7

Turning Inside Out

Resolving Conflicts over the Scope of the Police Power

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.

Federalist No. 78 (A. Hamilton)

In 2020, a group of women in Georgia, organized under the name Reaching our Sisters Everywhere ("ROSE") filed a complaint against the Secretary of State, challenging the constitutionality of the Georgia Lactation Consultant Practice Act. This Act limited strictly the provision of lactation services to providers who had had obtained an appropriate license. These licenses were available only to those who were members of the International Board of Certified Lactation Consultants. This regulation, ROSE argued, prohibited them from providing their services to needy women. They argued that the statute was irrational, lacking in any reasonableness connection to public health, safety, and welfare.

This case came to the Georgia Supreme Court beginning in 2020, and was finally decided in 2023. If it were considered under the rubric of Supreme Court of the US precedent, it would surely have failed. Alleging a due process or equal protection claim that this exercise of the police power was unjustified by any plausible public health rationale would have failed under a web of decisions, arguably going back to Munn and Mugler in the nineteenth century, running up through Nebbia v. New York,[1] an important New Deal era case that illustrates the Court's retreat from Lochner era jurisprudence, and, most definitely, by the Supreme Court's decision in Williamson v. Lee Optical in 1955.[2] In that case, a unanimous Court upheld a regulation that limited, for reasons not at all apparent from the legislative record or statutory text, the provision of certain eyeglass services to registered optometrists and ophthalmologists. As in the Georgia case Raffensberger v. Jackson,[3] the plaintiffs in Lee Optical attacked this law as lacking any reasonable basis and as reflecting an arbitrary distinction among service providers. The Court, in an opinion by Justice Douglas, made relatively quick work with this argument, insisting that, even if the

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law was stupid, "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."[4] While the statute is not immune from review in any formal sense, Justice Douglas made clear that the standard of review in these matters of economic regulation is highly deferential. He wrote: "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[5] Douglas makes a rather half-hearted effort to deal with the forceful argument that the statute was palpably ineffective at curing a problem that, in and of itself, elided description, and then concludes that "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here."[6]

Lee Optical illustrated the "apogee of deference," as historian Ted White describes it.[7] It was reinforced in later cases and, indeed, remains rock solid as a precedent. It is cited regularly by the Court in instances in which occupational licensing and other economic liberty litigation is brought in federal court. And where justices dissented in important substantive due process claims involving individual liberties and privacy, including Griswold, Roe, and Casey, Lee Optical is notable again as an illustration of why Lochner's reasoning fails and why the only question, says Justice Rehnquist in his Roe dissent, is whether the law being challenged bears "a rational relation to a valid state objective."[8]

The Georgia court in Raffensberger was unmoved by the thread of Supreme Court decisions since the Court retreated in the New Deal from its close interrogation of economic liberty-impacting regulations. Whereas these cases reflected a "nearly toothless deferential posture the Court has assumed where stated regulated business and industrial conditions,"[9] the supreme court of Georgia's approach was anything but. The language of the due process clause of the Georgia Constitution was essentially identical to that in the Fifth Amendment of the US Constitution. And yet Georgia has "'long recognized' that this provision 'entitled Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference'."[10] This understanding of due process (and, the court noted in an important footnote, also equal protection under its constitution) has been unbroken from the beginning of its constitutional law, through constitutional reform, and up to the present day.

The question begged by this broad account of what due process and equal protection ensures by way of occupational freedom is what deference is owed to the judgment of the legislature that certain regulations are proper under the police power. The key statement of the Georgia court is this: "[U]nless an act restricting the ordinary occupations of life can be said to bear some reasonable relation to one or more of these general objects of the police power, it is repugnant to constitutional guarantees and void."[11] The discrimination that matters in occupational restrictions (and presumably any other regulation that draws line between individuals able to

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engage in certain business activities on certain conditions) is not necessarily "invidious discrimination along the lines of modern equal protection analysis."[12] Rather, the courts should be concerned with "the imposition of arbitrary (i.e., not reasonably necessary) burdens on the ability to pursue a lawful occupation."[13] Thus the court in one fell swoop distances itself from any conceivable kind of rational basis review, review which would eschew any consideration of the means-end fit or the evidentiary basis of this regulation and also makes clear that the state will need to provide some reasonable justification (which they equate here with non-arbitrary) for this particular regulatory strategy.[14]

In one sense, Raffensberger's approach hearkens back to Lochner. In another sense, the court conjures a standard of review that is internalist and purposive. It is internalist in that it looks to the rationale and method of regulation – what Hamilton calls the inquiry into the "commission under which it is exercised" – to determine its constitutionality. It is purposive in its further inquiry into whether the statute's means are tied adequately to its ends. Unlike in Lochner, the court in Raffensberger does not dwell excessively on the applicable liberty interest. Presumably the only liberty interest at stake here is the right to pursue an occupation or else the right to furnish services to individuals in need. These feel like manufactured liberty interests, even if we subscribe to some decent amount of freedom of action. Instead, the question at the center is whether this law makes the regulation makes any good sense, in light of the government's stated aim of promoting public health and safety. The court concludes that there is insufficient evidence that this law is "reasonably necessary to advance a specific health, safety, or welfare concern."[15]

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This detailed consideration of a recent state case illustrates the issues we explore in more depth in this chapter, drawing upon some of the more historical dimensions of constitutional review in Part I and the more conceptual and doctrinal discussion in the previous chapter on the role of rights review in police power cases. Rights claims will continue to loom large, in both the federal and state context, in disputes over the government's police power regulations. Yet, as we discussed in the previous chapter, this will mostly be true of rights claims brought under those enumerated rights that have long enjoyed a preferred position. Relatedly, the protections will be most salient for individuals who are part of a suspect class, therefore raising the antennae of courts worried about equality under the law. By contrast, judicial review of regulations that impact individuals' property and liberty rights, and that are not focused on whether adequate procedures have been given under the Due Process clause or whether the actions are a regulatory taking, have been minimal, at least since the retreat from economic liberties review in the period of Lochner and, albeit unsteadily, in the first half of the century

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What are the limits that grow out of the police power itself, that is, separate from constitutional rights as trumps? Constitutional law is not unfamiliar with internal constraints. For example, the question of whether Congress can exercise certain powers under the rubric of the Commerce Clause is an interrogation into the meaning of this power-granting provision. The puzzle is even more puzzling, to be sure, in the state constitutional context, because here we embrace the principle that state constitutions are documents of limit and so the legislature is viewed as having plenary power. However, this power must be defined, and its outer boundaries established. Plenary power is not the power to act without any constraints. The focus in this chapter is on the configuration of these constraints growing out of the police power itself. To put the point in a homely way: Rights are part of the perspective of we the people looking for outside limits on government; structure looks from an internal vantage point outward.

REASONABLENESS

A plethora of police power cases stretching back to the early nineteenth century and continuing through Raffensberger and other cases involving governmental regulations of various shapes and sizes under the police power use the term "reasonableness," standing alone under the spotlight or connected to other words nearby, to describe what is necessary to uphold a state law under the constitution. However we might critique "reasonableness" as a criteria too opaque for meaningful judicial review, the prominence of reasonableness in constitutional review is understandable. Under a vastly diverse range of theoretical views about the proper role of government and scope of government action, some deeply philosophical, others more pragmatic, we nearly always come back to the question: Has the government acted in a way that we regard as reasonable?[16]

That said, resort to the generic and ultimately inscrutable notion of reasonableness standing alone is ultimately a fool's errand. There is little content to this standard other than that imputed by other considerations and elements, as we will investigate more fully below.[17] Viewed practically, reasonableness might be little more than a residual category, something that captures in an omnibus rhetorical way the notion that laws ought not be stupid; they ought to be based upon a sensible and even sufficiently rigorous analysis of the problem to be solved and the ways in which this law will tackle this problem. Unreasonableness in this account is little more than a trope, invoked as a synonym for a bad law. That this is a problematic basis for judicial intervention under our constitutions is revealed in a vast body of constitutional scholarship, perhaps most cogently by James Bradley Thayer in his exhortation that courts review legislative acts for only clear error. Thayer writes: "[T]he constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that

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whatever choice is rational is constitutional."[18] But even judges willing to intervene in proper cases to either narrow the scope of ill-configured legislation or, in extreme instances, to invalidate these laws as exceeding the bounds of what the government ought to able to do under its police powers have found the residuum of unreasonableness to be part of a robust test.

But there is a deeper concern than just with opacity and fear of over- or underinclusive review. Reasonableness as an account decoupled from other, sharper standards of sorting out proper from improper legislative action can easily slide into a judicial assessment of the merits of a particular law. Investigating the rationale of a law and the connection between its ends and means – akin to what the Court has long used in strict scrutiny review of legislation in fundamental rights cases – inevitably substitutes legislative for judicial judgment. This is a feature, not a bug, of such review. Gerald Gunther's fabled comment that strict scrutiny is strict in theory but fatal in fact is best understood as revealing not only the consequence of such interventionist review, but the purpose behind such scrutiny.[19] And this purpose could and should be implemented by an informed cynicism of the reason for the law ("Is the state interest compelling?" "Is this the least restrictive means?"), the strategy ("Is this law narrowly tailored"), and a consideration of alternatives. The thumb, in such strict scrutiny review, is squarely on the scale in favor of protecting individual rights against governmental overreach. By contrast, the police power has long accepted a wide ambit of governmental power and also an acceptance that the government knows best how to effectively govern. Intervening to determine whether the government's approach is or is not reasonable risks collapsing what is essentially strict scrutiny review into a shapeless, but ambiently utilitarian, approach to reviewing the form and strategy of legislation.

This is not to say that judges have not proffered approaches to judicial review that aim to assist in the inquiry as to whether the government has exercised its wide regulatory discretion to impede upon individuals' liberty. Even where this liberty cannot be sourced in any particular state or federal constitutional provision, the Court has undertaken, albeit in a somewhat piecemeal fashion, the task of interrogating laws that interfere with privacy and intimate relations. For example, in his famous dissent in Poe v. Ullman, Justice Harlan looks skeptically at the anti-contraception law enacted by the state legislature, insisting that "[t]hough the State has argued the constitutional permissibility of the moral judgment underlying this statute, neither its brief, nor its argument, nor anything in any of the opinions of its highest court in these or other cases even remotely suggests a justification for the obnoxiously intrusive means it has chosen to effectuate that policy."[20] Moreover, it is the "utter novelty" of this law that warrants his skepticism and ultimately, he argues, dooms this law as in excess of the police power and in violation of the substantive due process rights of liberty.[21]

Although not embracing the substantive due process formulation, Justice David Souter's concurring opinion in the 1997 assisted-suicide case Washington v. Glucksburg[22] also illustrates one approach to evaluating legislative reasonableness.

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He says there that "[i]t is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way."[23] Stripped to its essence, this flips the script on the traditional deference accorded to legislation except when it interferes with fundamental rights. It asks, instead, is this legislation arbitrary? Pointless? The burden is on the legislature to justify its policy, not only the rights-holder to show how a policy about which the court stands agnostic is in conflict with their liberty (or other substantive) rights.

Harlan in Poe and Souter in Glucksburg attract inordinate attention by scholars who would urge on courts a more searching review, more latitude to call out truly dumb laws for opprobrium and possible invalidation. Nonetheless, the spotlight on these and similar opinions is at least interesting for a focus on a road not travelled. Certainly there has not been any meaningful review of economic regulations under federal constitutional law in many decades. And the treatment of preferred constitutional rights, as we discussed in the previous chapter, has long followed the architecture of tiered review. And so we can ultimately be less alarmist (if we fear more muscular scrutiny) or less hopeful (if we welcome it) about the courts embrace of so-called reasonableness review, the kind of review illustrated by the Georgia case that began this chapter. For in the lion's share of the cases, including contemporary ones, what the courts look to is not an open-ended consideration of statutory reasonableness, but other factors that raise doubts about whether the police power was truly being used for good governing, for furthering objectives central to state constitutional purpose.

ARBITRARINESS

In Raffenberger, the Georgia high court used "reasonably necessary" as a syllogism for "arbitrary." The main apparent concern here was that the state enacted a law that drew a line between acceptable and unacceptable conduct – or, more precisely here, acceptable versus unacceptable providers of services – that could not be justified as anything other than arbitrary. For example, if the principal concern here was with competency and public safety, they might have established comprehensive quality control guidelines, perhaps with a test. Putative plaintiffs might still quarrel with the heavy-handedness of such quality control. They might challenge the law alleging that such laws were too strict in design, effectively keeping well-intentioned folks locked out of providing important services. But notice that this is a different kind of objection, in that it does not claim that the legislature is acting arbitrarily, but just that it is acting unreasonably, if based upon some assessment of whether such (to them) severe limitations are justified. After all, if the court must interrogate each standard-setting regulation, they are interfering deeply with the legislature's policymaking discretion. However, the court does concern itself with claims that the drawing of lines through police power regulations is utterly senseless, and therefore arbitrary.

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The law's concern with arbitrariness is ubiquitous. Even a minimal examination of the basis of a state law might require the lawmakers to explain why they drew lines that included some and excluded others from the law's reach, whether by way of protection or of prohibition. This explanation might come in the form of a "whereas" clause, as are typical in both old and modern legislative acts; it might come in the form of legislative history; or it might require some judicial creativity in assessing legislative purpose. Interrogating legislation to determine whether or not it is arbitrary has been a common, if somewhat episodic, element of constitutional review in both federal and state courts for generations. For example, the Cleburne Living Center case,[24] which we described briefly in a previous chapter, is a relatively contemporary instance of the Court invalidating a law that did not, as it viewed it, infringe on fundamental rights or impact a suspect (or even a quasi-suspect) class. Rather, it was the sheer arbitrariness of the law's impact that warranted invalidation. "[T]his record does not clarify how," wrote Justice White for the Court, "the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes."[25] This arbitrariness gave rise to an uncontested belief that the permit requirement in Cleburne rests only "on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law."[26]

Arbitrariness as a rubric for review can be sensibly deployed in a range of cases. However, it carries with it some risks of uncertainty. When used in the administrative law context, for example, the basic thrust of arbitrariness review is procedural, that is, it smokes out real reasons for the government acting, reasons that can be evaluated on the basis of a record of some sort to make sure that there are, at the very least, not capricious, nor are they rationally indefensible when measured by what the statute does or does not require.

This approach has been described in modern federal administrative law as "hard look review."[27] Efforts to go beyond proceduralist review, to something more searching in the sense that it assesses the overall merits of the agency's decision is not unprecedented. Colin Diver long ago called this strategy "synoptic review,"[28] and Martin Shapiro has commented informatively on the tendency of the federal courts in the latter decades of the twentieth century to look at the overall reasonableness of agency performance, this at the risk of substituting the courts' judgment for the judgment of Congress.[29] Still, this approach has been heavily criticized as beyond the scope of what courts should do in reviewing agency action.[30] In any event, it is important to understand that administrative law review is not free-floating; its standards are forged through the deep analysis of the agency's enabling law. Review that is trans-statutory (itself an awkward locution given the nature of administrative governance) is mainly directed to ensuring that the agency is providing reasons adequate to warrant the use of the awesome power of the government, use outside the four corners of the structure of Articles I–III of the Constitution.[31]

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Bringing the subject back to constitutional review of police power regulations, we see the same essential logic at work here. Even without the principle of legislative supremacy, we can expect that the legislature has a wide lane of discretion to choose its preferred regulatory ends and means. With it, the tilt is toward a more limited judicial role in assessing the legislature's regulatory choices. Constitutional review must necessarily assess what is or is not merely arbitrary by resort to what obligations the constitution imposes on legislative or administrative action. And so we are back squarely to the question of how much demand the text, structure, and (especially) purpose of the police power imposes on the government to act rationally and non-arbitrarily.

Arbitrariness review absorbs the assumption that random decisions by government are intrinsically unacceptable. But this view may not be so clear in all cases. Suppose that the government enacts a law that forgives student loan debt up to an amount of $25,000 per person, regardless of the amount of individual debt. This is a policy intended to address hardship, but of course it does so only in a partial way. Some former students carry $250,000 worth of debt, and so this relief is relatively modest. Some carry $25,000, but have sufficient wealth that the burden was consequential. And all this is not to mention, as we hear today in arguments over student loan forgiveness, that the line is drawn between individuals with student debt and others who did not take out student loans, for whatever reason, but still face crushing debt. Suffice it to say that there are many dimensions upon which such a law makes arbitrary distinctions. This does not necessarily mean that the law is stupid or that partial help is unwarranted, but that there is not a rationale that can meet any strict standard of assessing "why x but not y?" Police power regulations of this type are common; indeed, they are especially common in a world in which states can enact laws for what we have called *salus populi* reasons, and not merely as a matter of *sic utere*. The general welfare has not been understood to mean that individuals are equal beneficiaries of equal sufferers from legislative or administrative acts.

Arbitrariness review is a conventional part of our constitutional review toolkit, especially so far as state constitutional review of police power regulations are concerned. But it carries its pitfalls. It can be overinclusive, as where legislatures drawn lines for what are entirely pragmatic reasons. It can also be underinclusive in that laws that are neither arbitrary nor targeted on particular individuals or groups for discernible reasons might raise constitutional concerns not addressable by "arbitrariness" review. Nonetheless, courts have persisted in their inquiries into the arbitrariness of legislative action under the police power.

ANIMUS

Concern with laws that draw lines in ways that reveal "invidious discrimination" or what the Court in United States Dep't of Agriculture v. Moreno memorably called "a bare … desire to harm a politically unpopular group,"[32] has been longstanding.

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We can see as far back as Yick Wo the Court's concern with baseless discrimination and animus in legislation.[33] Justice Harlan's famous dissent in Plessy,[34] which we discussed in Chapter 3, illustrates well the dismay with laws that convey to those denied protection or facing burdens a badge of inferiority. What the past few decades have revealed is a greater skepticism of legislative action that reveals animus in just this way described.

Even so, animus has seldom been used in an ungrounded way, but rather has been packaged usually with strict scrutiny of laws that impose burdens on members of protected classes under classic equal protection doctrine.[35] Evidence of animus is used to support a claim of invidious discrimination, not to define what is in fact invidious. In more modern parlance, animus is what fuels efforts to subordinate members of disfavored groups, to enact laws and regulations that segregate, sort, and ultimately humiliate individuals on the basis of what are typically immutable characteristics that are anathema to those in power.[36] The law sensibly (even if inadequately) imposes constitutional barriers, flowing from both the US Constitution and state constitutions, to such acts of subordination.[37]

A more recent phenomenon, still emerging and so understandably more difficult to frame as a distinct element of modern constitutional law, is the resort to animus as the main basis for invalidation of legislation under either the equal protection, due process clauses, or both. We have already discussed two of the exemplar cases of this modern development, Romer v. Evans and Lawrence v. Texas. Another example of this use of animus in this way is the Court's 2018 decision in Masterpiece Cakeshop v. Colorado.[38] In that case, the Court considered a constitutional challenge under the Free Exercise clause to a decision of the Colorado Civil Rights Commission objecting to the bakery owners refusal to make a cake for a same-sex wedding couple. Accepting that the Commission may have been acting consistent with Colorado's anti-discrimination laws, but scrupulously avoiding taking the step of invalidating those laws as violative of the First Amendment, Justice Kennedy rests his opinion for the Court ruling in favor of the bakery on his view that Commission acted with unacceptable animus in their evaluation of their claim. "The Civil Rights Commission's treatment of his case," Kennedy writes, "has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[39] It is hard to excavate from Justice Kennedy's opinion a clear through line from earlier cases such as Romer and Lawrence, and so the exact role played by animus in this inquiry into unacceptable discrimination under the First Amendment remains somewhat inscrutable. In any event, Masterpiece Cakeshop must be understood in the special context of the Court's religious liberty jurisprudence and the focus on government neutrality in matters religious, this a *sine qua non* for the evaluation of constitutional claims under this clause of the First Amendment.[40] However, the broader point – that government decisions evincing animus raise red flags – is illustrated in this recent opinion, here by the author of Romer and Lawrence.

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Sticking for now with the development of animus as a strong constitutional principle in Supreme Court jurisprudence, it is important to highlight three cautionary notes: First, the conundrum of assessing legislative purpose and motivation does not evaporate even as courts focus studied attention on the reasons for discriminatory laws. In evaluating skeptically the Court's rationale for invalidating the Colorado civil rights commission's decision in Masterpiece Cake Shop, Leslie Kendrick and Micah Schwartzman summarize the cluster of familiar and deeply-theorized arguments against the judicial assessment of motivation and intent in legislative (and, as here, administrative) decision-making.[41] These arguments range from the ontological claim that intent does not exist in ways that are tractable for judicial decision-making and, further, even if it did, we could not draw conclusions from the aggregated intent of multiple decision-makers, to the epistemic objection that "[c]ourts may not be able to know with any reliability what reasons motivated a particular action or decision."[42] Perhaps most vexing, for the purposes of assessing whether animus can do the work of separating and sorting constitutional illegitimate from legitimate bases, is the objection that a law can be justifiable under the conventional standards of constitutional evaluation, even if ill-motivated. As Kendrick and Schwartzman note, "[w]hether an action is permissible, or allowed, turns on whether that action is justified, not on whether the officials who carried it out believed it was justified … [W]hat matters is whether there are sufficient reasons for an action and not whether officials were motivated by those reasons."[43]

Second, these arguments against animus-based reasoning have been articulated by justices in other opinions. In his dissents in Romer and Lawrence, Justice Scalia exclaimed that unacceptable animus is extremely difficult to define, despite our intuition that it permeates certain legislative decisions. In Romer in particular, Scalia explains that one of the difficulties with relying on animus as a basis of constitutionally relevant opprobrium is that it does not acknowledge that there are kinds of animus that we permit legislatures to express, and that we indeed want them to do so. Scalia mentions the example of polygamy and shows unequivocally that Congress's animus, undoubtedly reflecting public opinion of then and now, was directed at the state of Utah, which had refused to outlaw polygamy in the state. As a result, Utah's application for admission to the union was long postponed until they were willing to formally renounce plural marriage. Animus toward individuals whose conduct has disqualified them from government benefits is common, whether we are considering felon disenfranchisement, sexual predator registries, or other such laws. How do we distinguish between acceptable and unacceptable animus in assessing laws? This inquiry, of course, parallels the difficulties we have already considered in connection with the evolution of morals regulation under the police power.

From a big picture perspective, animus can be seen as motivating most of the kinds of morals legislation we discussed in Chapter 7. We criminalize, for example, gambling and prostitution principally because of the animus we hold against these activities. More precisely, we have animus toward individuals who engage in

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these activities. While we might climb off that moralizing precipice saying (silently) something like "love the sinner, but hate the sin," the essential point remains: It is our antipathy toward certain activities that motivates our decision to proscribe one act while permitting another.

More recently, the Court has expressed some unease about the use of animus as a criterion for constitutional review. In the case of Trump v. Hawaii,[44] for example, the Court heard the objection that the ban on immigration of individuals from certain Muslim majority countries was the product of the Trump administration's antipathy toward these groups, rather than a legitimate concern with national security. Over Justice Sotomayor's impassioned dissent in which she argued that this evidence of animus ought to be relevant to the Court's analysis of the constitutional claim,[45] the Court declined to consider evidence of animus and prejudice in evaluating the legality of a ban on immigration of individuals from certain Muslim countries. "[T]he issue before us," writes Chief Justice Roberts for the Court, "is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility."[46]

Despite some of these criticisms, animus can furnish a critical part of the inquiry of government strategy under the police power. Returning to the overarching objective that motivates this book's normative argument, commitment to good governing under the state constitution surely requires that the government treat individuals in its charge fairly and without prejudice. Animus directed at a group based upon any characteristics, but certainly those characteristics that are immutable and not the product of behavior or conduct that we have a vested interest in restricting in order to reduce public harm, should never be a reason for imposing a regulation or denying a public benefit. In reality, however, we know that animus is ubiquitous. Indeed, it may well be on the rise in our polarized politics. We further know that personal animus can and does aggregate itself into a collective force that influences politics and generates legislation. And it may behoove federal and state courts on whose shoulders the responsibility rests to resolve conflicts over the scope of the police power to investigate laws for evidence of animus in both their origins and their implementation. Even if animus does not ultimately furnish the essential basis for invaliding the law, it can illuminate the legislature's purpose and objective, potentially relevant considerations in both constitutional and statutory interpretation contexts.

To make this discussion somewhat less abstract, it is important to see the troubling rise in efforts at the state and occasionally local levels to translate animus toward disfavored groups into state laws. We can think here especially of the plethora of anti-LGBTQ+ and, more particularly, anti-trans bills that have emerged at the state level.[47] These bills may or may not raise issues under the US Constitution. Despite watershed decisions such as Romer, Lawrence, Obergefell v. Hodges,[48] United States v. Windsor,[49] and Bostock v. Clayton County,[50] the jury is still out on the lengths to

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which the current Court is likely to go to protect LGBTQ+ rights against interference. Now and in the next several years, it is likely that the main battleground for the fight over such rights will be in state courts adjudicating state constitutional claims.[51] In these fights, the consideration of animus may well become important. More than in the past, courts should be prepared to look at the expressions in public of legislators and executive officials to put some contextual reality into legislative acts and regulations that can often by styled as neutral and acts of equality rather than revelations of base discrimination and prejudice. To be sure, advancing evidence of animus does not mean that these cases will decide themselves. Looking fairly at the other side of the coin, advocates of various anti-trans bills have simultaneously revealed ignorance and an absence of empathy while at the same time advancing arguments that what they are really concerned about is the welfare of families, of enabling families to make choices without the interference of outside actors (such as health professionals) and guarding against decisions by minors that can have permanent consequences. These are difficult issues, bound up seemingly inextricably with the modern culture wars, and, like other such difficult issues, they are likely to end up before judges in litigation. But the narrow but important part here is that a full evaluation of the legality of these controversial actions under the modern police power, a power that has long given wide deference to public authorities acting in the name of public health, safety, and morals, should consider the ways in which prejudice and animus have factored into choices about how best to advance the public welfare and how to assess the rights of free individuals to pursue their own choices, especially in the most profoundly intimate matters.[52]

SELF-DEALING

A foundational principle undergirding the police power is that the legislature, through the use of its awesome plenary power, will act responsibly to further the public interest. This principle goes back to the origins of state constitutions, persists through early court decisions involving the power, and has also been hard-wired in state constitutions through such devices as the public purpose requirement and the prohibition against special legislation. In light of this principle, courts are occasionally receptive to claims that the legislature is acting for private-regarding, rather than public-regarding reasons. Under this logic, where there is critical evidence that regulatory initiatives reveal what Cass Sunstein famously called "naked preferences,"[53] actions taken under the police power should be struck down. The fundamental idea is that there is a baseline of proper governmental action under the relevant constitutional commands, a baseline that emphasizes that whatever the legislative output, the consideration of policy should be carried out with public-regarding aims in minds, not their own self-interest.

The notion of a self-dealing legislature is a complicated one, however.[54] Legislators are appropriately response to constituent demands, as part of their democratic

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commitments. These demands are manifest in unequal ways, and this has always been the case. The structure of the legislative process reveals many elements, both features and bugs, that will push legislation in directions that meet the needs and wants of interest groups. Clinging to a positive view of the legislature as eliding these elements and always putting the public interest first is naïve. Similarly unrealistic is a rigid normative commitment to a faction-free legislature. Therefore, courts will always be faced with the difficult challenge of sorting between laws that are adequately public-regarding – good enough for government work, we might say – and those that reveal considerations that are so tangibly private-regarding that the requirements embedded in the police power are not met.[55]

Courts have faced this ubiquitous challenge in the US constitutional law context. Lacking an explicit public purpose requirement or special legislation prohibition, courts have looked episodically at the propriety of legislation under the doctrines of equal protection and due process. Cases are infrequent in which the Supreme Court has invalidated a piece of legislation on the grounds that a plausible public purpose is lacking. That said, there are cases, even some landmark ones, where the gravamen of the problem is that the legislature, Congress or in the states, has configured processes that are rather manifestly private-regarding.

Perhaps the best examples are found in the Court's election law jurisprudence. In these areas, thinking of the Court's reapportionment jurisprudence beginning with Baker v. Carr [56] and also race-relevant cases such as Gomillion v. Lightfoot,[57] the Court has acted where the justices have been skeptical of the underlying reasons for certain electoral structures. In Gomillion, even a pillar of judicial restraint as was Justice Frankfurter notes that this "was not an ordinary geographic redistricting measure, even within familiar abuses of gerrymandering."[58] "If these allegations, upon a trial, remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[59] Calls for intervention have been persistent in the scholarly literature for many years. Richard Pildes and Sam Issacharoff have written about the risks of partisan lockups in the political process and the prospect of fruitful judicial intervention;[60] other scholars have looked at various legislative and electoral rules and have opined that there are available doctrinal structures to temper these power instantiating policies.[61] Indeed, one of our most important normative paradigms in all of constitutional law – John Hart Ely's democracy-reinforcing theory of judicial review[62] – is concerned at an elemental level with self-dealing (among other tangible political process problems).

In the state constitutional law context, we have available not only the same supply of doctrinal hooks to attach skepticism about legislative self-dealing, both from federal constitutional rules including due process and equal protection, but also state constitutional rules, which are least as capacious in design and function for these

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purposes. Moreover, we have the logic of the police power itself. In other words, state courts can look at the police power under their own constitutions and, consistent with decades of precedent that have adverted to "reasonableness" as a basis of serious scrutiny, interrogate state laws to determine whether they reveal nakedly private interest and therefore do not honestly attend to the public's interest in health, safety, morals, or furthering of the general welfare. Such scrutiny, to be sure, may to eradicate the mechanisms of self-interest that underlie the legislature's behavior. Concerns have been raised, especially by scholars working within the traditions of public choice theory, that legislatures are essentially transmission belts for interest group influences.[63] Nonetheless, judicial review, insofar as courts pay attention to the avowed public purpose of the legislation, can at the very least raise the costs to the legislature in making and implementing policy that smacks of self-dealing.[64]

INTERPRETIVE CANONS, PRESUMPTIONS, AND OTHER SHORTCUTS

Our history of judicial review in the American context reveals myriad uses of interpretive canons to assist courts with resolving what might otherwise be difficult disputes. (We will leave here to one side the true meaning of "difficult," noting just that this may be difficult in the interpretive or political sense.) The canon of constitutional avoidance is a classic example of such a principle used to avoid deciding on constitutional grounds where other bases are available.[65] In addition, the various clear statement rules emerge to put the onus on the legislature to express their intentions to accomplish an objective that might otherwise be legally suspect. Taken together, these canons and presumptions are "shortcuts" in the sense that they enable courts to reach results without the strong arm of constitutional invalidation.

We can see these mechanisms functioning in the context of the police power. For example, state courts have looked closely at whether and to what extent the state legislature has authorized other governmental entities, be they general-purpose municipal governments, special-purpose agencies, or ordinary administrative agencies to exercise police powers. In doing so, courts have relied on some of the familiar (at least to them) interpretive canons, for example, Dillon's rule, named after the author of the famous treatise noted earlier, in order to settle the question of what the legislature has or has not done. Even more important as an example of this practice has been the presumption described in many state judicial opinions of the nineteenth century in favor of securing liberty and private property. In Forbes' Case,[66] a New York case from 1860, the court considered whether a certain criminal vagrancy statute should be upheld under the police power, noting that such statutes "are constitutional, but should be construed strictly, and executed carefully in favor of the liberty of the citizen."[67] In a Massachusetts case from 1846, Commonwealth v. Tewksbury,[68] the court upheld a law forbidding the taking away of sand and gravel from the owner's own beach, on public safety grounds, but observed that the police power is "a high power,

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to be exercised with the strictest circumspection, and with the utmost sacred regard to the right of private property and only in cases amounting to an obvious public exigency."[69] These observations need not be read as equivocations by courts on the fundamental question of whether the power enables the government to act, but they do function as guides of a certain sort to legislatures in enacting such statutes and to later courts in construing the scope of the power in close cases.

Another venue in which interpretative guidance is potentially promising is in the determination of the statute's purpose. Is the government using the police power to actually facilitate public health, safety, and general welfare? In the preceding subparts of this chapter, we have looked at this question from the standpoint of constitutional adjudication. But there is another way to come at this question, and that is to interrogate the statute's context, its objectives, and its mechanisms in an effort to reveal as best as possible the overall statutory purpose. In the heyday of the so-called Legal Process era (roughly from the 1950s through the early 1980s),[70] purposive statutory interpretation was viewed as an entirely proper, for some the most compelling, approach to discerning statutory meaning in difficult cases.[71] As Henry Hart and Albert Sacks expressed it, the court should look at the legislature as "a group of reasonable persons pursuing reasonable aims reasonably" and should do their best to look at statutory purpose in order to give a reading of the statute "that the words can bear."[72] While purposive statutory interpretation has lost much of its luster, as the modern courts have embraced textualism as the most credible theory of interpretation, its use in discerning the connection between the underlying objectives of the police power under a state constitutional tradition and the purposes of the statute can be especially helpful.

THE POLICE POWER AND ADMINISTRATIVE LAW

The discussion thus far has centered upon constitutional review of state or local legislative action. Interrogations about the "reasonableness" of legislation under the police power, unpacked as we have above, are intended to determine the ultimate question of whether this power has been exercised consistent with the state constitution. However, there is another body of law that will often be brought to bear in the consideration by courts of whether the power has been misused. This is state administrative law. It will provide the principles, rules, and standards for the courts to consider when evaluating the exercise of the power by institutions other than the state legislature, including local governments and state and local administrative agencies.[73]

Without going into depth about the components of state administrative law (which will differ from state to state in any event), we can make some general observations about the rule and function of administrative law in police power controversies. First, considerations of reasonableness are omnipresent in administrative law.[74] Courts at both the federal and state level have always looked at the reasoning process

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of agency officials to determine whether the agency decision passes muster. This phrase "substantive review" is often used in the administrative law context to distinguish the enterprise from "procedural review," the latter focusing on the question of whether the agency has complied with required procedures and the former capturing the general inquiry into whether the agency provided adequate reasons for the actions taken. Thus, whatever concerns we have about close interrogations by courts into the reasonableness of legislative action, some of which we surfaced and summarized in the first subsection of this chapter, we should regard reasonableness review as by and large business as usual in the administrative law context.

Second, we should ask: Are there guidelines in doing this review in the administrative law context that are especially well-suited to disputes involving the police power? One guideline, an important consideration in administrative law is that agencies should be required by courts to reveal transparently the evidentiary basis of their actions and, where evidence is introduced by others in the rulemaking or adjudicatory process, the agency should reveal why they rejected some evidence and considered others.[75] As part of its responsibility to undertake hard look review of administrative rulemaking, they should make sure they have reasoned well from premise to conclusion and they should to the extent possible base their decisions on the best available science, especially where the matters involve public health and safety, where there are truly facts and scientific elements to the decisions reached by the relevant agencies. The closer the agency's choices come to evidence-based considerations – which will be often, but not always, in the police power context – the more the agency's reasoning process should be tethered to the facts.

At the same time, the courts in undertaking their administrative law responsibilities should give agencies an appropriate space for discretion, this in order to acknowledge the important place and prominence of expertise in administrative decision-making. We discussed expertise as an important element in the evolution of the police power generally (Chapters 2 and 3) and in the steady acceptance of the legislature's decision to delegate to agencies police power functions in order to get the best advantage of expert decision-making (Chapter 5). Administrative law that defers in appropriate ways to the judgment of agencies is key to the overall functioning of a regime in which choices about health, safety, and even in some cases morality. The essential idea is that decisions are made by those who have expertise and can balance the demands of democracy with the imperative of good governing in ways that are as objective as possible and, where not possible, reflect reasonable disagreement.[76]

Another way to think about the role of administrative law as a partial substitute for more searching constitutional review of regulations under the police power. After all, one way to maintain a commitment to a light-touch judicial review while also interrogating the basis for the particular policy choice is to look at administrative regulations to ensure that they are well-reasoned, non-arbitrary, and procedurally fair, standards which are familiar parts of mainstream administrative law, whether in

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the state or federal governments. As we saw in our discussion of rights and judicial review in Chapter 6, such interventions maintain legislative power after all, since the focal point is on the agency, not the legislature. If we worry that vigorous constitutional review is a too-blunt tool for addressing goals of sound public policy and fair regulatory decision-making, administrative law, by contrast, can provide greater nuance and flexibility, with fewer costs to democracy.

In reconfiguring the focus from constitutional law to the administrative law, the issue moves away from the big issue of "Does the legislature have the power to do X or Y?" to "Has the agency/municipality acted properly in exercising power that we can accept without further interrogation that the legislature has delegated to the relevant administrator?" Administrative law provides the government with a softer landing. Second, courts have more flexibility in using administrative law doctrines in the ways that are typical in both federal and state contexts. So, for example, the court might find that the agency has, in enacting a public health regulation, acted in an arbitrary, and therefore illegal, way. This gives the agency an opportunity to revisit their regulatory choice and to do so without running a legislative enactment gauntlet. Or maybe the court orders that the regulation not apply to a particular individual or entity (perhaps for reasons having to do with arbitrariness or other bases) but leaves the regulation otherwise intact. Still yet, the court might impose certain procedural requirements, presumably sourced in administrative law doctrine or relevant statutory procedures, requirements which regulate how the agency can exercise their delegated police power, without fundamentally challenging the fact that they have this power. As one final example, consider a judicial decisions that holds that the agency has erroneously interpreted the statute and in a way that renders the agency's judgment ultra vires. This strategy, again, draws a distinction between the authority of the agency to act under the police power and the propriety of the way the agency acted. These (and other) doctrines are part of the classic toolkit of courts in administrative law. Insofar as they are geared fundamentally to ensuring that an agency has acted in ways consistent with sound and fair administration, there is built-in flexibility in how the court goes about its evaluation.

*

As explained in the introduction, this book endeavors to focus on the origins, the shape, and the functions of the police power. The question of how best to interpret the police power in matters of dispute is a part of this inquiry, although it is not the central point. The reasons for its relatively cabined place in an analysis that covers a wide amount of terrain both temporally and conceptually is two-fold: First, whether the government has exceeded its authority under the police power, either because it has violated someone's constitutional or (considering federal supremacy) statutory rights entails a close look at the particular legal architecture, including both text and doctrine. Not only are there many potential rights objections that

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stem from federal law, but there is the brute fact that we have fifty distinct states, with their own constitutions and bodies of law. So, anything more than a 10,000 feet look at interpretive issues here is unrealistic, especially in a book that doesn't aspire to be a treatise. Second, at the risk of sounding overly grandiose, the issues of interpretation, hopefully raised in a clear way in this and the preceding chapter, can be resolved best by a more coherent understanding of the overall purpose of the police power. Courts will decide concrete cases in accordance with their favored rules and techniques of interpretation. And law professors, including this one, will reserve the right to criticize or applaud these decisions for how well they fit with our own favored approaches. However, we are remiss if we do not properly situate this awesome and often misunderstood power in a framework, even an incomplete and evolving one, that helps answer the question, put colloquially: "What is the police power about anyway?"

That all said, this chapter concludes with some normative views about the basic parameters of the interpretive approach to the police power, taking account especially of the myriad state court cases in which state supreme courts have aimed to give shape and content to the overall structure and scope of this power.

TWO CHEERS FOR MODERATE SCRUTINY

The great police power treatise writers of the late nineteenth and early twentieth centuries, along with distinguished scholars who tackled the big question of what the police power means and how it should best be construed, were in general agreement on three big principles: First, the police power was broad in its scope and had been and should be read as accepting government regulation that advanced public health, safety, morals, and the overall welfare of the community (which is not to say, as we have already discussed, that everyone agreed on what this "welfare" entailed); second, this power should be scrutinized by courts with an appropriate appreciation for the prominent role and value of private property and individual liberty, crucial parts of the constitutional firmament in which the police power functioned; and, lastly, the disputes over the scope of the police power would be justiciable, in both the federal and state courts; moreover, so far as the state courts were concerned, having the responsibility to interpret their own constitutions, it would principally fall upon their shoulders to look at the government's exercise of this power to determine whether it was reasonable.

With the hindsight of more than a century, during which police power disputes continue to arise, the same basic principles animate the interpretation of the police power. We can characterize the courts' approaches, viewed holistically, as revealing a sort of moderate scrutiny. While no effort has been made to truly count all the police power cases decided in two centuries' time or any subset, a decently informed observer would notice that state and local governments prevail in the vast majority of cases where the exercise of the police power is contested; and when they lose, it

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is usually because the power runs up against a constitutional right that trumps the legislature or agency's action. Still, the argument has always been available that the agency has acted in ways arbitrary, or unreasonable in some other sense. The Indiana case which began this chapter is an exemplar of the state courts' insistence that the government present decently rigorous arguments for why they encroached on individual liberty or property rights in order to implement a policy. It is jarring to an audience whose familiarity with the constitutional caselaw involving economic liberties is mainly limited to federal constitutional cases, cases which, since the end of the Lochner era and the Court's momentous decision in Lee Optical in the early 1950s, have almost never struck down an economic regulation on the grounds that such a regulation was patently unreasonableness. By contrast, state constitutional law occasionally does march to the beat of another drummer.

Looking at the recent Covid-related cases, it is noteworthy how frequently lawyers on behalf of individuals and businesses framed their arguments against certain measures, such as shutdowns and gathering limits, as basically "this restriction makes no sense and dumb laws should not be allowed to stand." Few Covid regulations were struck down on this basis. On the other hand, state courts did not reject these arguments out of hand. The extent of scrutiny suggested that there remained room in state constitutional jurisprudence for a decent examination of these public health regulations. Tellingly, the Supreme Court in Jacobson was explicit in saying that individuals could challenge police power regulations under the US or relevant state constitution, and they could do so under a theory of equal protection or due process that, in essence, made out a strong claim that the legislature's approach here made no good sense.

All of this is to say that the courts' approach to interpreting the police power has been less than strict, but, on the whole, tougher than what we find in the run of US constitutional law cases in which a rational basis standard has been used. If rational basis is minimal-level scrutiny, and strict scrutiny has been, as Gunther wrote, generally "fatal in fact," state judicial review under the police power is somewhere in between. Some might label it "rational basis with a bite;" or "rational basis plus,"[77] but ultimately the label matters less than the overall gestalt of the approach.

This moderate scrutiny has much to recommend it. It does open the door somewhat to plausible arguments that the legislature has acted in untrustworthy ways. The focus, as we have discussed above, on animus and self-dealing reveals such skepticism, and a moderate scrutiny of state legislative and administrative decisions can, in the right hands, smoke out government decisions that are noxious and inappropriate, when judged by reference to the values of our state constitution. When combined with arbitrariness review, which has more or less always been around, standing ready to strike down a state or even federal law (as in Yick Wo, and a century later in Cleburne) that reveals that our treasured legislatures sometimes act irrationally and, where they do, judicial review is an important line of defense.

Moreover, review by state courts that goes beyond rational basis enables courts to focus on protecting private property and liberty of contract in a more meaningful

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way than the federal courts have done since Lochner's end and since the Court in Lee Optical swept away in a breathtakingly shallow opinion by Justice Douglas any credible argument that an interference with so-called economic liberties is more or less nonjusticiable. Federal and state courts have been haunted by the ghost of Lochner. Even now, Lochner and Lochnerization is a convenient pejorative phrase, something to be hauled out where the judge or commentator is annoyed by the depth of judicial intervention (or, in the case of the so-called Lochnerization of the First Amendment, the absence of intervention that would provide what in their view is some appropriate redistribution of economic and political power).[78] State courts need not be haunted by Lochner, however. For one thing, they never really got the memo that economic liberties and private property rights are at the mercy of the legislature. There are a number of important, but largely neglected by legal scholars, state court cases that have protected economic liberties against interference. We could quibble and quarrel about the wisdom of particular state decisions to be sure, but the larger point to be made here is that the effort to protect liberty and property and, in a more measured sense, to balance these liberties with the imperative of enacting and implementing policies to advance the overall welfare of the relevant citizenry even at the price of some liberty or property interests has not withered away in the state constitutional context. It will not do to say that "Lochner is alive and well" and, as such, such a claim would be rather facile. But what has persisted is the effort by state courts to look at the myriad rights and values wired into their state constitutions and, in that process, to interpret responsibly the police power to ensure that the government is pursuing the public's good and is governing well.

Why only two cheers? Putting Lochner's ghost and also the tortured history of rational basis review in US constitutional law to one side, there have been good reasons for the courts being very judicious when they examine closely the structure and purposes of legislation in order to determine whether the government's approach has been reasonable. Legislatures enact statutes in a very complicated way, with a wealth of pressures and incentives, not to mention formal and informal rules. While we can envision, when we think about American politics and democracy in the most noblest sense, a kind of "due process of lawmaking."[79] But when we bring the rubber of this standard to the road, it is challenging, to say the least, for courts to do the necessary interrogations to determine whether a police power statute was enacted for the "right" or the "wrong" reasons. We can be more optimistic about evaluations that are focused on means and ends, but even that raises the specter of Monday morning quarterbacking. Especially interventionist approaches risk stifling legislative innovation and do not account for either the ingenuity of legislatures and agencies in developing strategies that might seem opaque to an outside reader or also the complexity of legislation in its enactment and implementation phases.

In addition, the effort to examine the reasonableness of legislation, which is formulated as an inquiry into the legislative product irrespective of its tangible impact

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on a right that the courts would protect under its constitution can become rather aimless. It gives the state court a role perhaps more akin to the French constitutional court than a court that decides cases and controversies. Scrutiny of the government's power independent of this scrutiny of rights is necessary as a matter of constitutional logic, and yet it should be cautiously used.

At the end of the day, the state courts have an important, indeed vital, role to play in interpreting the police power and in resolving disputes over questions of whether the government has gone too far. This is true as an historical matter. It is likewise compelling as a matter of state constitutional theory. Courts have an obligation to ensure that the police power is being properly viewed. This is especially important in the state context in which the legislature has the plenary power of governing, and so where an unregulated legislature poses risks for democracy and, as we considered in Chapter 1, the stability of our constitutional regime.

NOTES

1. 291 U.S. 502 (1934).
2. 348 U.S. 483 (1955).
3. S23A0017; S23X0018 (Decided May 31, 2023). [Citations are to unofficial report of decision.]
4. 348 U.S. at 489.
5. Ibid.
6. Ibid., at 489. See also Ferguson v. Skrupa, 372 U.S. 726 (1963).
7. See White, *Law in American History Volume III* 552(2006).
8. Roe v. Wade, 410 U.S. 113, 143 (Rehnquist, J., dissenting).
9. White, *Law in American History Volume III*, at 557.
10. Raffensberger, at 12 (quoting from Jackson v. Raffensberger, 309 Ga. 736 (2020), a decision from the court at an earlier stage in this litigation).
11. Raffensberger, at 15.
12. Raffensberger, at 16.
13. Ibid.
14. Notably, the Raffensberger court denied the government an off-ramp, in that it rejected the argument that the plaintiffs here could continue their work as lactation peers and counselors "because such work is not a clinical service." Raffensberger, at 17. Instead, the court viewed the plaintiff's activities as squarely inconsistent with the statute and therefore as suffering a clear interference with their ability to conduct their occupation as lactation service providers in Georgia.
15. Ibid., at 21. The court invokes earlier Georgia decisions that strike down laws which seem to have only a tenuous connection to public safety (and, in the process, seemingly ignoring that these laws may be grounded in general welfare considerations, even if not tangibly furthering of public safety or health).
16. See, e.g., Brandon L. Garrett, "Constitutional Reasonableness," 102 *Minn. L. Rev.* 61 (2017). "Even criticisms of the application of the rational basis test largely ignore the import and breadth of its demands, perhaps because the argument against rationality starts at such a considerable rhetorical disadvantage." Thomas B. Nachbar, "The Rationality of Rational Basis Review," 102 *Va. L. Rev.* 1631 (2016).

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17. Thomas Nachbar summarizes the essential objection to rationality review (synonymous with reasonableness review, for our purposes): "Rationality review is highly problematic as a constitutional matter. There is no textual basis in the Constitution to justify reviewing legislation for its rationality. Indeed, the test is counter-textual (as implementing the Due Process Clause) in as much as it examines the product rather than the process of law-making. But even if rationality is itself a good thing, rationality review is a potentially limitless and unprincipled usurpation of legislative authority by the judiciary. Even taking general substantive judicial review as a given, there is nothing about the means-ends rationality that pervades rationality review that is inherent in the U.S. constitutional order." Nachbar, "Rational Basis Review." See also Nathan S. Chapman & Michael W. McConnell, "Due Process as Separation of Powers," 121 *Yale L. J.* 1801 (2012).
18. James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.* 129, 144 (1893).
19. See Gerald Gunther, "The Supreme Court 1971 Term, Foreword: In Search of the New Equal Protection," 86 *Harv. L. Rev.* 1 (1972).
20. Poe v. Ullman, 367 U.S. 497 (1961).
21. Ibid., at 545.
22. 521 U.S. 702 (1997).
23. Ibid., at 710.
24. Cleburne, 473 U.S. 432 (1985).
25. Ibid., at 444.
26. Ibid.
27. Jim Rossi, "Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry," 1994 *Wisc. L. Rev.* 763 (1994).
28. See Colin Diver, "Policymaking Paradigms in Administrative Law," 95 *Harv. L. Rev.* 393 (1981).
29. See Martin Shapiro, *W–o Guards the Guardians? Judicial Control of Administration* (1988).
30. See, e.g., Thomas McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," 41 *Duke L. J.* 1385 (1992).
31. See, e.g., Lisa Bressman, "Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State," 78 *NYU L. Rev.* 461 (2003).
32. 413 U.S. 528, 534 (1973).
33. See also Palmore v. Sidoti, 466 U.S. 429 (1984). "The Constitution cannot control such prejudice, but neither can it tolerate it."
34. See Plessy.
35. See, e.g., Sidoti.
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