, J., dissenting) (endorsing — in dissent — the argument that price controls improved dry cleaning sanitation).

⁷⁰ *See id.* at 36 (majority opinion).

⁷¹ 78 A.2d 54 (N.J. 1951).

⁷² *Id.* at 61.

⁷³ *Id.* at 58.

⁷⁴ *See id.* at 59.

⁷⁵ *See id.*

operators — who lobbied for the bill — by preventing competition from cheaper self-service stations did not vitiate the legislature’s public safety concerns.⁷⁶

B. Meaningful Means-End Analysis

If a law’s ends were within the police power’s legitimate sweep, courts applied a robust yet deferential form of means-end scrutiny. This analysis began with a presumption of validity, and although litigants could rebut that presumption, courts did not require an exact fit between means and ends. Instead, reasonableness was the touchstone.

1. *Rebuttable Presumption of Validity.* — In a significant departure from the *Lochner* era, *Carolene Products*-era courts assumed legislatures selected valid means to achieve their policy ends. This principle derived from *Carolene Products* itself, in which the Supreme Court announced that “the existence of facts supporting the legislative judgment is to be presumed.”⁷⁷ Lower courts obeyed this directive. For example, the South Carolina Supreme Court chastised plaintiffs challenging the constitutionality of a tax act for “ignor[ing] the presumption of accuracy of the legislative findings” and emphasized that “[t]he burden does not rest upon [the state] to prove the presumed.”⁷⁸ Likewise, the District Court for the District of Columbia observed that “[l]egislative acts, when subjected to judicial scrutiny, must be presumed to rest on a rational basis.”⁷⁹ A California federal court put it most succinctly: “Every legislative enactment is rightly presumed to be constitutional.”⁸⁰ Other courts made similar proclamations.⁸¹

The presumption of legislative validity, however, was always rebuttable, in contrast to modern rational basis review.⁸² Even courts that upheld regulations made sure to note that plaintiffs had the opportunity to disprove a law’s rational basis. When a Florida federal court allowed a state board to set minimum prices for dry cleaning, for example, it emphasized that although legislative findings receive deference, they are “not conclusive.”⁸³ Citing *Carolene Products*, the court stated that the constitutionality of a statute may always be challenged by disproving its

⁷⁶ See *id.*

⁷⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

⁷⁸ *State ex rel. Edwards v. Query*, 37 S.E.2d 241, 246 (S.C. 1946).

⁷⁹ *Carolene Prods. Co. v. Wallace*, 27 F. Supp. 110, 112 (D.D.C.), *aff’d mem.*, 307 U.S. 612 (1939).

⁸⁰ *Merced Dredging Co. v. Merced County*, 67 F. Supp. 598, 604 (S.D. Cal. 1946).

⁸¹ See, e.g., *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 132 (W.D. Okla. 1954); *Reingold*, 78 A.2d at 61; *Carolene Prods. Co. v. Mohler*, 102 P.2d 1044, 1049 (Kan. 1940).

⁸² See *Barnett*, *supra* note 25, at 857.

⁸³ *Publix Cleaners, Inc. v. Fla. Dry Cleaning & Laundry Bd.*, 32 F. Supp. 31, 33, 36 (S.D. Fla. 1940).

factual underpinnings.⁸⁴ These assertions were not empty words — on numerous occasions, courts invalidated economic regulations for lacking a rational basis.⁸⁵ For example, the district court in *Lee Optical* held that Oklahoma’s restrictions on opticians did not “bear ‘a real and substantial relation’” to improving Oklahomans’ vision and therefore violated due process.⁸⁶ When parties challenging economic regulations presented compelling evidence, courts were willing to declare the regulations unconstitutional.

The presumption of validity was particularly relevant in cases of factual ambiguity. Legislatures frequently regulate in areas of uncertainty and in response to new concerns;⁸⁷ in these cases, it may be impossible for states to *prove* that their selected means will yield their desired ends.⁸⁸ So *Carolene Products*—era courts deferred to legislative factual determinations as long as the facts were “fairly debatable.”⁸⁹ The controversy over filled milk bans highlighted this strand of judicial deference. On the one hand, some health experts viewed vegetable oil, a key filled milk additive, as an inadequate alternative to milk fat.⁹⁰ Filled milk, accordingly, could never take the place of regular milk in a healthy diet. Others viewed filled milk as a nutritious product — after all, it was the combination of skim milk and vegetable oil, two products considered (at the time) to be healthy.⁹¹ In the face of this scientific disagreement, courts generally allowed legislatures to decide which argument they found more persuasive.⁹² It was proper for the people’s elected officials, not the courts, to muddle through factual ambiguities.⁹³

2. *Assessing the Means.* — To determine whether a party had successfully rebutted the presumption of validity, courts scrutinized the relationship between means and ends. Rational basis review did not require a perfect fit — courts accepted that some harmful products

⁸⁴ See *id.* at 33 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938)). Likewise, in upholding a ban on the sale of filled milk, the Florida Supreme Court noted that if the plaintiffs could prove their filled milk was as nutritious as regular milk, the product could not be banned as a milk substitute. See *Setzer v. Mayo*, 9 So. 2d 280, 282–83 (Fla. 1942).

⁸⁵ See, e.g., *Lee Optical*, 120 F. Supp. at 138; *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29, 36 (Cal. 1953).

⁸⁶ *Lee Optical*, 120 F. Supp. at 138.

⁸⁷ See Stephanie Tai, *Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty*, 11 U. PA. J. CONST. L. 671, 672 (2009).

⁸⁸ See *id.* at 692.

⁸⁹ *Publix Cleaners*, 32 F. Supp. at 36; see also *Reingold v. Harper*, 78 A.2d 54, 60 (N.J. 1951).

⁹⁰ See *Carolene Prods. Co. v. Wallace*, 27 F. Supp. 110, 113 (D.D.C. 1939).

⁹¹ Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 406 (1988).

⁹² See *Setzer v. Mayo*, 9 So. 2d 280, 281 (Fla. 1942); *State ex rel. Mitchell v. Sage Stores Co.*, 141 P.2d 655, 663 (Kan. 1943), *aff'd*, 323 U.S. 32 (1944); *Wallace*, 27 F. Supp. at 113.

⁹³ Courts permitted legislatures to resolve factual disagreements on topics beyond the public health sphere. Debatable questions, of course, arose in a variety of contexts. For instance, during the *Carolene Products* era, courts often deferred to legislatures’ judgments about whether a product posed a risk of consumer fraud, see, e.g., *Carolene Prods. Co. v. Mohler*, 102 P.2d 1044, 1050, 1054 (Kan. 1940), or a service presented a safety hazard, see, e.g., *Reingold*, 78 A.2d at 59.

would escape regulation and some innocent goods would face exclusion from the market.⁹⁴ As a California federal court said: “Reasonableness [was] the test of police power, not scientific precision.”⁹⁵ Courts used a medley of phrases to describe this means-end inquiry. Some required the means to be “reasonably necessary” to achieving the state’s objective;⁹⁶ others said “the means [must] be reasonable and appropriate”⁹⁷ or must have a “reasonable relationship to the end sought.”⁹⁸ Some courts framed the inquiry in the negative, prohibiting measures that were “clearly unreasonable”⁹⁹ or that banned “unnecessary and unreasonable restrictions upon lawful occupations.”¹⁰⁰ Regardless of the exact phrasing, reasonableness was the touchstone.

To assess whether the means of a regulation were reasonable, courts would look at each justification for the statute and determine if actual — not hypothetical — facts suggested a connection between the justification and the regulation’s means.¹⁰¹ As discussed above, courts presumed that such facts existed,¹⁰² and the party challenging a regulation bore the burden of producing evidence that convinced the court otherwise.¹⁰³ If a regulation’s means supported any of its ends, the court would generally uphold the law as a valid exercise of the police power.¹⁰⁴ Alternative means of achieving the same ends were also a relevant consideration — if a given end could be more easily achieved by substantially less restrictive means, the chosen means were more likely to be arbitrary and unreasonable.¹⁰⁵

Merced Dredging Co. v. Merced County,¹⁰⁶ in which a California federal court considered a county ordinance requiring surface-mining

⁹⁴ See *Setzer*, 9 So. 2d at 281; *Wallace*, 27 F. Supp. at 112–13.

⁹⁵ *First Nat’l Benefit Soc’y v. Garrison*, 58 F. Supp. 972, 982 (S.D. Cal. 1945) (citing *Sproles v. Binford*, 286 U.S. 374 (1932)).

⁹⁶ *Md. Coal & Realty Co. v. Bureau of Mines*, 69 A.2d 471, 474 (Md. 1949).

⁹⁷ *Reingold*, 78 A.2d at 58.

⁹⁸ *Edwards v. State Bd. of Barber Exam’rs*, 231 P.2d 450, 452 (Ariz. 1951).

⁹⁹ *Merced Dredging Co. v. Merced County*, 67 F. Supp. 598, 610 (S.D. Cal. 1946) (citing *Lawton v. Steele*, 152 U.S. 133, 139 (1894)); see also *Publix Cleaners, Inc. v. Fla. Dry Cleaning & Laundry Bd.*, 32 F. Supp. 31, 34 (S.D. Fla. 1940) (similar language).

¹⁰⁰ *Md. Coal*, 69 A.2d at 474 (citing *Spann v. Gaither*, 136 A. 41, 45 (Md. 1927); *Jack Lewis, Inc. v. Mayor of Baltimore*, 164 A. 220, 223 (Md. 1933); *Lawton*, 152 U.S. 133; *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924)).

¹⁰¹ See, e.g., *Merced Dredging Co.*, 67 F. Supp. at 610; *Edwards*, 231 P.2d at 452–53.

¹⁰² See, e.g., *Merced Dredging Co.*, 67 F. Supp. at 610.

¹⁰³ See, e.g., *Setzer v. Mayo*, 9 So. 2d 280, 283 (Fla. 1942) (indicating the onus was on the plaintiffs to disprove a law’s factual basis).

¹⁰⁴ See, e.g., *Merced Dredging Co.*, 67 F. Supp. at 610 (invalidating a regulation only after concluding that “every constitutional purpose . . . would appear well served by” alternative, much less restrictive means).

¹⁰⁵ See, e.g., *id.* at 606; *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 137 (W.D. Okla. 1954); *Edwards*, 231 P.2d at 453 (quoting *State Bd. of Barber Exam’rs v. Cloud*, 44 N.E.2d 972, 977 (Ind. 1942)).

¹⁰⁶ 67 F. Supp. 598 (S.D. Cal. 1946).

operations to replace the soil they removed,¹⁰⁷ illustrate how this means-end analysis operated in practice. Merced County offered several justifications for its ordinance, none of which satisfied judicial scrutiny.

One of the county's justifications failed at the first step of the means-ends inquiry: The ends were illegitimate. Merced argued that the ordinance was necessary to protect the county's "historic lore" and "scenic attraction[s]."¹⁰⁸ But the county could not marshal the police power to protect these purely "aesthetic or sentimental considerations."¹⁰⁹ Scenic beauty was not an excuse to curtail economic rights.

The county's four other justifications were legitimate objects of the police power, but the means lacked a reasonable relationship to the ends. In three cases, the county essentially selected the wrong means. First, Merced claimed that water pooling in mined areas provided a breeding ground for mosquitoes and increased the risk of malaria transmission.¹¹⁰ Two pieces of evidence undermined this argument: An affidavit from the Field Superintendent of the Merced Mosquito Abatement District stated that the type of mosquito that carried malaria "never breeds in stagnant or foul water."¹¹¹ Merced also had instituted a mosquito abatement policy that included the mining company's land — efforts already were underway to prevent mosquito proliferation.¹¹² Because resoiling "would seem to be a decidedly arbitrary means of accomplishing ineffectively what could be effectively accomplished by" other means, it was an unreasonable method of mitigating malaria risk.¹¹³

The county next argued that preventing water pollution justified the ordinance.¹¹⁴ But resoiling — which involved dumping allegedly contaminated soil back into the place where pollution could seep into the water supply — would likely aggravate, rather than abate, water pollution.¹¹⁵ The state, moreover, already had laws on the books that addressed commercial pollution, rendering the ordinance unnecessary.¹¹⁶

Third, Merced claimed that leaving mounds of dirt and rock could create a public nuisance.¹¹⁷ Like with water pollution, however,

¹⁰⁷ *Id.* at 603 (quoting Merced County, Cal., Ordinance 253 § 2 (Sept. 1, 1945)).

¹⁰⁸ *Id.* at 607 (quoting Merced County, Cal., Ordinance 253 § 8 (Sept. 1, 1945)).

¹⁰⁹ *Id.* (citing *Welch v. Swasey*, 214 U.S. 91, 107 (1909); *St. Louis Poster Advert. Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919); *Varney & Green v. Williams*, 100 P. 867 (Cal. 1909); *Abbey Land & Improvement Co. v. San Mateo County*, 139 P. 1068, 1070 (Cal. 1914)).

¹¹⁰ *Id.* at 605 (quoting MERCED COUNTY, CAL., Ordinance 253 § 13 (Sept. 1, 1945)).

¹¹¹ *Id.* at 606 (quoting Affidavit of the Field Superintendent for the Merced Mosquito Abatement District, *Merced Dredging Co.*, 67 F. Supp. 598 (No. 378) [hereinafter Field Superintendent Affidavit]).

¹¹² *See id.* (citing Field Superintendent Affidavit, *supra* note 111).

¹¹³ *Id.*

¹¹⁴ *See id.* (quoting Merced County, Cal., Ordinance 253 § 7 (Sept. 1, 1945)).

¹¹⁵ *See id.* at 607.

¹¹⁶ *See id.* (citing *Yuba County v. Kate Hayes Mining Co.*, 74 P. 1049 (Cal. 1903); *Yolo County v. City of Sacramento*, 36 Cal. 193 (1868); CAL. CIV. CODE §§ 3479–3503 (Chase 1947); CAL. CIV. PROC. CODE §§ 731–735 (Chase 1947); CAL. PENAL CODE §§ 370–374 (Chase 1947)).

¹¹⁷ *Id.* (quoting Merced County, Cal., Ordinance 253 § 8 (Sept. 1, 1945)).

California maintained laws that required the mining company to abate any nuisances.¹¹⁸

Merced's final argument was a closer call. The county contended that preventing the destruction of "rich agricultural lands" justified the resoiling requirement.¹¹⁹ Preserving agricultural fertility was a legitimate object of the police power,¹²⁰ and a resoiling requirement — in the right circumstances — could be a constitutionally permissible means to achieve that end.¹²¹ But although Merced's means weren't wrong in kind, they were excessive as a matter of degree. The ordinance's "absolute mandate" that dredgers leave the land precisely as level as before mining began "greatly exceed[ed] the necessities of the situation" because a requirement that the surface be left "as level as reasonably possible would" preserve soil fertility.¹²² Likewise, the ordinance's requirement that dredgers leave no more than five acres unlevelled at any given time was excessive; soil preservation could be achieved "by plaintiff's resoiling . . . at any rate that best suits the circumstances of plaintiff's operations."¹²³ The court's analysis showed that means couldn't just bear *any* relationship to a law's ends; the link between means and ends had to be reasonable based on the "relevant facts."¹²⁴

Merced Dredging Co. exemplified the deferential, but not toothless, means-end scrutiny that courts applied during the *Carolene Products* era. It required regulations to operate within the police power. It looked at actual facts offered by the parties to determine if a reasonable relationship existed between the regulatory aims and the means employed. It assessed obvious alternative means of achieving the legislature's objectives. And although it gave the legislature broad latitude to govern, it struck down arbitrary laws.

In sum, during the *Carolene Products* era, courts applied deferential yet toothy scrutiny to economic regulations. Statutes enjoyed a presumption of validity, legislators had discretion to make sense of uncertainty, and laws didn't rise to the level of class legislation just because they incidentally benefitted certain groups. At the same time, naked class legislation violated due process, legislative means had to reasonably fit ends, and courts policed the police power's boundaries. In other words, the Constitution's due process guarantees protected litigants who could prove the legislature genuinely exceeded its authority.

¹¹⁸ *Id.* (citing *Carter v. Chotiner*, 291 P. 577 (Cal. 1930)).

¹¹⁹ *Id.* at 607–08 (quoting *MERCED COUNTY, CAL.*, Ordinance 253 § 13 (Sept. 1, 1945)).

¹²⁰ *See id.* at 608 ("Unquestionably the object is a laudable one. It must be conceded today that preservation of the fertility of our soil serves both the present and the future public welfare.").

¹²¹ *See id.* at 610 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

¹²² *Id.* at 611.

¹²³ *Id.* at 612.

¹²⁴ *Id.* ("[A] regulation valid . . . in given circumstances, may be invalid . . . for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts." (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934))).

III. THE RIGHT BALANCE

Economic liberty is entitled to constitutional protection, but it's also subject to reasonable regulation. *Carolene Products*-era review recognized this and struck the right balance between liberty and regulation.¹²⁵ The same cannot be said for either *Lochner*'s interventionism or *Lee Optical*'s extreme deference.

A. A Tradition of Liberty

The Constitution guarantees a measure of economic liberty.¹²⁶ "Economic liberty" is an amorphous term, but Barnett provides a good working definition: "[T]he right to acquire, use, and possess private property and the right to enter into private contracts of one's choosing."¹²⁷ This right was recognized at common law,¹²⁸ and the Framers viewed "the rights to acquire, possess, and protect property" as "natural, inherent, and inalienable."¹²⁹

Economic liberty retained its exalted position at the time of the Civil War Amendments. The idea of "free labor" coursed through abolitionist thought¹³⁰ and was a "unifying purpose" of the Reconstruction Amendments.¹³¹ The Civil Rights Act of 1866 emphasized contractual and property rights, indicating that those economic liberties were "[a]t the very core of civil rights" during Reconstruction.¹³² Thoroughly canvassing the historical record,¹³³ Professor Stephen Williams shows the drafters of the Civil Rights Act were particularly concerned about laws in southern states that subjected newly emancipated Black people to de facto forced labor.¹³⁴ To combat this system, Congress aimed to bolster the "right to make a contract to secure the privilege and rewards of

¹²⁵ In doing so, the *Carolene Products* era shows that it's possible to strike this balance. That's nothing to scoff at — some commentators have defended *Lee Optical*'s impotent form of rational basis review by arguing that any form of heightened scrutiny portends a return to the early twentieth century's laissez-faire jurisprudence. See Brandon R. Magner, Note, *Burying Lochner: Why Courts Should Reject Coming Attempts to Revive Economic Due Process*, 106 KY. L.J. 463, 503–04 (2017). The history of *Carolene Products* review should alleviate these fears.

¹²⁶ See Bernick, *supra* note 17, at 479 & n.1 (citing Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 604 (1976); *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 246–47 (1957); *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923); *Truax v. Raich*, 239 U.S. 33, 41 (1915)).

¹²⁷ Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 5 (2012).

¹²⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *427 ("At common law, every man might use what trade he pleased" (footnote omitted)).

¹²⁹ Barnett, *supra* note 127, at 7.

¹³⁰ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 205 (2004).

¹³¹ LESSIG, *supra* note 62, at 111.

¹³² Barnett, *supra* note 127, at 8.

¹³³ See Stephen F. Williams, "Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions, 53 U. COLO. L. REV. 117, 128–31 (1981).

¹³⁴ See *id.* at 128. Members of Congress frequently invoked pass requirements and vagrancy laws that forced Black people to work under exploitative conditions. See *id.* at 129.

labor.”¹³⁵ And both proponents and critics of the Fourteenth Amendment agreed the measure was passed in large part to safeguard the Civil Rights Act against both constitutional challenges and revision by future Congresses.¹³⁶ In light of this historical record, it’s clear that a primary purpose of the amendment was “the protection of occupational liberty” that was so central to the Reconstruction Congress’s handiwork.¹³⁷

Even in the modern era, when economic liberty receives scant protection, the Court has recognized constitutional protections for economic rights.¹³⁸ Justice Douglas, the author of *Lee Optical*, recognized that “[t]he right to work . . . [is] the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property.”¹³⁹ Modern courts may not rigorously scrutinize restrictions on occupational freedom, but they at least sometimes rhetorically carry the torch of the Fourteenth Amendment’s Framers.

Beyond its historical pedigree, there are theoretical and practical reasons to favor more searching review of economic regulations. By applying modern rational basis review to restrictions on economic liberty, the judiciary abdicates its responsibility to enforce the Constitution. On a theoretical level, this erodes the rule of law. Professor Tara Smith, for example, argues that rational basis review “allow[s] government actions that might be in the neighborhood of the Constitution’s boundaries, but are not within its limits,” which “exchanges the rule of law for the rule of ‘close enough.’”¹⁴⁰

Perhaps more important than theoretical concerns, this judicial abdication inflicts real harm on real people. Recall Sandy Meadows. The court’s decision to apply rational basis review allowed the state to enact what amounted to class legislation,¹⁴¹ undermining her constitutional right (at least as originally conceived) to pursue a lawful calling.¹⁴² The human consequences were disastrous.¹⁴³ And laws like Louisiana’s don’t only cheapen individual rights — they also transfer wealth upward. The state’s florist-licensing scheme enriched established market participants at the expense of people like Sandy, who have limited opportunities to find rewarding, good-paying jobs.¹⁴⁴ In an era of high

¹³⁵ *Id.* at 130 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (statement of Rep. Lawrence)).

¹³⁶ *Id.* at 128–29.

¹³⁷ *Id.* at 118.

¹³⁸ See Bernick, *supra* note 17, at 479.

¹³⁹ *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

¹⁴⁰ Tara A. Smith, *A Conceivable Constitution: How the Rational Basis Test Throws Darts and Misses the Mark*, 59 S. TEX. L. REV. 77, 98 (2017).

¹⁴¹ See *infra* notes 189–94 and accompanying text.

¹⁴² See *supra* notes 15–20 and accompanying text.

¹⁴³ See *supra* notes 12–20 and accompanying text.

¹⁴⁴ See Neily, *supra* note 3.

inequality and stagnant mobility,¹⁴⁵ the state shouldn't line the pockets of established interests on the backs of people like Sandy.

B. A Tradition of Deference

At the same time, the Fourteenth Amendment's history supports judicial deference. Although the Fourteenth Amendment shifted power from the states to the federal government, observers at the time of enactment didn't appear to read the amendment as a broad abrogation of states' police power. Arguing in favor of state authority, Professor Raoul Berger highlights that even the North "was apprehensive of undue interference with the States' right to order their own internal affairs."¹⁴⁶ And when critics of the amendment fretted that it would strip states of regulatory power, proponents pushed back strongly, arguing that the proposal wouldn't "destroy the sovereignty of a State."¹⁴⁷ Legislators distinguished "between a right itself and the regulation of the right"¹⁴⁸ and viewed the Fourteenth Amendment as entirely consistent with the principle that a state could regulate the conduct of its citizens, so long as its regulation was "reasonabl[e]."¹⁴⁹

Early judicial application of the Fourteenth Amendment bolsters this view. In *Davidson v. New Orleans*,¹⁵⁰ the Supreme Court took up the issue of whether a property assessment to fund drainage projects in New Orleans violated the property owners' due process rights.¹⁵¹ The Court determined it did not.¹⁵² On the way to that conclusion, Justice Miller, writing for the majority, expressed concern that a "strange misconception of the scope of" the Due Process Clause had developed.¹⁵³ The provision, he wrote, was:

looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.¹⁵⁴

The Court didn't see the Due Process Clause as a sword with which to disembowel the police power. In historian Professor William Nelson's view, by "avoid[ing] extreme positions and usually deferr[ing] to

¹⁴⁵ See Matthew Yglesias, *Rising Inequality Has Crushed the Dream of Upward Mobility*, VOX (Dec. 14, 2016, 8:30 AM), <https://www.vox.com/new-money/2016/12/14/13936920/inequality-mobility-chetty> [<https://perma.cc/73T4-YPVZ>].

¹⁴⁶ RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 52 (1989); see also *id.* at 17–19.

¹⁴⁷ WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 115 (1988) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (remarks of Rep. Woodbridge)).

¹⁴⁸ *Id.* at 120.

¹⁴⁹ *Id.* at 121.

¹⁵⁰ 96 U.S. 97 (1878).

¹⁵¹ *Id.* at 97–98.

¹⁵² See *id.* at 106.

¹⁵³ *Id.* at 104.

¹⁵⁴ *Id.*

legislative judgments” in cases like *Davidson*, “the late nineteenth-century Court” remained “[f]aithful to the compromises that had taken place during the framing and ratification of the [Fourteenth A]mendment.”¹⁵⁵

Beyond its historical basis, deference yields practical benefits. Even strident libertarians would agree that society profits from *some* measure of regulation in service of the public welfare.¹⁵⁶ Before Progressive Era reforms, for example, working and living conditions weren’t pretty — children filled urban factories, workplace hazards killed people on the job, and overcrowded slums bred disease.¹⁵⁷ In response, legislators sought to enact regulations that would provide the public with “unadulterated food, safer workplaces, decent housing, and fair business practices.”¹⁵⁸ Those are good things, and society benefits when the government has the latitude to pursue them.

C. Blending Liberty and Deference

Carolene Products rational basis review fits comfortably within a judicial tradition that protects economic rights while deferring to legislatures. The same cannot be said for *Lochner*’s activism¹⁵⁹ or *Lee Optical*’s abdication.

Consider first *Carolene Products* review’s soft prohibition on class legislation. During the *Carolene Products* era, pure class legislation remained beyond the scope of the police power. But legislation in service of legitimate ends that incidentally benefited specific groups survived judicial review. *Lochner*, by contrast, applied a much more aggressive prohibition on *A to B* legislation, striking down the hours-limitation statute in part because “many of the laws of [its] character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.”¹⁶⁰ In the Court’s view, the law “was simple class warfare.”¹⁶¹ The *Lochner* Court transformed the idea of class legislation into a broad

¹⁵⁵ NELSON, *supra* note 147, at 198.

¹⁵⁶ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 418 (2011) (“Many a Tea Party activist would hesitate before putting every state’s wage and hour and employment discrimination laws in jeopardy of judicial override.”).

¹⁵⁷ See Kirsten Swinth, *The Square Deal: Theodore Roosevelt and the Themes of Progressive Reform*, GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/essays/square-deal-theodore-roosevelt-and-themes-progressive-reform> [https://perma.cc/Z53D-VNQA].

¹⁵⁸ *Id.*

¹⁵⁹ There is, of course, a minority of scholars that sticks up for Justice Peckham’s much-reviled opinion. See, e.g., Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453, 454 (1985); Richard A. Epstein, *The Mistakes of 1937*, GEO. MASON U. L. REV., Winter 1988, at 5, 17. See generally DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011). The majority view, however, is that *Lochner* was an exercise in judicial overreach. Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987). This Note agrees.

¹⁶⁰ *Lochner v. New York*, 198 U.S. 45, 64 (1905).

¹⁶¹ LESSIG, *supra* note 62, at 129.

obstacle to economic regulation,¹⁶² something quite different from its original narrow prohibition on confiscatory legislation.¹⁶³ *Lee Optical* and its progeny erred in the other direction. Courts applying *Lee Optical* rational basis review have concluded that even “intrastate economic protectionism” — in other words, protecting industry *A* to the economic detriment of industry *B* — “constitutes a legitimate state interest.”¹⁶⁴ This view would have been utterly foreign to the framers of the Fourteenth Amendment, who were steeped in a legal culture that understood *A* to *B* legislation as an illegitimate exercise of state power.¹⁶⁵

Next, take the presumption of validity. By requiring plaintiffs to demonstrate the lack of a rational connection between the statutory means and ends, *Carolene Products* respected legislative determinations. *Lee Optical*, for its part, took this principle too far — the Court turned a rebuttable presumption into an effectively irrebuttable one.¹⁶⁶ And on the other end of the spectrum, *Lochner* — deeply skeptical about the validity of economic regulations¹⁶⁷ — appeared to put the onus on the state to justify its intrusion on individual liberty.¹⁶⁸

Relatedly, *Carolene Products*’s deference to legislatures in areas of factual ambiguity gave the police power appropriate room to breathe. Consistent with the original understanding of the Fourteenth Amendment, *Carolene Products* recognized that the amendment left significant room for reasonable regulation¹⁶⁹ and that deference to legislative fact-finding respected the compromises at the amendment’s core.¹⁷⁰ This approach contrasted with *Lochner*’s, under which courts overtly substituted their assessment of the available evidence for legislatures’.¹⁷¹ It also diverged from *Lee Optical*, where the Court suggested that the caprices of the legislature merited total deference, even when a law, in light

¹⁶² See *Lochner*, 198 U.S. at 64.

¹⁶³ See BARNETT & BERNICK, *supra* note 25, at 270–72 (discussing the early American bar on class legislation).

¹⁶⁴ *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004). The court ever so slightly cabined its holding by noting that protectionism would cease to be a valid state interest if a state statute “violat[ed] . . . a specific constitutional provision or other federal law.” *Id.* To say that a state cannot violate the Constitution or federal law is to not say much.

¹⁶⁵ See BARNETT & BERNICK, *supra* note 25, at 284.

¹⁶⁶ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (remarking that even “[f]or protection against *abuses* by legislatures the people must resort to the polls, not to the courts.” (emphasis added) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877))).

¹⁶⁷ See Barnett, *supra* note 25, at 860 (discussing the *Lochner* Court’s “presumption of liberty”).

¹⁶⁸ See *Lochner v. New York*, 198 U.S. 45, 59 (1905). Writing for the *Lochner* majority, Justice Peckham stated that restrictions on economic activity required a relatively “direct relation,” *id.* at 57, to the public welfare, and he emphasized the importance of an “individual . . . be[ing] free in his person and in his power to contract in relation to his own labor,” *id.* at 58.

¹⁶⁹ See *supra* note 149 and accompanying text.

¹⁷⁰ See *supra* note 155 and accompanying text.

¹⁷¹ In *Lochner*, the Court acknowledged that the case involved factual ambiguity, conceding that the baking profession posed some health risks. See *Lochner*, 198 U.S. at 59. No matter, said the Court, asserting — without evidence — that “[t]o the common understanding the trade of a baker [had] never been regarded as an unhealthy one.” *Id.*

of the available facts, appeared “needless” or “wasteful.”¹⁷² This approach allows states to restrict economic liberty at will — a power inconsistent with the Constitution’s protections for economic rights.

Finally, consider *Carolene Products*’s loose means-end scrutiny, which appropriately balanced economic liberty against the state’s legitimate regulatory powers. Courts applying this test demanded “[r]easonableness[,] . . . not scientific precision,” in the relationship between means and ends.¹⁷³ *Lochner*, by contrast, demanded a close — and perhaps unattainable — relationship between means and ends. In *Lochner*, not even statistical evidence casting doubt on bakers’ health adequately linked limits on bakers’ working hours to public health — the Court would have required even more conclusive evidence.¹⁷⁴ This was the type of “scientific precision” that courts no longer required by the *Carolene Products* era. On the other end of the spectrum, *Lee Optical* barely pretended to engage in means-ends scrutiny. Despite acknowledging that “[t]he Oklahoma law may exact a needless, wasteful requirement in many cases,” the Court hypothesized three reasons why the legislature may have thought the regulation necessary.¹⁷⁵ The Court remarked that a “law need not be in every respect logically consistent with its aims to be constitutional,”¹⁷⁶ but that’s not really the test it applied; the Court hardly required the Oklahoma law to be in *any* respect logically consistent with its aims.¹⁷⁷ In contrast, the *Carolene Products* test looked to actual facts to evaluate a law’s constitutionality and required a real connection between means and ends.¹⁷⁸ The history of the *Carolene Products* era showed that its form of rational basis review was a meaningful check on legislatures — courts frequently invalidated laws that failed to draw a meaningful connection between means and permissible ends.¹⁷⁹ But they did so without substituting judicial policymaking for legislative analysis.

In sum, only one of the three eras of twentieth-century economic rights jurisprudence — the *Carolene Products* era — is consistent with the nation’s judicial traditions of respect for economic liberty and deference to legislative exercises of the police power. *Lochner* recognized that economic rights are constitutionally protected but was unfaithful to the Fourteenth Amendment’s view that the states could reasonably regulate those rights. *Lee Optical* erred in the other

¹⁷² *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955).

¹⁷³ *First Nat’l Benefit Soc’y v. Garrison*, 58 F. Supp. 972, 982 (S.D. Cal. 1945) (citing *Sproles v. Binford*, 286 U.S. 374 (1932)).

¹⁷⁴ See *Lochner*, 198 U.S. at 59.

¹⁷⁵ *Lee Optical*, 348 U.S. at 487.

¹⁷⁶ *Id.* at 487–88.

¹⁷⁷ See *id.* at 487.

¹⁷⁸ See *supra* note 101 and accompanying text.

¹⁷⁹ See, e.g., *Christian v. La Forge*, 242 P.2d 797, 807 (Or. 1952); *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 135 (W.D. Okla. 1954).

direction, overemphasizing the tradition of deference while straying from the original understanding that the Fourteenth Amendment safeguards economic liberty. By charting a course between the shoals of *Lochner* and *Lee Optical*, the *Carolene Products* approach gives due respect to both the government's police power and individuals' constitutional rights.

IV. SANDY MEADOWS REVISITED

To illustrate how *Carolene Products*-era rational basis review would apply to real situations today, consider Louisiana's floral licensing regime — the one that ensnared Sandy Meadows. Unlike under the current rational basis analysis, Sandy would have had the opportunity to meaningfully challenge each of the state's justifications for the law. In her case, Louisiana advanced three. The court held that each provided a rational basis for the licensing requirements; under *Carolene Products*-era review, none would have passed muster.

First, the state argued that requiring florists to pass an exam improved florist quality.¹⁸⁰ This justification would have passed the first step of the rational basis test — consumer protection is a legitimate exercise of the police power.¹⁸¹ But the exam itself was not rationally related to florist quality. The *Meadows* plaintiffs presented testimony from florists who said that the skills tested on the exam were “totally outdated” and not relevant to their practice.¹⁸² The exam, moreover, was wildly subjective, with examiners giving applicants dramatically different scores for the same arrangements.¹⁸³ And no other state required such an exam.¹⁸⁴ On these facts, the state's consumer protection justification would have fallen apart.

Next, the state claimed that licensing was necessary to protect public health and safety. As in the case of consumer protection, protecting public health is a classic object of the police power.¹⁸⁵ But again, under *Carolene Products*-era review, the means wouldn't have fit the ends. In accepting the state's health and safety argument, the court relied on bare assertions from a state employee that licensed florists are “very diligent about not hav[ing] an exposed pick, not having a broken wire, not having a flower that has some type of infection” and that their

¹⁸⁰ *Meadows v. Odom*, 360 F. Supp. 2d 811, 823 (M.D. La. 2005).

¹⁸¹ See *supra* note 55 and accompanying text.

¹⁸² See Appellants' Brief at 11, 12 & n.3, *Meadows v. Odom*, 198 Fed. App'x 348 (5th Cir. 2006) (No. 05-30450).

¹⁸³ *Id.* at 13–15.

¹⁸⁴ Boehm, *supra* note 6. Although the *Meadows* court correctly noted that a lack of regulation in other states doesn't automatically mean that Louisiana's regulation is irrational, 360 F. Supp. 2d at 824, it raises a red flag. If licensing exams were a reasonable way to maintain florist quality, one would expect to see them in more than one state.

¹⁸⁵ See *supra* note 53 and accompanying text.

conscientiousness “prevents the public from having any injury.”¹⁸⁶ But the licensing commission’s own conduct undercut this rationale. The written component of the floral exam didn’t feature any questions about health or safety, and the commission didn’t keep records of floral safety issues or warn the public about safety risks.¹⁸⁷ One commissioner even admitted “that he doesn’t ‘pay any attention’ to the issue.”¹⁸⁸ And on a national level, the lack of injuries caused by unlicensed florists suggests that licensing is unnecessary to protect public safety. Like the consumer protection justification, the state’s health and safety argument would have wilted in the face of contradictory evidence.

Third, the state justified its law on protectionist grounds.¹⁸⁹ The court accepted this argument, holding that “a state’s intent to enhance the floral industry . . . is a legitimate government interest which is rationally related to a floral examination.”¹⁹⁰ Protectionism is quintessential class legislation, which is not a proper exercise of the police power.¹⁹¹ Even if the state hadn’t relied on protectionism to justify its law, the licensing scheme would have run afoul of *Carolene Products*’s soft prohibition on class legislation.¹⁹² As discussed, neither of the state’s alternative justifications were rationally related to a licensing exam. And licensed florists administered the exam, deciding whether to admit potential competitors to the business.¹⁹³ Language used by the Oregon Supreme Court in striking down a price-fixing statute fits like a glove: Louisiana’s law does not “hav[e] a well-recognized and direct bearing upon the health, happiness, and well-being of the public as a whole,” but instead is a “statute of primary interest to the [florist] trade itself.”¹⁹⁴

In addition to Louisiana’s argumentative defects, the *Meadows* case did not involve factual ambiguity that would have accentuated the presumption of validity and militated in favor of deference. The plaintiffs mustered evidence demonstrating that the licensing exam protected neither consumer welfare nor public health and safety.¹⁹⁵ And Louisiana didn’t present *facts* that showed otherwise. It offered testimony from a state employee (and licensed florist) who believed that the exam

¹⁸⁶ *Meadows v. Odom*, 360 F. Supp. 2d 811, 824 (M.D. La. 2005).

¹⁸⁷ Appellants’ Brief, *supra* note 182, at 26–27.

¹⁸⁸ *Id.* at 27.

¹⁸⁹ See *Meadows*, 360 F. Supp. 2d at 823. The state justified its regulation based on “the enhancement of industry reputation,” *id.* — a clever euphemism for protectionism.

¹⁹⁰ *Id.* at 824–25.

¹⁹¹ See *supra* notes 63–64 and accompanying text. This parallels the district court’s analysis in *Lee Optical*, where a licensing requirement enriched optometrists and ophthalmologists at the expense of opticians. *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 135 (W.D. Okla. 1954).

¹⁹² See *supra* note 65 and accompanying text.

¹⁹³ NEILY, *supra* note 1, at 1.

¹⁹⁴ *Christian v. La Forge*, 242 P.2d 797, 807 (Or. 1952).

¹⁹⁵ See *supra* text accompanying notes 180–88.

promoted safety,¹⁹⁶ but bare conjecture from a self-interested party doesn't create a factual dispute. Louisiana failed to bring the evidence back into equipoise; with the facts favoring the plaintiffs, deference would have been inappropriate under the *Carolene Products* framework.

In sum, under *Carolene Products*-era review, Louisiana could have defended its regulation as a measure to protect public health or consumer welfare — both legitimate exercises of the police power. But the lack of fit between those ends and the licensing means would have undermined those justifications. And no factual ambiguity would have supported deference. Since the regulatory scheme appeared to do no more than protect one industry at the expense of potential market entrants, a court applying *Carolene Products*-era review would have invalidated the licensing requirement.

CONCLUSION

Writing in 2022, Sixth Circuit Chief Judge Sutton summarized the state of rational basis review well: “[T]he current deferential approach to economic regulations may amount to an overcorrection in response to the *Lochner* era at the expense of otherwise constitutionally secured rights.”¹⁹⁷ True. But as the pendulum was swinging from *Lochner* to the modern rational basis standard, it passed through a period when courts properly calibrated individual rights and the states’ police power: the *Carolene Products* era. During this period, courts gave legislatures wide latitude to regulate the economy but meaningfully reviewed statutes to ensure that lawmakers had not acted in an arbitrary, unreasonable, or discriminatory manner. This jurisprudence struck the right balance between respecting the democratic process and vindicating Americans’ constitutional rights. Fortunately for all Americans, commentators¹⁹⁸ and courts¹⁹⁹ appear increasingly interested in applying a toothier version of rational basis review to economic regulations. *Carolene Products*-era rational basis review offers a path forward.

¹⁹⁶ *Meadows v. Odom*, 360 F. Supp. 2d 811, 824 (M.D. La. 2005).

¹⁹⁷ *Tiwari v. Friedlander*, 26 F.4th 355, 368 (6th Cir. 2022).

¹⁹⁸ See sources cited *supra* note 25.

¹⁹⁹ See, e.g., *Raffensperger v. Jackson*, 888 S.E.2d 483, 492 (Ga. 2023); *Patel v. Tex. Dep’t of Licensing & Regul.* 469 S.W.3d 69, 87, 88–90 (Tex. 2015); *id.* at 98 (Willett, J., concurring).