

Business Licensing and Constitutional Liberty

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Claims that the Constitution prohibits business licensing requirements have proliferated in recent years. The U.S. Court of Appeals for the District of Columbia Circuit recently concluded that a District requirement that tour guides obtain business licenses violated the First Amendment.¹ The Sixth Circuit likewise held that a licensing scheme for funeral directors violated due process and equal protection under the Fourteenth Amendment.² These cases mark a sea change in the treatment of economic liberty claims both by the courts and in U.S. legal culture.

In this Essay, I situate debates over the constitutional treatment of business licensing schemes in larger historical context. Doing so reveals the changing treatment of these schemes to be part of a trend that goes far beyond the regulation of licensing: the Constitution is increasingly being invoked as a trump against certain types of economic regulation. My thesis is that the central arguments currently marshaled in favor of extending stringent judicial review to business licensing regulations are untenable. These lines of reasoning have no logical endpoint. Individual rights, on this view, could trump any manner of governmental regulation in favor of free-market ordering.

These business licensing cases raise deep and pressing questions about the purpose and scope of rights and constitutional judicial review more broadly today. Underlying these debates are competing conceptions of constitutional liberty. One view, perhaps the ascendant one, reflects free-market libertarian values, whereas others understand the First and Fourteenth Amendments to reflect ideals such as democratic self-governance, anti-subordination, or civic

1. *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

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

republicanism. Resolving disputes about the constitutional status of business licensing requires that we grapple with those deeper questions.

I. A BRIEF HISTORY

In the modern era, until recently, business licensing, like most of life, was not the subject of constitutional litigation.³ Regulations requiring you to get a license before working as a doctor, a lawyer, or a candlestick maker (not to mention a tour guide or a securities trader), were instead part of the vast swath of non-constitutionalized economic life. If you did not like the business licensing regime in your area and asked a lawyer for advice, she would most likely have given you tips on how to achieve compliance or perhaps suggested that you organize politically to change the regulation. Challenging the licensing law under the Constitution would not have come to mind.⁴

Part of why your lawyer would not turn to the Constitution is because, since the 1930s, it has been black letter constitutional law that economic regulation is subject only to rational basis review—generally the most lenient type of explicit constitutional scrutiny. This well-established principle was largely the result of the New Deal settlement.

For several decades before the New Deal, however, the Constitution provided a stronger measure of defense against the regulation of economic life. Often called the *Lochner* era, that period from the end of the Gilded Age through much of the Great Depression has come to symbolize the judicial striking down of economic regulation. *Lochnerism* was an obstacle for New Dealers interested in expanding governmental intervention into economic affairs, including in response to the challenges of the Great Depression.⁵ In the late

3. Cf. *Slaughter-House Cases*, 83 U.S. 36 (1872); *Bradwell v. Illinois*, 83 U.S. 130 (1872); *infra* note 5.

4. For principally social and cultural reasons, well-socialized lawyers and judges do not identify constitutional concern in a host of cases in which they conceivably could do so. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004); Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346 (2015); Frederick Schauer, *The Politics of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613 (2015); Amanda Shanor, *The New Lochner*, 2016 WISC. L. REV. 133 [hereinafter Shanor, *The New Lochner*]; Amanda Shanor, *The First Amendment's Boundaries as Social Cohesion* (Aug. 18, 2016) (unpublished manuscript) (on file with author) [hereinafter Shanor, *The First Amendment's Boundaries*]. Business and occupational licensing, until recently, largely fell into that category.

5. See *Lochner v. New York*, 198 U.S. 45 (1905) (holding maximum hours law for bakers unconstitutional); see also, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage legislation for women); *Adair v. United States*, 208 U.S. 161 (1908) (striking down a federal statute that prohibited railroad companies from requiring that a worker

1930s, the Court repudiated *Lochner*, thereby rejecting its prior understanding of liberty and ushering in a more active regulatory state.⁶ Ever since, it has been generally accepted—if not unchallenged—law that economic regulation is subject only to rational basis review.⁷

The last two decades have arguably begun to unsettle that well-established principle. First and Fourteenth Amendment challenges to a wide array of economic regulations have proliferated—and many have been met with significant success. In the First Amendment context, plaintiffs across the country are increasingly invoking the Free Speech Clause as a shield against what a generation ago would have been viewed as ordinary economic regulation subject to lax, if any, constitutional review.⁸ Just this term, for example, the Supreme Court granted certiorari in *Expressions Hair Design v. Schneiderman*, a First

not join a labor union as a condition for employment). In early decisions, however, the Supreme Court took a relatively flexible approach to medical licensing, finding it within the proper exercise of the police power. For example, in *Dent v. West Virginia*, 129 U.S. 114 (1889), the Court rejected a challenge to a state law requiring physicians to obtain a certificate from the state board of health attesting to their qualifications. And, in *Hawker v. New York*, 170 U.S. 189 (1898), the Court again held that a law specifying the qualifications to practice medicine was a proper exercise of the police power.

6. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
7. This rule withstood significant practical and scholarly mid-century efforts to instantiate welfare rights in U.S. constitutional architecture. See, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1971); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Cf. William E. Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001); Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008).
8. In the immediate wake of the turn away from *Lochner*, the Supreme Court held that commercial speech was not subject to any constitutional scrutiny. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). It was not until the 1970s that the Court extended constitutional protection to commercial speech at all—and then only with a weaker form of review. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (explaining that the Constitution “accords a lesser protection to commercial speech that to other constitutionally guaranteed expression”). As I and others have described, the First Amendment emerged as an avenue for the revival of economic liberty claims by at least the 1970s. See C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 4 n.22 (1976); Shanor, *The New Lochner*, *supra* note 4. Cf. SAM LEBOVIC, *FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA* (2016) (exploring earlier libertarian strains of press jurisprudence); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. (forthcoming 2016) (arguing that the roots of First Amendment *Lochnerism* lie in the 1930s and 1940s).

Amendment challenge to the regulation of credit card swipe fees.⁹ Fast food plaintiffs, too, brought a First Amendment challenge to Seattle's ordinance raising its minimum wage.¹⁰ And a wide array of warning labels and disclosure requirements has been challenged as an infringement on speech—from nutrition labels to cigarette warning labels, to country of origin and sourcing disclosures.¹¹ These examples represent only a small fraction of the recent deluge of free speech challenges to economic regulation.

At the same time, Fourteenth Amendment economic liberty claims are emerging.¹² Although support for a return to robust substantive due process review of economic claims is still not generally accepted,¹³ there are prominent voices in the conservative legal community—some in this collection—that no longer take for granted that *Lochner* is or should be anticanonical.¹⁴

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9. At issue are regulations that require such fees to be included in the sticker price of a product so that a customer can get a discount for paying cash rather than incur a surcharge for paying credit. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2d Cir. 2015), *cert. granted*, No. 15-1391, 2016 WL 2855230 (Sept. 29, 2016) (mem.).
 10. *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015).
 11. See, e.g., *Am. Meat Inst. v. U.S. Dep't Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled in part by Am. Meat Inst.*, 760 F.3d 18; *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).
 12. Many, but not all, recent Fourteenth Amendment economic liberties claims involve business licensing regimes. See, e.g., *Young v. Ricketts*, 825 F.3d 487 (8th Cir. 2016) (First and Fourteenth Amendment challenge to state real estate licensing law); *Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012) (equal protection and due process challenge to milk regulations); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (substantive due process and equal protection challenge to funeral director licensing law); *Complaint for Declaratory and Injunctive Relief, Vogt v. Ferrell*, 2:16-cv-04492 (S.D. W. Va. May 19, 2016) (Fourteenth Amendment and Commerce Clause challenge to licensing of moving services); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (substantive due process and equal protection challenge to cosmetology licensing scheme).
 13. Arguments in favor of a return to *Lochner* remain a minority position today. Even recently, *Lochnerism* has been invoked as a criticism by jurists including Chief Justice Roberts and the late Justice Scalia. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010) (Scalia, J., concurring); *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting).
 14. For recent cogent arguments in this vein, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014); and George F. Will, *The 110 Year-Old Case That Still Inspires Supreme Court Debates*, WASH. POST (July 10, 2015), http://www.washingtonpost.com/opinions/110-years-and-still-goingstrong/2015/07/10/f30bfe10-2662-11e5-aae2-6c4f59b050aa_story.html [<http://perma.cc/UN63-E47Y>]. Cf. Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. (2015) (tracing recent shifts to developments in the intellectual framework of originalism). For earlier arguments against the rejection of *Lochner*-style judicial review of economic

Recent challenges to occupational licensing regimes under the First and Fourteenth Amendments are one facet of these larger trends. Raised as free speech claims, these challenges contribute to broader efforts to expand the scope of the First Amendment in economic life. When brought under the Fourteenth Amendment, occupational licensing cases seek to reinvigorate economic substantive due process and revive *Lochner*-type principles under their original constitutional hook. In either First or Fourteenth Amendment form, these cases contribute to a moment in which advocates are seeking more stringent review of economic liberty claims.¹⁵

Recent occupational licensing cases have provoked considerable disagreement and created several circuit splits. The Fifth Circuit and District of Columbia Circuit have diverged, for instance, over whether a requirement that tour guides acquire a business license violates the First Amendment.¹⁶ And the circuits have likewise split over whether, in the context of other business licensing regimes, a desire to favor one intrastate industry or group over another constitutes a rational basis under substantive due process.¹⁷ Occupational licensing is being pushed from being largely a non-constitutional issue to being a constitutional one.¹⁸

rights on the basis of laissez-faire economic principles, see Roger Pilon, *The Cato Institute's Center for Constitutional Studies*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 134, 135 (Lee Edwards ed., 2004); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 113-14, 203 (1980).

15. As Victoria Nourse has aptly described, constitutional review of individual rights (such as free speech) has become more stringent than the *Lochner* era's more flexible review. Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009). This means that if economic liberty claims were leveled up to today's individual rights claims (for example, by way of the First Amendment), they would rest on an even higher plane than they did during the *Lochner* era.
16. Compare *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (holding tour guide licensing requirements to be unconstitutional), with *Kagan v. New Orleans*, 753 F.3d 560 (5th Cir. 2014), cert. denied, 135 S. Ct. 1403 (2015) (holding licensing requirements to be constitutional), and *Billups v. Charleston*, -- F. Supp. 3d --, 2016 WL 3569534 (July 1, 2016) (denying motion to dismiss and preliminary injunction). See also Noah Feldman, *Free Speech Protects Tour Guides (Even the Ignorant Ones)*, Bloomberg View (July 12, 2016), <http://www.bloomberg.com/view/articles/2016-07-12/free-speech-protects-tour-guides-even-the-ignorant-ones> [<http://perma.cc/8NW8-TRVC>]. Cf. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014), cert. denied sub nom. *Liberty Coins, LLC v. Porter*, 135 S. Ct. 950 (2015) (holding precious metals licensing requirement to be economic activity, not speech).
17. Compare *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2016), cert. denied, 136 S. Ct. 1160 (2016), and *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), with *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), and *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). Cf. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).
18. It is becoming, in the words of Frederick Schauer, constitutionally salient. See Schauer, *The Boundaries of the First Amendment*, supra note 4.

What do we make of this emergent constitutional shift?¹⁹ A number of commentators and academics have critiqued these larger trends as *Lochner*-esque and therefore, at least implicitly, normatively undesirable.²⁰ That is not my point here. Like David Bernstein, Clark Neily, and a host of other commentators, I do not believe that an accusation of *Lochnerism* suffices as a normative conclusion about the good of stringent constitutional review.²¹ Nor can we reach a normative judgment based solely on the historical contention that at an earlier point in history the Court rejected stringent review of the regulation of economic life.²² We must instead ask if, and if so why, that arrangement is justified today.²³

The constitutional implications of business licensing schemes present hard questions: Could the government constitutionally prohibit individuals who lack political power from pursuing *any* remunerative profession? Regardless of one's perspective, the answer to this question is almost certainly no. But could the government prohibit such an individual from pursuing her *chosen* profession? And, if so, on what grounds? Those questions present much more difficult cases.

This short piece does not endeavor to define the precise scope of, or circumstances surrounding, any limits on business licensing regimes that may be constitutionally required. Rather, I want to focus on the key constitutional ar-

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19. I say emergent shift advisedly based on trends in cases in the Supreme Court and lower courts. The Court's membership change following Justice Scalia's death, however, will almost certainly affect the path of the law on these questions. Cf. Adam Liptak, *Supreme Court Nominee Could Reshape American Life*, N.Y. TIMES (Feb. 18, 2016), <http://www.nytimes.com/2016/02/19/us/politics/scalias-death-offers-best-chance-in-a-generation-to-reshape-supreme-court.html> [<http://perma.cc/92SF-V954>] (speculating about the jurisprudential effects of Justice Scalia's death).
20. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2685 (2011) (Breyer, J., dissenting).
21. See, e.g., David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287 (2016), <http://www.yalelawjournal.com/forum/the-due-process-right-to-puruse-a-lawful-occupation>; Clark Neily, *Beating Rubber-Stamps into Gavel: A Fresh Look at Occupational Freedom*, 126 YALE L.J. F. (2016), <http://www.yalelawjournal.org/forum/ beating-rubber-stamps-into-gavels>.
22. Cf. Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 772 (2016) (arguing that history is not helpful to counter contemporary libertarian originalists and reviewing DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014)); Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452 (2015) (noting the lack of a normative defense of the privileging of individual over economic liberties, despite the historical acceptance of this distinction).
23. See Amanda Shanor, *The Expanding Constitution and the Erosion of the New Deal Settlement* (Oct. 8, 2016) (unpublished manuscript) (on file with author) (providing normative arguments for an economic-sociopolitical rights distinction and arguing that historical arguments are insufficient).

guments that advocates have marshaled in opposition to such regimes. Leading arguments currently being made—and sometimes accepted by courts—create a host of problems of their own. Resolution of the hard questions surrounding constitutional challenges to business licensing demand at once a broader and more nuanced approach.

II. THE UNTENABILITY OF CURRENT ARGUMENTS AGAINST THE REGULATION OF BUSINESS LICENSING

Constitutional challenges to business licensing regimes are most typically brought under the First and/or Fourteenth Amendments. This Part examines the central arguments currently being marshaled by advocates in favor of stringent review of business licensing regimes with respect to each of those constitutional hooks.²⁴

A. Free Speech

First Amendment arguments in favor of robust rights to be free from occupational licensing requirements often focus on “speech” within the business undertaking. Advocates at the forefront of business licensing challenges have argued that certain “speaking occupations” (like, in their view, tour guides or interior designers) should uniquely qualify for stringent First Amendment scrutiny.²⁵ These claims are based on the contention—often implicit and almost never defended—that (1) all “speech is speech,” and (2) all types of “speech” should therefore be subject to the same stringent constitutional review.

Putting aside the rather amorphous issue of what the term “speaking occupations” should be read to encompass, this position raises a serious limiting principle problem. If the “speaking” nature of a profession were sufficient to

24. My focus here is on the primary public arguments and litigation strategies surrounding these cases. A number of prominent thinkers—including Judge Alex Kozinski, Richard Epstein, Randy Barnett, George Will, and David Bernstein—have come out in favor of a return to *Lochner*-type review of economic regulation. See, e.g., BARNETT, *supra* note 14; EPSTEIN, *supra* note 14; Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5 (2012); Randy E. Barnett, *Foreword: Why Popular Sovereignty Requires the Due Process of Law to Challenge “Irrational or Arbitrary” Statutes*, -- GEO. J.L. & PUB. POL’Y -- (forthcoming, 2016); David B. Bernstein, *The Mainstreaming of Libertarian Constitutionalism*, 77 L. & CONTEMP. PROBS. 43 (2014); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993). Their arguments are varied and more nuanced than I can do justice to in this short piece.

25. See, e.g., Brief of Plaintiffs-Appellants at 26-27, *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. Sept. 16, 2013) (No. 13-7063); Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 195-96 (2015).

trigger stringent review of the regulation of that profession, professional conduct such as malpractice and fraud would be entitled to stringent review as well. But neither has been traditionally subject to *any* First Amendment scrutiny—and advocates of applying more stringent review to the licensing of “speaking professions” generally do not seriously contend it should be.²⁶

Let’s take an example. If I am your doctor, and I recommend we amputate your leg (when, based on prevailing professional norms, we certainly should not), and you later sue me for malpractice, the claim is no less based on words than a tour guide who “speaks” for a living. “But,” you might say, “the malpractice example has a real-world harm—you cut off my leg!” Of course, you would be right. But that harm does not have any *analytically* different relationship to speech than the sorts of harms—health and safety, say—that licensing seeks to address in the first instance. The harms that may flow from fraud or malpractice are no less related to the “speakingness” of a “speaking occupation.”²⁷

As I and others have explored, it has never been the case that all “speech” or expression has been subject to constitutional review, let alone stringent scrutiny. Most of life, including life in words and expressive activities, falls (at least as a practical, if not analytical matter) entirely outside of the First Amendment’s ambit.²⁸ This includes all variety of activities from the compelled filing of tax returns to ordinary contract law to the discovery rules in federal courts (all words on a page); the regulation of perjury, fraud, and conspiracy; rules about fiduciary duties; much of securities, antitrust, and trademark law; and Title VII’s workplace harassment provisions.

Given the pervasiveness of speech and expression, were it otherwise, the First Amendment could be invoked against nearly any regulation.²⁹ It is not an overstatement to say that treating all words as “speech” entitled to strict constitutional scrutiny would render self-government as a practical matter impossible.³⁰ In concrete terms, it would require either a radical reconfiguration of the modern administrative state—including the drastic curtailing of the work of

26. See, e.g., Sherman, *supra* note 25. See generally Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016) (analyzing the constitutional treatment of professional speech).

27. See Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. 165, 178 (2015); Shanor, *The New Lochner*, *supra* note 4, at 181-82.

28. Frederick Schauer has termed these sorts of activities “patently uncovered speech.” See Schauer, *Out of Range: On Patently Uncovered Speech*, *supra* note 4, at 346; see also Shanor, *The New Lochner*, *supra* note 4, at 177-83; Shanor, *The First Amendment’s Boundaries*, *supra* note 4, at 29; Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law* 5 (Harvard Public Law, Working Paper No. 16-26, 2016), <http://ssrn.com/abstract=2770774> [<http://perma.cc/CZQ4-462N>].

29. See, e.g., Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169 (2012).

30. See Post & Shanor, *supra* note 27; Shanor, *The New Lochner*, *supra* note 4.

agencies such as the Securities and Exchange Commission, Federal Trade Commission, and Consumer Financial Protection Bureau—or the significant watering down of stringent review. Advocates in favor of stringent First Amendment protection against business licensing fail to contend with this logical conclusion of their argument.

B. Substantive Due Process

Litigators of the business licensing cases today also seek to strengthen the bite of economic substantive due process by identifying crosscutting bases for economic regulation that can be deemed irrational.³¹ In so doing, they aim to do away with the rational basis test altogether in favor of more stringent review.³²

Their central contention is that licensing regimes implicate a sort of favoritism of one intrastate industry or group over another (say, dentists over teeth whitening businesses). Advocates argue that this difference in treatment should suffice to trigger more searching constitutional scrutiny. At the least, they assert, favoritism should trigger so-called “rational basis with bite,” of the kind applied in cases like *City of Cleburne v. Cleburne Living Center* and *Romer v. Evans* in the context of regulations based on animus against a group.³³

This argument that any line drawing between groups should necessarily trigger heightened constitutional scrutiny is problematic in several respects. First, if “favoritism,” defined as broadly as advocates urge, were an illegitimate legislative basis, almost any sort of regulation would be suspect. The Supreme Court confronted this issue in *Fitzgerald v. Racing Association of Central Iowa*, an equal protection challenge to a state law that taxed riverboat slot machines more favorably than racetrack slot machines. The Court applied ordinary rational basis principles and rejected the challenge, explaining that “[a]fter all, if every subsidiary provision in a law designed to help racetracks had to help those racetracks and nothing more, then (since any tax rate hurts the racetracks when compared with a lower rate) there could be no taxation of the racetracks at

31. See sources cited *supra* note 17.

32. See, e.g., BARNETT, *supra* note 14; Evan Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 GEO. MASON L. REV. 479 (2016); Clark Neily & Evan Bernick, *Putting The Rational Basis Test to the Test*, INST. FOR JUSTICE (2016), <http://ij.org/ll/april-2016-volume-25-issue-2/putting-rational-basis-test-test> [<http://perma.cc/Y2RN-H3FB>].

33. *Powers v. Harris*, 379 F.3d 1208, 1223-25 (10th Cir. 2004) (discussing and rejecting plaintiffs’ argument that rational basis review with a bite, as articulated in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) and *Romer v. Evans*, 517 U.S. 620 (1996), should apply to the regulation of economic issues) (citing Gayle Lyn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987)).

all.”³⁴ As the Court rightly recognized, some degree of line drawing—that is, favoring one group, behavior, or activity over another—is necessary to legislate.³⁵

Relatedly, advocates argue that restrictions on economic liberty should be treated as analogous to restrictions on other sorts of individual rights (such as political liberties), which generally receive heightened constitutional scrutiny. All manner of “rights,” the argument goes, are equal; and all should be subject to stringent review. Evan Bernick of the Institute for Justice, for instance, has argued that “the Court must insist that the government may *never* restrict people’s peaceful exercise of their liberty without an honest, reasoned justification” because there should be “no such thing as a second-class right, any more than a second-class citizen.”³⁶ On this view, there is no articulated limit to the opt-out “rights” that courts should recognize and subject to stringent review.

It is easy to think of examples that draw the analytical limits of this argument into serious question. Do I have a constitutional right against your employment claim because I have a liberty to racially discriminate? A right against your slip and fall suit because I have a liberty to leave puddles of water in my building? A right against a criminal fraud charge because I have a liberty to say (that is, lie about) whatever I want? The problem, which remarkably bears repeating, is that individual liberties—at least if they are treated as trumps against lawmaking and regulation—must not be infinite if we care to live in an organized, let alone just, society.³⁷

34. *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 108 (2003); see also *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) (“It is now settled that States ‘have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.’”).

35. See, e.g., *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2016); *Powers*, 379 F.3d 1208.

36. Evan Bernick, *Griswold at 50: An (Incomplete) Constitutional Revolution and Its Meaning Today*, HUFFINGTON POST (June 9, 2016, 11:43 AM), http://www.huffingtonpost.com/evan-bernick/griswold-at-50-an-incompl_b_7544458.html [<http://perma.cc/Q75B-NENV>] (arguing that the problem with *Griswold*’s protection of the right of privacy was that the unenumerated rights revolution did not go far enough). It is worth noting that Bernick’s argument is not limited to business licensing cases. This litigation strategy may have intellectual roots, in part, in the work of scholars like Richard Epstein, who has argued that “all individual interests, whether they are classified as economic, expressive, or intimate,” should be treated the same. EPSTEIN, *supra* note 14, at 305.

37. Several prominent libertarian academics and advocates, including those who support stringent constitutional review of business licensing regimes, recognize that there must be *some* limit to the principle that economic rights should trump the government’s ability to regulate. See, e.g., BARNETT, *supra* note 14, at 262-63 (maintaining that the government should retain its ability to regulate property, contract, and much of criminal law); Gary Johnson, *A*

The contention that all rights (or in the context of First Amendment arguments, all speech) must be treated the same implicates a deeper problem: the argument assumes both the scope of what constitutes a “right” and the *purpose* of their stringent judicial review. Even on their own terms, advocates lack accounts of why all “rights” should qualify for stringent review (that is, of the purpose of the doctrinal architecture of the First or Fourteenth Amendments), or for that matter what activities fall within the scope of the “rights” subject to that heightened review. Presumably, few of those advocates would accept positive welfare rights, for instance, as “interests” that deserve heightened constitutional scrutiny—as a civic republican view might. The broad arguments against the regulation of business licensing instead appear to presuppose that the purpose of the right invoked, be it the First or Fourteenth Amendment, is to defend market ordering unencumbered by government regulation. They reflect, in so doing, a certain vision of liberty defined by individual market choice and freedom *from* government. These views are, however, not the necessary or only understanding of liberty or the purpose of either the First or Fourteenth Amendments. They are also rarely if ever explicitly justified.

CONCLUSION

The fact of this conversation—of these cases, of this collection—sheds light on deep questions in constitutional discourse today. The ambit of the Constitution’s more stringent review is being pushed to expand more broadly into economic affairs. These shifts raise deep questions about our constitutional system. They challenge us to ask what sorts of activities should be devoted to politics (as protected by law or no judicial review) versus law (as defended by more stringent scrutiny). They challenge us to consider substantively conflicting notions of liberty and their relationship to constitutional review—including whether liberty is only freedom *from* regulation, or also freedom *of* self-government. To date, however, the chief public arguments in favor of more

Message from Gov. Gary Johnson for Libertarian Delegates, FACEBOOK (May 22, 2016), <http://www.facebook.com/govgaryjohnson/posts/10153109454754364> [http://perma.cc/FS62-ZC2P] (taking a position in favor of anti-discrimination laws); EPSTEIN, *supra* note 14, at 55, 78 (arguing that prohibitions on fraud should remain permissible, as should restrictions on abortion and sexuality).

Likewise, many deregulatory First Amendment litigants forswear challenging the exclusion of commercial fraud from First Amendment coverage, even though that position is not consistent with their argument that *Reed v. Town of Gilbert* should be extended to abolish the commercial speech doctrine. See, e.g., Amicus Curiae Brief for The Chamber of Commerce of the United States of America in Support of Plaintiff-Appellee and Affirmance of the Decision Below, *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (No. 11-5332).

stringent constitutional review of occupational licensing regimes have not addressed themselves to, let alone answered, those questions.

Whether or not business licenses improve health and safety or promote protectionism are important questions for the political branches. But the fact of legislative line drawing or “speech as such” does not make them ones for heightened constitutional review. Without a principled limit on when and how the Constitution can be invoked as a shield against economic regulation, we will embrace a world sharply tilted against democratic governance.

But no matter whether we agree or disagree about the status of business licensing under various constitutional provisions or in differing contexts, these cases highlight the need to reconsider the purpose and scope of what stringently protected constitutional liberties are and should be today. Is the purpose of the First or Fourteenth Amendment market freedom? Democratic self-government? Or other ideals? To answer those questions, it is not enough to look narrowly at the issue of business licensing or to point to line drawing or speech as such. Instead, we must squarely consider competing substantive understandings of constitutional liberty within the context of broader shifts in contemporary legal culture and jurisprudence.

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