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NO SUCH THING: LITIGATING UNDER THE RATIONAL BASIS TEST

Clark Neily*

Introduction

The original legal definition of insanity is the inability to tell right from wrong.[1] So it is the first irony of the "rational" basis test that it is, according to that definition, insane. The word "basis" is likewise a misnomer, since the rational basis test is concerned not with the *actual* basis for challenged legislation, but with speculative and hypothetical purposes instead. Finally, the word "test" is inappropriate, at least insofar as it suggests some meaningful analytical framework to guide judicial decision-making, because the rational basis test is nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens to be shaking it and with what level of vigor.[2]

Mendacious as the rational basis test is in name, however, that is nothing compared to the intellectual dishonesty it engenders in actual litigation, where it produces a variety of bizarre phenomena that would never be tolerated in any other setting. These include the spectacle of judges simultaneously recognizing and refusing to protect fundamental constitutional rights; permitting government lawyers and witnesses to misrepresent—or at least disregard—material facts; preferring conjecture over evidence; saddling plaintiffs with a burden of proof that is technically impossible to discharge; abandoning judicial neutrality; and blatant—but unacknowledged—misapplication of the test in select cases to achieve preferred outcomes.

* Senior Attorney, Institute for Justice. http://www.ij.org.

[1] M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

[2] For a recent example, compare the majority and dissenting opinions in *Ferdon v. Wisconsin Patients Compensation Fund*, 701 N.W. 2d 440 (Wis. 2005) analyzing the rationality of damages caps and other medical malpractice-related tort reforms.

The purpose of this essay is to help expose the rational basis test for the sham that it is and to show how application of the test in actual litigation perverts our system of justice.

I. The History of the Rational Basis Test

The rational basis test was invented in the Supreme Court more than 100 years ago,[3] and it acquired prominence as a standard of review in the years following the "constitutional revolution" of the New Deal era, when the Supreme Court suddenly switched course and approved Congress's massive usurpation of power under the Commerce Clause, abandoning such quaint concepts as the "sacred right of labor" and the sanctity of contract along the way. Beginning with such cases as *West Coast Hotel v. Parrish*,[4] *Nebbia v. New York*,[5] and *United States v. Carolene Products*,[6] the Court made clear that the federal courts would no longer provide meaningful judicial review of economic regulations, particularly those affecting occupational freedom and property ownership.

The Court's retreat from the pre-New Deal era, when it performed balanced but meaningful review of regulations affecting economic liberties, followed an asymptotic curve of increasing deference that approached its limit in *Williamson v. Lee Optical*.[7] That case involved the constitutionality of an Oklahoma statute that permitted only licensed ophthalmologists and optometrists to, among other things, fit eyeglass frames to a person's face or duplicate lenses, services that in most other states were commonly (and much less expensively) performed by opticians.[8] No serious person would believe the purpose of that law was really to protect public health and safety—any more than they would believe the "filled milk" regulations at issue in *Carolene Products* were really about infant nutrition.[9] But the Supreme Court nevertheless upheld the Oklahoma law on the grounds that the legislature *might conceivably* have been motivated by health and safety concerns, no matter how clear it was that in fact the purpose was pure economic protectionism.

The Supreme Court has practically had to invent a new vocabulary to make clear-just how utterly insubstantial the rational basis test is as a standard of judicial review. In *Beach Communications v. FCC*, for example, the Court explained that "if there is any conceivable state of facts that could provide a rational basis" for a challenged law, it will survive rational basis review.[10] And because the Court "never

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[3] *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 132 (1877) ("If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did.").
[4] 300 U.S. 379 (1937).
[5] 291 U.S. 502 (1934).
[6] 304 U.S. 144 (1938).
[7] 348 U.S. 483 (1955).
[8] *See id.* at 485 n.1.
[9] For a detailed description of the shameful history of the filled milk statutes at issue in *Carolene Products* and related cases, *see* Geoffrey Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (1987).
[10] 508 U.S. 307, 313 (1993).

require[s] a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature."[11] Thus, not only is the government invited to dream up entirely *post hoc* rationalizations for challenged legislation, it has "no obligation to produce evidence" in support of those rationalizations either.[12]

When it comes to certain constitutional rights—particularly the right to earn a living in the occupation of one's choice—the Supreme Court finds itself in a remarkable conundrum. On the one hand, the Court has repeatedly acknowledged the existence and importance of the right of occupational freedom, the common law heritage of which is beyond dispute.[13] On the other hand, the post-New Deal Court has made clear that it has no interest whatsoever in actually defending the right to earn a living (at least outside the context of racial and gender discrimination, interstate commerce clause cases, and other unique situations). Thus, instead of declaring that it no longer exists, the Court achieved essentially the same result by inventing a fictive standard of review that enables judges to *speak* as if the right of occupational freedom still exists, without actually having to *act* as though it does.

Part II of this essay briefly discusses how occupational licensing regulations have been abused in this country and describes the Institute for Justice's efforts to restore some meaningful level of judicial review of those regulations. In the third and final part, I discuss what it is actually like to litigate a rational basis case and explain what happens when litigants, lawyers, and judges attempt to apply in good faith a legal standard that is nothing more than a rhetorical fig leaf for the wholesale abandonment of a judicially disfavored, but historically well-established and unquestionably "fundamental," constitutional right.

II. The Abuse of Occupational Licensing

Since its founding in 1991, a core mission of the Institute for Justice (IJ) has been to challenge occupational licensing laws aimed not at protecting public health and safety or preventing consumers from being exploited, but instead at protecting existing businesses from competition. Because the rational basis test is so shamelessly pro-government, to have even the slightest chance of prevailing, IJ must start with laws that are so outrageous, so palpably unjust, that it is impossible to take seriously any assertion that they might plausibly have been enacted to promote genuine public policy objectives. Thus, IJ's economic liberty cases have involved everyone from African hairbraiders forced to spend hundreds of hours learning totally irrelevant cosmetology techniques, to Las Vegas limousine drivers excluded from the world's most lucrative market by a state-sanctioned transportation mo-

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[11] *Id.* at 315.
[12] Heller v. Doe, 509 U.S. 312, 320 (1993).
[13] *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 211–17 (2003) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *427 ("At common law every man might use what trade he pleased.")).

nopoly, to would-be florists in Louisiana who must pass an utterly archaic, grossly subjective, and arbitrarily-graded licensing exam just to arrange and sell flowers.

Government creation of occupational monopolies like these at the behest of politically powerful special interests has a long, sordid, and well-documented history at common law. English monarchs often rewarded supporters and toadies by granting them monopolies on everything from the importation of particular commodities to the manufacture of playing cards and other goods.[14] Indeed, one of the iconic events leading up to the American Revolution—the Boston Tea Party—was prompted by colonists' frustration with (and attempts to avoid) the legal monopoly on the importation of tea that had been granted by the Crown to the East India Company.[15] Concern about the evils of state-granted monopolies was so prevalent at the founding that four states—Massachusetts, North Carolina, New Hampshire, and New York—included prohibitions against monopolies in their proposed bills of rights when ratifying the Constitution.[16] Although the anti-monopoly provision never made it into the Federal Constitution, many states included such provisions in their own constitutions.[17]

All too predictably, American politicians proved no less eager than their British forebears to curry favor with special interests by erecting blatantly protectionist economic regulations designed to thwart fair competition.[18] Such abuses became particularly acute in the mid-to-late Nineteenth Century, when waves of immigrants and newly emancipated African-Americans began competing with, and threatening the economic primacy of, entrenched interests.

Politicians of the era reacted to this sudden influx of cheap labor exactly the way experience, public choice theory, and common sense would predict: by enacting legislation designed to promote the self-interested economic agenda of the politically powerful establishment at the expense of the politically disenfranchised, including Irish immigrants, European Jews, Catholics, Asians, African-Americans, and, as increasing numbers of them began leaving the home and entering the workforce, women.

Of course, just as they are today, politicians of the era were savvy enough to clothe these blatantly protectionist occupational regulations in the mantle of public interest. For example, a New York law that forbade the making of cigars in "tenement-houses" was presented as a health and safety measure,[19] even though its

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[14] *Id*. at 211–17.
[15] *Id*. at 218.
[16] *See* 1 THE DEBATE ON THE CONSTITUTION 944 (Bernard Baylin ed., 1993); 2 *id*. at 542, 551, 571.
[17] *See, e.g*., OKLA. CONST. art. II, § 32; N.H. CONST. art. LXXXIII; N.C. CONST. art. I, § 34; TEX. CONST. art. II, § 4; WASH. CONST. art XII, § 22.
[18] *See* Gibbons v. Ogden, 22 U.S. 1 (1824) (striking down New York's grant to a private party of a 30-year monopoly on the passenger ferry trade between New Jersey and Manhattan).
[19] *In re* Jacobs, 98 N.Y. 98, 103 (1885) ("An act to improve the public health by prohibiting the manufacture of cigars . . . in tenement houses.").

obvious purpose was to put immigrant cigar-makers, who typically worked from their homes, out of business.[20] Similarly, regulations in San Francisco and other California cities forbidding the operation of wooden laundries were supposedly enacted to reduce the risk of fire—not to victimize Chinese immigrants who, as it so happened, tended to own wooden laundries while white-owned laundries were generally made of brick or stone.[21]

Meanwhile, so-called "emigrant agents," who traveled around the South encouraging newly freed African-Americans to move west to work at understaffed cotton plantations in Mississippi and Texas, were subjected to exorbitant "registration fees" and occupational taxes—not to thwart the emigration of cheap labor, of course, but simply to ensure proper oversight and regulation of their activities.[22] More blatant was the enactment of "Black Codes," many of which contained ostensibly race-neutral provisions such as curfew laws that were, in application, clearly designed to prevent African-Americans from exercising their hard-won economic liberties. This led to the enactment of the Civil Rights Act of 1866, which guaranteed the rights of all citizens to, among other things, make and enforce contracts, hold and convey property, and enjoy the "full and equal benefit of all laws and proceedings."[23] Concerns about the constitutionality of the act prompted the enactment of the Fourteenth Amendment, and specifically the Privileges or Immunities Clause, which the Supreme Court quickly eviscerated in the infamous *Slaughter-House Cases*.[24]

For more than fifty years following the enactment of the Fourteenth Amendment, the U.S. Supreme Court, state supreme courts, and lower federal and state courts recognized the right of occupational freedom—which they often referred to as the "sacred right of labor"—and accorded it equal dignity with other constitutional rights. Far from the Lochnerian caricature that has become popular in the post-New Deal era, courts did not reflexively reject any and all occupational licensing regulations. To the contrary, judges struggled mightily to balance the legitimate interests of government in serving genuine public purposes with the widespread and historically indisputable tendency of politicians to shamelessly sell their occupational licensing power to the highest-bidding special interests.[25]

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[20] *Id*. at 113–15.
[21] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[22] DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 8–27 (2001).
[23] Civil Rights Act, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981-1982 (2000)); *see, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389 (1992).
[24] 83 U.S. (16 Wall.) 36 (1873). There is remarkable consensus among commentators that the *Slaughter House Cases* were wrongly decided. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting) ("Legal scholars agree on little beyond the conclusion that the [Privileges or Immunities] Clause does not mean what the Court said it meant in 1873.").
[25] *See, e.g.,* Lochner v. New York, 198 U.S. 45, 54–58 (1905) (noting there have been "numerous instances" in which the Court upheld workplace regulations, "even in border cases," when the regulations had a "direct relation" to promoting legitimate health, safety, or welfare objectives).

Thus, contrary to much of the scholarly criticism, the question in the paradigmatic case of the pre-New Deal era, *Lochner v. New York*,[26] was not whether the government had the power to mandate various occupational regulations (including the maximum-hours law for the bakers at issue in that case), but the level of scrutiny to which courts should subject such regulations when they were challenged.[27] Again, the Supreme Court was simply—and sincerely—trying to find the right balance between respecting the legitimate power of government to regulate economic activities in the service of legitimate public concerns with the well-documented tendency of politicians to abuse that power. That dynamic persisted until the mid-1930s when, quite suddenly, the Supreme Court simply threw in the towel and declared the federal judiciary to be out of the business of subjecting economic regulations to any meaningful level of scrutiny.[28]

While there is much scholarly debate about whether President Roosevelt's court-packing scheme was the proximate cause of the Supreme Court's so-called "switch in time,"[29] there is no disputing the remarkable speed with which the Court abandoned the field of economic regulation to the political branches. Had legislatures grown somehow less prone to manipulation and corruption when it came to occupational regulations? They had not. Had the ability to choose the field and terms of one's employment somehow grown less important, less central to citizens' "pursuit of happiness" and to America's conception of itself as the "land of opportunity"? It had not. Nevertheless, for reasons that are beyond the scope of this paper (and that remain the subject of fascinating academic debates[30]), the Supreme Court decided it wanted no further part in protecting various economic liberties, including the right of occupational freedom. The rational basis test became the vehicle for that wholesale abdication of responsibility.

III. Litigating Rational Basis Cases

Having set the stage, it is time to explore the bizarre world of rational basis litigation. As we shall see, the attempts of courts and litigants to apply the thoroughly fraudulent rational basis test to real world court proceedings as if it were a genuine legal standard lead to bizarre and sometimes humorous results.

1. *Rhetoric versus reality*. From its earliest days, the Supreme Court has recognized a constitutional right of occupational freedom.[31] Many justices have in fact

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[26] 198 U.S. 45 (1905).

[27] *Compare id*. at 56–60 *with id*. at 66 (Harlan, J., dissenting) ("Speaking generally, the state . . . may not unduly interfere with the right of the citizen to enter into contracts" and to "earn his livelihood by any lawful calling.").

[28] A useful chronology is set forth in Daniel A. Farber, *Who Killed Lochner? The Constitution and the New Deal*, 90 GEO. L.J. 985, 997 (2002) (book review).

[29] *See, e.g.*, Michael Ariens, *A Thrice Told Tale, Or Felix the Cat*, 107 HARV. L. REV. 620 (1994).

[30] *See, e.g.*, Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3 (1999).

[31] *See, e.g.*, Dent v. West Virginia, 129 U.S. 114, 121 (1889) ("[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to

gone out of their way to emphasize that the right to earn a living in one's chosen field is one of the most fundamental rights that human beings possess. As Justice Field explained in his eloquent *Slaughter-House* dissent:

> And when the Colonies separated from the mother country *no privilege was more fully recognized or more completely incorporated into the fundamental law of the country* than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others.[32]

And here is Justice Sutherland speaking for a majority of the Court sixty years later in *New State Ice Co. v. Liebmann*: "Under [the Fourteenth Amendment] nothing is more clearly settled than that it is beyond the power of the state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable or unnecessary restrictions upon them."[33] According to Justice Douglas "the right to work . . . [is] the most precious liberty that man possesses."[34] Indeed, the importance of this right is such that even decades after abandoning it to the legislative process, the Supreme Court in unguarded moments still refers to the right as "fundamental"[35]—which of course it is.

Accordingly, there has never been any doubt at the Supreme Court about whether the Constitution protects the right of citizens to earn a living in the occupation of their choice. Moreover, the Court has long been aware of the legislature's

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such restrictions as are imposed upon all persons of like age, sex, and condition"); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (Fourteenth Amendment's conception of "liberty" includes the right "to engage in any of the common occupations of life"); New State Ice Co. v. Liebmann, 285 U.S. 262, 278 (1932) ("nothing is more clearly settled than that it is beyond the power of a state, under the guise of protecting the public, arbitrarily to interfere with private businesses or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them") (internal quotations and citations omitted); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 238–39 (1957) ("[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment"); Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (recognizing the right "to engage in any of the common occupations of life") (citing *Meyer*, *supra*); Lowe v. SEC, 472 U.S. 181, 228 (1985) (quoting *Dent* and *Schware*, *supra*, for the proposition that citizens have a right to follow any lawful calling subject to licensing requirements that are rationally related to their fitness or capacity to practice the profession); Connecticut v. Gabbert, 526 U.S. 286, 291–92 (1999) ("this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation").

[32] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 105 (1873) (Field, J., dissenting) (emphasis added).

[33] 285 U.S. 262, 278 (1932) (quoting Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513(1924)).

[34] Barsky v. Bd. of Regents, 442, 472 (1954) (Douglas, J., dissenting).

[35] Supreme Court of N.H. v. Piper, 470 U.S. 274, 280 n.9, 285 (1985) (striking down state residency requirement for Bar admission and rejecting economic protectionism as legitimate governmental interest, and citing prior case law in which the Court had described "the pursuit of a common calling" as "one of the most *fundamental* of those privileges" protected by the Privileges and Immunities Clause) (citing United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 219 (1984) (emphasis added)).

propensity for passing blatantly protectionist and otherwise illegitimate occupational regulations "under the guise of protecting the public."[36] By assigning occupational freedom "non-fundamental" status, however, and applying only rational basis "scrutiny" to occupational regulations, the Court has consistently approved laws whose illegitimacy practically leaps off the page.[37] Thus, there is a yawning chasm between the Court's rhetoric, which still refers—accurately—to occupational freedom as a constitutional *right*, and the Court's holdings, which no longer provide any meaningful protection for that right and instead permit legislators to trample and abuse the right with near total impunity.

2. *The irrelevance of facts and the invitation to dishonesty*. In normal litigation, facts are critical. From chasing down key documents and witnesses during the discovery phase to battling over the admission or exclusion of evidence at trial, a lawyer's ability to marshal (or resist the marshaling of) important facts is often the key to victory. That is why the discovery process is so time-consuming and expensive, and why we have such detailed rules governing the investigation and presentation of evidence in litigation.

But rational basis cases are different—shockingly so. In rational basis cases, facts tend to be relevant only insofar as they help support the challenged regulation. And if *actual* facts are in short supply, then government lawyers may simply make them up as they go along. This is because the Supreme Court "never require[s] a legislature to articulate its reasons for enacting a statute"[38] and will uphold the challenged regulation "if there is any reasonably conceivable state of facts that could provide a rational basis" for it.[39] In short, "the existence of facts supporting the legislative judgment is to be presumed."[40] Or, as the Second Circuit has stated, "*the Government is under no obligation to produce evidence or empirical data* to sustain the rationality of a statutory classification *and can base its statutes on rational speculation*."[41] Now there's a standard most litigators can only fantasize about:

> "Objection—lacks foundation; hearsay; assumes facts not in evidence."
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> "Counsel?"

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[36] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[37] *See, e.g.,* N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) (upholding North Dakota law requiring every pharmacy operator be either a registered pharmacist or a corporation or association whose majority stock was owned by a registered pharmacist who actively managed the business); Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) (upholding state statute permitting only lawyers to engage in the practice of debt-adjusting); Williamson v. Lee Optical, 348 U.S. 483 (1955) (approving Oklahoma law that prohibited opticians from merely fitting eyeglass frames to a customer's face); Kotch v. Bd. of River Pilot Comm'rs, 330 U.S. 552 (1947) (upholding apprenticeship requirement for Louisiana river boat pilots that effectively permitted only relatives and friends of current pilots to meet the statutory requirements).

[38] F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 314–15 (1993).

[39] *Id*. at 313.

[40] United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

[41] Lewis v. Thompson, 252 F.3d 567, 582 (2nd Cir. 2001) (emphasis added).

> "The witness is speculating, your honor."
>
> "Is it rational speculation?"
>
> "Why, yes your honor, it is."
>
> "Overruled!"

This invitation to government lawyers to simply make up facts can lead to comical results. For example, the IJ is challenging a Louisiana law that says only state-licensed florists may arrange and sell flowers.[42] Among other things, Louisiana's lawyers have defended the law as a public health and safety measure, and members of the Louisiana Horticulture Commission have testified that improperly placed corsage pins and loose wires present significant safety risks to the flower-buying public.[43] Even more amusing was the state's response to the fact that Louisiana's florist licensing law is the only one of its kind in the country.[44] Unable to find any support for their position in America, the state's lawyers turned to France, which, they claimed, "has its own set of regulations on the certification of florists."[45] Whatever else may be said of Louisiana's attempt to defend its blatantly protectionist florist licensing scheme, the spectacle of a government lawyer citing French economic policy to illuminate a point of American constitutional law is rich.

But for pure comedy, consider the following deposition testimony from the IJ's challenge to an Oklahoma law that permits only fully licensed funeral directors to sell caskets. This is the state's expert witness (who ran the mortuary science program at the University of Central Oklahoma) trying to defend the state's assertion that people who merely wish to sell caskets must master all of the education and skills required for full-blown funeral directors:

> Q. Do you think it is important for someone who only sells caskets to know, for example, how to reconstruct a face that has been damaged by trauma, in preparation for a funeral service?
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> A. Yes, I do.

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[42] For a description of the case and links to briefs, press releases and other documents regarding the florist licensing case, *see* http://ij.org/economic_liberty/la_florists/index.html (last visited Nov. 26, 2005).

[43] Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 9 & nn. 45–47, Meadows v. Odom, CA (M.D. La.) (No. 03-960-B-M2) (copy on file with the Institute for Justice).

[44] The Eleventh Circuit has noted that the absence of similar laws "although not controlling, is a strong suggestion that the [challenged] ordinance is arbitrary and irrational." *DeWeese v. Palm Beach*, 812 F.2d 1365, 1369 (11th Cir. 1987).

[45] Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 12, Meadows v. Odom, CA (M.D. La.) (No. 03-960-B-M2) (copy on file with the Institute for Justice). The state's lawyers' made this claim on the strength of four untranslated pages of French regulations, their rather obfuscatory description of which strongly suggests that even France does not actually require people to have a license in order to arrange and sell flowers—only that it sets minimum standards for people seeking state-sanctioned certificates of aptitude.

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> Q. [Do] you think someone who just wants to sell caskets needs to know how atomic particles interact with each other?
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> A. I think they do, because that's a building block upon learning how different metals from which caskets are constructed, the strength of metals, and a whole host of technical things that are associated with that, that are taught out of chemistry. So yes, I do.
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> ***
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> Q. One thing I remember learning in microbiology was how a virus reproduces itself using RNA instead of DNA. Is that something they might learn in this microbiology class?
>
> A. Again, I don't have that before me. But that would sound important.
>
> Q. Okay. You think it would be important for someone who only proposes to sell caskets to know how a virus reproduces itself?
>
> A. Yes, I do.[46]

The florist and casket examples above could be multiplied endlessly, but beneath the humorous anecdotes lurks an important question: Should government lawyers and witnesses be allowed to lie in court just because it is a rational basis case? For example, no serious person could believe that casket retailers need to know about the motion of subatomic particles or that licensing florists has anything to do with protecting public health and safety. Likewise, the state's lawyers originally told the court that Oklahoma's casket sales laws might play some role in protecting public health and safety but then withdrew that argument after their *own witnesses* repudiated it under oath during depositions.[47] While such conduct might well be sanctionable in other court proceedings, in rational basis cases it is simply business as usual. After all, if the actual facts don't matter in the first place, then why should a witness' or attorney's misrepresentation of the facts matter either?

3. *Judges as Advocates*. It is a bedrock principle of common law that parties to court proceedings are entitled to a neutral adjudicator who is free from bias and

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[46] Deposition of Kenneth Curl, Ph.D., July 17, 2002, Powers v. Harris, (W.D. Okla.) (No. CIV-01-445) (copy on file with the Institute for Justice).

[47] The decision by the state's lawyers to withdraw their public health and safety argument after their own witnesses repudiated it prompted the district court judge to observe that "[i]t is doubtful, but perhaps arguable, that even where grounds which might justify statutory restrictions have been withdrawn from the court's consideration, those grounds could still be used by a court to find a statute constitutional under the rational basis test." Powers v. Harris, No. CIV-01-445-F, 2002 WL 32026155, at *8 n.3 (W.D. Okla. Dec. 12, 2002). In other words, depending how literally one takes the rational basis test, judges might actually be obliged to accept justifications that even the government's own lawyers cannot offer with a straight face.

even the appearance of bias.[48] Indeed, so fundamental is that principal that the Supreme Court considers it an indispensable requirement of due process.[49]

But like so many of our most cherished legal traditions, that one goes right out the window in rational basis cases, where judges are not only permitted but *required* to assist the government in defending challenged regulations by dreaming up possible justifications of their own.[50] In any other setting, the idea that judges may actually align themselves with one party and actively work to help that side prevail in litigation would be intolerable. Those of a skeptical mindset might even doubt whether the judges can cabin their role so neatly. After all, having been told by the Supreme Court that they are required to help the government in one regard, surely it is not unreasonable to suspect that judges might unwittingly find themselves helping the government in other ways as well.

4. *Turning a Blind Eye to Corruption*. When it comes to enforcing rights the Supreme Court actually cares about, like preventing racial discrimination, the Supreme Court has shown confidence that judges are capable of discerning the motives of legislators and other government actors in adopting particular government policies.[51] But once again, because it applies to rights the Court doesn't particularly care about, the rational basis test is different. The Supreme Court has repeatedly held that under the rational basis test, it is irrelevant why a particular law was *actually* passed—it only matters whether it could *theoretically* have been passed for proper purposes.[52]

Thus, to take another example, there are a small handful of states that prohibit self-service gas stations, ostensibly for health and safety reasons.[53] That rationale is pure hogwash, of course; in reality such laws are nothing but full-employment measures for the service station industry. And yet, if lower courts actually took the rational basis test at face value, it would matter not a whit if every legislator who voted for the self-service gas station ban came into court and swore on a stack of Bibles that he had only done so because he was paid off by the service station lobby. In other words, as long as the health and safety argument is "con-

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[48] *See, e.g.*, Tumey v. Ohio, 273 U.S. 510 (1927) (adjudicator must not have actual bias regarding outcome of proceeding); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) (mere appearance of bias also improper).

[49] *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972).

[50] *See*, *e.g.*, Powers v. Harris, 379 F.3d 1208, 1217 (10th Cir. 2004) (citing Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001)).

[51] Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 264–65 (1977).

[52] *See, e.g.*, F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

[53] Or. Rev. Stat. § 480.340 (coin-operated or self-service gasoline pumps prohibited); *see* Atlantic Richfield Co. v. Greene, 784 P.2d 442 (Or. Ct. App. 1989); N.J. Admin. Code, tit. 12, §12:196-1.1 (same). *See also* McCardle v. City of Jackson, 260 So.2d 482 (Miss. 1972) (same).

ceivable," the fact that it is also perfectly fraudulent has no bearing on the outcome of a legal challenge.[54]

Or consider another actual example from the IJ's challenge to Louisiana's florist licensing law. The lawsuit generated so much adverse publicity regarding the licensing scheme that a bill was introduced in the Louisiana House of Representatives that would have eliminated the law completely. The bill passed the House 92-3, and it was then sent to the Agriculture Committee of the Louisiana Senate, where it died without ever receiving a vote on the floor of the full Senate.[55] When questioned about his role in the process, Louisiana Agriculture Commissioner and lead defendant Bob Odom testified that he had helped "kill" the bill based on a long-standing agreement he had with state-licensed florists to follow their bidding in that regard.[56] Odom also testified that he did not consult with any consumers or consumer groups in deciding to oppose the bill,[57] and that his decision was based purely on an agreement he had made with licensed florists when he ran for office in 1980 that he would support whatever they wanted by way of licensing.[58]

Some people would call that irresponsible; others would go further. Under the almost infinitely permissive standards of the rational basis test, judges are apparently supposed to call it none of their business, no matter how bad it looks or smells.

5. *Logically impossible burden of proof*. It is well known that in order to adequately protect the liberty of citizens, the requirement for conviction in criminal cases is proof beyond a reasonable doubt. What is less well known is that plaintiffs seeking to *vindicate* their constitutional rights in rational basis cases carry an even heavier burden than the government does when it is trying to put people in jail. Thus, not only are laws clothed with a virtually irrebuttable presumption of constitutionality under the rational basis test,[59] the plaintiff must also "negative every conceivable justification" for the challenged regulation.[60]

First, the standard is technically impossible to meet because it is impossible to prove the non-existence of something as a matter of formal logic. One can prove that a particular thing has never been encountered, never observed in recorded history; one can even prove that in light of known facts, the existence of the thing is

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[54] *See, e.g.*, S.C. Educ. Ass'n v. Campbell, 883 F.2d 1251, 1257–61 (4th Cir.1989) (explaining that except in certain exceptional cases, courts may not consider possible legislative motives in evaluating the constitutionality of state statutes).
[55] *See* history of H.B. 1409, 2004 Reg. Sess. (La. 2004), *available at* http://www.legis.state.la.us/.
[56] Deposition of Bob Odom, July 9, 2004 at 40, 56, Meadows v. Odom, (M.D. La.) (No. CA 03-960-B-M2) (copy on file with the Institute for Justice).
[57] *Id*. at 57.
[58] *Id*.
[59] *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993).
[60] *Id*. at 315 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

extraordinarily unlikely and would defy the known laws of nature—but absolute proof of the nonexistence of the thing? Impossible.

For example, in *United States v. Phillips*,[61] the Eighth Circuit rejected an argument that to introduce evidence obtained through a wiretap, the government had to prove the "interception was made for no criminal, tortious or other injurious purpose." The Eighth Circuit found that this "would create an impossible burden of proving three negatives."[62] What an appalling double standard: when citizens are trying to vindicate basic constitutional rights, like the freedom to choose their field of employment, they are saddled with the technically "impossible" burden of proving not just one negative, but "negativing" *every conceivable* justification that might be advanced in support of a law.[63] But when the government merely wishes to convict someone of a crime, well, God forbid it should carry the far more modest burden of merely proving three discrete and well-defined negatives.

But even assuming, as we must, that the "prove a negative" standard is simply another of the many linguistic hyperboles with which the rational basis test is polluted, it still leaves rational basis plaintiffs in the desperate position of having to anticipate every single argument or justification that might ever be dreamed up—not only by their opponents, but by judges, law clerks, the media, passing strangers, Ouija boards, tic-tac-toe playing chickens, pretty much anyone or anything—in defense of the challenged law and create a fact record in the trial court so comprehensive and robust that it can prevail against literally any set of facts—real or imagined—and any argument that might ever be deployed against it. There comes a point where the deck is stacked so thoroughly against a litigant that the result of the case is effectively preordained. Saddling rational basis plaintiffs with a technically unattainable burden of proof and requiring them to construct a trial court record sufficient to rebut arguments that have not even been made yet would seem to reach that point.

6. *Deliberate Misapplication of the Test to Achieve Desired Outcomes.* A final indictment of the rational basis test is the Supreme Court's record of blatantly misapplying it in order to achieve preferred outcomes. In such cases, we see the Justices doing precisely what the rational basis test forbids—things like preferring facts to speculation, refusing to credit perfectly rational (if palpably false) justifications, and rejecting post hoc rationalizations for government conduct when the true motivation is reasonably clear. While that approach has the virtue of advancing liberty and fairness, it does tend to emphasize how intellectually dishonest the rational basis test really is.

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[61] 540 F.2d 319, 326 (8th Cir. 1976).
[62] *Id*.
[63] *Beach Communications*, 508 U.S. at 314.

There are many cases in which the Supreme Court has arguably strayed from the literal commands of the rational basis test in order to achieve a preferred result, but four seem particularly illustrative.

First, in *Moreno v. Department of Agriculture*,[64] the Court struck down a federal law that would have denied food stamps to people living in households that included members who were not related to one another. In defending that provision, the government argued that it could help to reduce fraud in the food stamp program—to ensure, as Justice Rehnquist quipped in his dissent, that "the household exists for some purpose other than to collect federal food stamps."[65] Even though the government's argument is plainly "rational" in the strictest sense of the word, the Court nevertheless rejected it, noting that the government's assumptions concerning the differences between related and unrelated households were "unsubstantiated" and observing that the legislative history "indicates that [the challenged law] was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[66] Of course, "unsubstantiated" arguments that ignore the true purpose of challenged legislation are precisely the kind the Supreme Court has approved in normal rational basis cases, so the Court's criticism of the government's argument in *Moreno* is ironic, to say the least.

The Court also ignored perfectly rational justifications while purporting to apply the rational basis test in *City of Cleburne v. Cleburne Living Center*[67] and *Romer v. Evans*.[68] *City of Cleburne* involved a zoning ordinance that prevented a group home for mentally retarded people from opening in a particular neighborhood. The issue in *Romer* was whether the state of Colorado could amend its constitution to prevent homosexuals from receiving any special treatment by the government, including specific nondiscrimination laws. In both cases, the Court swept aside plainly rational explanations for the challenged provisions and again chose to focus on what "really" seemed to be going on: namely, a bare desire to disfavor mentally retarded and homosexual people, respectively.

In *Cleburne*, the Court once again remarked on the absence of record evidence to support the government's stated concerns that the proposed group home would "pose any special threat to the city's legitimate interests," including the fears of elderly people in the neighborhood, the possibility that students from a nearby junior high school might harass the occupants of the home, and concerns about legal responsibility for actions the mentally retarded residents might take.[69] Of course, that criticism is rather odd in light of the "dog ate my homework" standard to which the Court normally holds the government in rational basis cases, demand-

[64] 413 U.S. 528 (1973).
[65] *Id*. at 546 (Rehnquist, J., dissenting).
[66] *Id*. at 534–35.
[67] 473 U.S. 432 (1985).
[68] 517 U.S. 620 (1995).
[69] *Cleburne*, 473 U.S. at 448–49.

ing nothing more than rational speculation—certainly nothing as inconvenient as actual facts—in support of challenged regulations. As Justice Marshall correctly observed in his concurring and dissenting opinion, "Cleburne's ordinance surely would be valid under the *traditional* rational basis test applicable to economic and commercial regulation."[70]

The state of Colorado likewise identified a number of technically rational justifications for the state constitutional amendment forbidding special protections for homosexuals, including protection of associational and religious freedoms, conservation of anti-discrimination resources, and promoting statewide regulatory uniformity.[71] Moreover, as Justice Scalia pointed out in his dissent, if the state could permissibly criminalize homosexual conduct, as it then could,[72] it is difficult to see how it could not also enact laws merely disfavoring homosexual conduct.[73] Again, however, the Court brushed aside the state's admittedly dubious justifications and focused instead on what it considered to be the essence of the provision in question: "a bare desire to harm a politically unpopular group."[74]

Finally, there have been a series of ostensibly rational basis cases in which the Supreme Court has struck down laws or policies that overtly favor state residents over out-of-state residents in the distribution of particular benefits or burdens.[75] Again, in each of these cases, the Court simply brushes aside what seem to be plain and clear rational justifications and focuses instead on what appears to be the true purpose of the underlying injustice—namely, a bare desire to favor locals over foreigners.[76] Again, however, the Court has repeatedly held that the rational basis test is not concerned with the true purposes of a challenged law, at least as long as one can conceive a technically rational (albeit entirely spurious) justification for it.

Of course, none of this should be taken as a criticism of the *results* reached in the foregoing cases. There is something quite satisfying (at least to those of a certain political persuasion) about seeing the government thwarted in its attempts to

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[70] *Id*. at 456 (Marshall, J., concurring in part and dissenting in part) (emphasis added).

[71] *See* Timothy M. Tymkovich, *Gay Rights and the Courts: The Amendment 2 Controversy: A Tale of Three Theories: Reason and Prejudice in the Battle Over Amendment 2*, 68 U. COLO. L. REV. 287, 301–04 (1997).

[72] The Supreme Court has since reversed itself and held that state laws criminalizing homosexual conduct are unconstitutional. Lawrence v. Texas, 539 U.S. 558 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

[73] *Romer*, 517 U.S. at 641 (Scalia, J., dissenting).

[74] *Id*. at 634 (quoting Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[75] *See, e.g.*, Hooper v. Bernalillo County Assessor, 472 U.S. 612, 621–23 (1985) (New Mexico income tax exemption favoring long-time residents over newcomers); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881–83 (1985) (Alabama law giving preferential tax treatment to in-state insurance companies); Williams v. Vermont, 472 U.S. 14, 22–27 (1985) (Vermont car tax favoring state residents); Zobel v. Williams, 457 U.S. 55, 60–64 (1982) (amount of benefit from proceeds of Alaska oil and gas benefits tied to length of residency).

[76] For a discussion of these cases and the ostensible justifications offered in support of the challenged regulations, *see* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 387–94 (1999).

benefit or penalize distinct groups simply because it favors or disfavors them. But there is also something remarkable about the rather cavalier manner in which the Supreme Court seems willing to abandon the literal mandates of the rational basis test and focus on things like whether the government's arguments are actually supported by the record and the true purpose of challenged regulations. Having created a pretend test, sometimes the Supreme Court only pretends to apply it.

Conclusion

To recap, the rational basis test permits—perhaps encourages—government lawyers and witnesses to misrepresent facts and distort reality; it destroys the principal of judicial neutrality by conscripting judges to act as advocates for the government; it turns a blind eye to corruption; it saddles plaintiffs with a logically impossible burden of proof; and it is often deliberately misapplied in order to achieve a preferred result.

In light of those points, why does the rational basis test have such staying power? After all, history shows that intellectually bankrupt constitutional doctrines do typically leach out of our national jurisprudence eventually.[77]

For many, of course, the primary virtue of the rational basis test is precisely the deferential (read "obsequious") relationship it creates between the courts and the other branches of government in certain areas. Thus, notwithstanding the overwhelming evidence that no government, including a democracy, is capable of exercising power without abusing it; and notwithstanding the overwhelming evidence that economic rights—particularly private property and occupational freedom—are among the most prone to abuse by government officials responding rationally to the desires of special interest groups; and notwithstanding that property ownership and the ability to earn a living in the occupation of one's choice are among the most clearly established rights at common law; we have nevertheless somehow gotten to the point where those rights are "protected" by a standard of review so anemic that courts often feel obliged to point out that it is neither "toothless"[78] nor a "judicial rubberstamp,"[79] even while they are applying it in just that manner. (In perhaps an impolitic moment of candor, the Seventh Circuit acknowledged—albeit somewhat off-handedly—that in fact the rational basis test *is* "toothless."[80])

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[77] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, (1954) (rejecting "separate but equal doctrine" announced in Plessy v. Ferguson, 163 U.S. 537 (1896)); United States v. Morrison, 529 U.S. 598 (2000) and United States v. Lopez, 514 U.S. 549 (1995) (together rejecting premise that Congress' powers under the Commerce Clause are plenary).

[78] Mathews v. Lucas, 427 U.S. 495, 510 (1976).

[79] Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir. 2000).

[80] Matter of Agnew, 144 F.3d 1013, 1014 (7th Cir. 1998) (per curiam) (noting that although appellate courts' review of trial court findings for "clear error or abuse of discretion is deferential, it is not toothless after the fashion of review for a rational basis").

As for the Supreme Court's expressed belief that truly obnoxious laws that do not affect "discrete and insular" minorities or affect the political process will eventually be corrected legislatively[81]—that might act as a soothing balm to the judicial conscience, but it hasn't got much to do with reality. Obnoxious laws affecting economic liberties tend to stay on the books for exactly the same reason they get on the books in the first place: they provide concentrated benefits to powerful interest groups that care passionately about maintaining their government-protected status, while the costs are borne by a diffuse class of people most of whom will never know how they are being exploited.

The Ninth Amendment says that unenumerated rights should neither be denied nor disparaged. But it is hard to imagine how one could more thoroughly "disparage" a constitutional right than to appoint as its sole guardian the rational basis test. The Supreme Court should have the courage either to expressly disavow economic liberties—and accept whatever consequences might flow from explicitly rejecting centuries of common law, overturning over one hundred years of precedent, and repudiating a core value of the founding fathers—or else devise a test for protecting those rights that contains some measure of integrity. Certainly, that is one word that few people who have ever sought to vindicate a constitutional right under the rational basis test would ever use to describe it.

[81] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).